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A
D I G E S T
OF THE
CASES DECIDED AND REPORTED
IN THE
SUPREME COURT OF JUDICATURE,
THE
COURT OF CHANCERY,
AND THE
COURT FOR THE CORRECTION OF ERRORS,
OF THE
STATE OF NEW-YORK;
FROM 1799 TO 1823;
WITH
TABLES OF THE NAMES OF THE CASES,
AND OF
TITLES AND REFERENCES.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

— UT EX HIS RECOLATUR JUS, NON PERDISCATUR.....&c.

IN TWO VOLUMES.

VOL. I.

Second Edition, Corrected.

PHILADELPHIA:
PUBLISHED BY E. F. BACKUS.

1837.

Explanation of the Abbreviations used in this Digest.

- C. C. Cases of Practice adjudged in the Supreme Court of the State of *New-York*. By *William Coleman*, Counsellor at Law; commencing in *April* Term, 1794, and ending in *October* Term, 1800. *In one volume 8vo.*
- J. C. Reports of Cases adjudged in the Supreme Court of Judicature of the State of *New-York*; from *January* Term, 1799, to *January* Term, 1803, both inclusive; together with the Cases determined in the Court for the Correction of Errors, during that period. By *William Johnson*, Counsellor at Law. *In three volumes.*
- C. R. Reports of Cases argued and determined in the Supreme Court of the State of *New-York*. By *George Caines*, Counsellor at Law. *In three volumes.* Commencing in *May* Term, 1803, and ending in *November* Term, 1805.
- C. C. E. Cases argued and determined in the Court for the Trial of Impeachments and the Correction of Errors, in the State of *New-York*. By *George Caines*. *In two volumes.* These Reports commence in *February*, 1804, and end in *February*, 1805; but the Reporter has added several cases decided in that Court, and in the Supreme Court, prior to that time.
- J. R. Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of *New-York*. By *William Johnson*, Counsellor at Law. *In twenty volumes.* Commencing in *February* Term, 1806, and ending in *January* Term, 1823.
- J. C. R. Reports of Cases adjudged in the Court of Chancery of *New-York*. By *William Johnson*, Counsellor at Law. *In seven volumes.* Commencing *March* 3, 1814, and ending *July* 29, 1823.
- S. C. Same Case.
- S. P. Same Point.
- C. P. Court of Common Pleas.
- Ch. Chancellor.
- Ch. J. Chief Justice.
- J. Justice.
- Reg. Gen. General Rules and Orders of the Supreme Court.
- N. R. L. The Statutes as last revised by Messrs. *Van Ness* and *Woodworth*.

SOUTHERN DISTRICT OF NEW-YORK, ss.

(L. S.) BE IT REMEMBERED, That on the sixteenth day of November, A. D. 1825, in the fiftieth year of the Independence of the United States of America, William Johnson, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"A Digest of the Cases decided and reported in the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New-York; from 1799 to 1823; with Tables of the Names of the Cases, and of Titles and References. By William Johnson, Counsellor at Law.

"—*Ut ex his recolatur Jus, non perdiscatur*.....Bac.

"In two volumes."

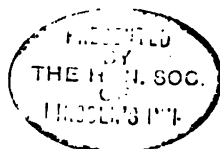
In conformity to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned." And also to the act, entitled, "An act, supplementary to an act, entitled, An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,

Clerk of the Southern District of New-York.



PRINTED BY T. K. AND F. G. COLLINS.



ADVERTISEMENT.



It was, at first, intended to give a supplement only to the former Digest, comprising the points subsequently decided; but that design has been relinquished, from a belief that the convenience and advantage of having the whole series of decisions incorporated together, would more than compensate the expense of an additional volume. All the decisions, therefore, in Law and Equity, from January, 1799, to 1823, have been arranged under their proper titles. The plan of the former Digest having been generally approved, its titles, divisions, and subdivisions, have been preserved, except in a few instances, where those relating to the same subject were improperly disjoined. The *Chancery System*, so long established as a distinct branch of our jurisprudence, seemed to require, that the decisions of the two great Courts of Law and Equity should be kept separate. The points adjudged in the Court of Chancery, and on appeal from that Court, have been accordingly placed together under the general head of CHANCERY. The *General Rules* of the Supreme Court have been incorporated under the head of PRACTICE.

In framing this Digest, the design has been carefully to extract from the opinions of the Judges, and to state, as far as the requisite brevity allowed, in their own language, the general principles of Law decided by the Court. Such positions as appeared to be deduced as consequences from the general proposition, or stated as modifications of the general rule, have been placed in successive order, so as to exhibit their connection and dependence. Such observations of the Judges, not embraced in the decision of the Court, as appeared important, have been stated; and these *dicta* are distinguished by the names of the Judges by whom they were expressed. Where a point of law has been more than once decided, a reference is made to all the cases, without repeating the same principle; and where a position has been overruled or reversed, the law is taken to be established by the last determination, referring merely to the former or original case, as containing a contrary doctrine. Where a case involved no general principle, yet seemed worth preserving, the facts have been concisely stated with the judgment of the Court; and where the construction of a *patent*, as to its boundaries merely, was the only point before the Court, the name of the case only has been given, with a reference to the place where it might be found.

As it does not fall within the proper scope of a work of this nature, to contain remarks or criticisms on the judgments pronounced, no attempt has been made to reconcile any apparent contradictions, further than by proper references to draw the attention of the reader to them. The real or apparent discrepancies are, however, considering the great number of cases, surprisingly few; fewer, it is believed, than can be found among an equal number of decisions, for the same period of time, in the Courts of any other country. This general harmony is the result, in a great measure, of the course adopted by the Judges of taking time to advise on all important questions, and of the practice of publishing reports of their determinations as speedily as possible after the term in which they are delivered.

The *Table of Titles, Divisions, Subdivisions, and References*, prefixed to each volume, together with the occasional references in the body of the work, will, it is hoped, enable the reader to find, with ease, the point which may be the object of his inquiry, when its true place does not immediately occur to his mind. The *Table of the Names of the Cases*, which have been carefully analyzed, will also assist him in his search. Those of the plaintiffs, only, are the leading names in alphabetical order, as a double arrangement, with the same references, would have increased the second volume to an inconvenient size. Errors and omissions are almost inevitable in a work of this nature, but it is hoped that they will not be found many or important. Such as were discovered too late for correction, though not very material, are collected and subjoined.

No one who looks at the numerous volumes which load the shelves of a lawyer's library, enough to appal the most resolute student, will question the utility of digests or abridgments, or whatever may facilitate research, and lighten the labors of a most laborious profession. Such compilations, however, cannot supersede the necessity of resorting to the original works; and they ought always to be received with the caution given by Lord Bacon: "*Cavendum autem est, ne sumpta ista reddant homines promptos ad practicam, cessatores in scientia ipsa.*"

NAMES OF THE JUSTICES

OF THE

SUPREME COURT OF THE COLONY OF NEW-YORK,

FROM 1691 TO 1776.

(a) JOSEPH DUDLEY,	Chief Justice, appointed	1691
JOHNSON,	Assistant Judges.	
WILLIAM SMITH,		
STEPHEN VAN CORTLANDT,		
WILLIAM PINHORNE,		
(b) WILLIAM SMITH,	Ch. Justice,	June 9, 14 Wm. III. 1702
JOHN BRIDGES,	2d Judge,	June 14, 1702
JOHN BRIDGES,	Chief Justice,	April 5, 1703
ROBERT MILWARD,	2d Judge,	April 5, 1703
THOMAS WENHAM,	3d Judge,	April 5, 1703
ROGER MOMPESON,	Chief Justice,	July 15, 1704
LEWIS MORRIS,	Chief Justice,	July 1, 1718
ROBERT WALTER,	2d Judge,	Oct. 23, 1718
JAMES DE LANCEY,	2d Judge,	June 24, 1731
FREDERICK PHILLIPS,	3d Judge,	June 24, 1731
(c) LEWIS MORRIS,	Chief Justice,	June 5, 1729
JAMES DE LANCEY,	Chief Justice,	Aug. 21, 1733
FREDERICK PHILLIPS,	2d Judge,	Aug. 21, 1733
(d) DANIEL HORSMANDEN,	3d Judge,	Jan. 24, 1736
JOHN CHAMBERS,	2d Judge,	July 30, 1751
DANIEL HORSMANDEN,	3d Judge,	July 28, 1753
DAVID JONES,	4th Judge,	Nov. 21, 1758
(e) JOHN CHAMBERS,	2d Judge,	Oct. 4, 1761
DANIEL HORSMANDEN,	3d Judge,	Oct. 14, 1761
DAVID JONES,	4th Judge,	Oct. 14, 1761
BENJAMIN PRATT,	Chief Justice,	Nov. 11, 1761
DANIEL HORSMANDEN,	2d Judge,	March 26, 1762
DAVID JONES,	3d Judge,	March 31, 1762
DANIEL HORSMANDEN,	Chief Justice,	March 16, 1763
DAVID JONES,	2d Judge,	March 16, 1763
WILLIAM SMITH,	3d Judge,	March 16, 1763
ROBERT R. LIVINGSTON,	4th Judge,	March 16, 1763
(f) GEORGE DUNCAN LUDLOW,		Dec. 14, 1769
(g) THOMAS JONES,		Sept. 29, 1773
WHITEHEAD HICKS,		Feb. 14, 1776

(a) See Smith's History of New-York, Carey's Ed. p. 89. and 265. Schermerhorn's Ed. p. 127. On the first erection of the Supreme Court, in 1691, it consisted of a Chief Justice and four Assistant Judges. The Chief Justice had a salary of 130 pounds, and the second Judge a salary of 100 pounds; but the other three Judges were allowed nothing for their services. This was a temporary law, but the Courts were afterwards regulated and fixed, by an ordinance of the Governor and Council, in 1699, and were continued and held under ordinances until the revolution.

(b) No records of commissions are to be found in the Secretary's Office from 1691 to 1702.

(c) Superseded, August 21, 1733.

(d) Superseded, September 22, 1737.

(e) Resigned, November 19, 1761.

(f) In place of William Smith, who resigned.

(g) In place of David Jones, deceased.

CHANCELLORS OF THE STATE OF NEW-YORK,

FROM 1777 TO 1823.

- (b) ROBERT R. LIVINGSTON, Esq. appointed *October 17, 1777*
(b) JOHN LANSING, Jun. Esq. *October 28, 1801*
(b) JAMES KENT, Esq. *February 25, 1814*

JUDGES OF THE SUPREME COURT.

Chief Justices.

- (d) JOHN JAY, Esq. appointed *October 17, 1777*
(c) RICHARD MORRIS, Esq. *October 28, 1779*
(f) ROBERT YATES, Esq. *September 28, 1790*
(g) JOHN LANSING, Jun. Esq. *February 15, 1798*
(A) MORGAN LEWIS, Esq. *October 28, 1801*
(i) JAMES KENT, Esq. *July 2, 1804*
(j) SMITH THOMPSON, Esq. *February 25, 1814*
(k) AMBROSE SPENCER, Esq. *February 9, 1819*

Puisne Judges.

- ROBERT YATES, Esq. } appointed *October 17, 1777*
(l) JOHN SLOSS HOBART, Esq. }
JOHN LANSING, Jun. Esq. *September 28, 1790*
MORGAN LEWIS, Esq. *December 21, 1792*
(m) EGBERT BENSON, Esq. *January 29, 1794*

(a) In consequence of his having accepted and exercised the office of Secretary of State of Foreign Affairs, under the *United States*, doubts were entertained whether the office of Chancellor, held by him, had not thereby become vacant; and having resigned his office of Secretary of State, he was re-appointed Chancellor, *June 22, 1783*.

(b) He was appointed in the place of Chancellor LIVINGSTON, who resigned, on being appointed Minister Plenipotentiary from the *United States to France*.

(c) Appointed in the place of Chancellor LANSING, who had arrived at the age of *sixty years*, the period limited by the 24th article of the constitution of the state, for the tenure of the offices of Chancellor, Judges of the Supreme Court, and first Judges of the County Courts.

(d) The *first term* of the Supreme Court, under the constitution of this state, was held in *September, 1777*. The Chancellor, Justices YATES and HOBART, and BENSON, the Attorney General, were appointed to their respective offices by an ordinance of the Convention, assembled to organize the government of the state, on the 22d of *May, 1777*. They were not, however, to continue in office after the first meeting of the Council of Appointment under the constitution, unless their appointments were confirmed by the Council.

(e) Appointed in the place of Mr. Chief Justice JAY, who resigned.

(f) Appointed in the place of Mr. Chief Justice MORRIS, who had arrived at the age of *sixty years*, the period limited by the constitution for the tenure of the office.

(g) Appointed in the place of Mr. Chief Justice YATES, who had arrived at the age of *sixty years*, the period limited by the constitution for the tenure of the office.

(A) In the place of Mr. Chief Justice LANSING, appointed Chancellor.

(i) In the place of Mr. Chief Justice LEWIS, elected Governor of the state.

(j) In the place of Mr. Chief Justice KENT, appointed Chancellor.

(k) In the place of Mr. Chief Justice THOMPSON, who resigned.

(l) Mr. Justice HOBART having arrived at the age of *sixty years*, his seat became vacant. He was afterwards appointed a Judge of the District Court of the *United States* for the district of *New-York*, and died *February 4, 1806*.

(m) He was the *fifth* judge. The Court before consisted of four judges only. He resigned his seat, on being appointed a Judge of the Circuit Court of the *United States*, in *March, 1801*.

JAMES KENT, Esq.	February 6, 1798
(n) JOHN COZINE, Esq.	August 9, 1798
(o) JACOB RADCLIFF, Esq.	December 27, 1798
(p) BROCKHOLST LIVINGSTON, Esq. } SMITH THOMPSON, Esq. }	January 8, 1802
AMBROSE SPENCER, Esq.	February 3, 1804
(q) DANIEL D. TOMPKINS, Esq.	July 2, 1804
(r) WILLIAM W. VAN NESS, Esq.	June 9, 1807
(s) JOSEPH C. YATES, Esq.	February 8, 1808
JONAS PLATT, Esq.	February 25, 1814
JOHN WOODWORTH, Esq.	March 27, 1819

[By the *ninth* article of the new constitution, which went into operation on the last day of *December*, 1822, the commissions of all persons holding civil offices were to expire on that day; but officers then in commission might continue to hold their offices until new appointments were made. *Chief Justice SPENCER*, *Judge PLATT*, and *Judge WOODWORTH*, the only Judges remaining on the bench of the Supreme Court, continued to hold their offices until the 29th of *January*, 1823, when *John Savage, Esq.* was appointed *Chief Justice*, and *Jacob Sutherland, Esq.* a Judge. *Judge Woodworth* received a new commission on the 6th of February following; the new constitution having limited the number of Judges to three. Chancellor KENT remained in office until the 31st of *July*, 1823, when he attained the age of sixty years, the period limited by the 5th article of the constitution for the tenure of the office, and that of a Judge of the Supreme Court. *Nathan Sanford, Esq.* was appointed Chancellor, *January 27th*, 1823; but did not take the oath, nor enter on the duties of his office, until the 1st of *August* following.]

ATTORNEYS GENERAL.

Egbert Benson, Esq.	appointed	January 15, 1778
Richard Varick, Esq.		May 14, 1789
Aaron Burr, Esq.		September 29, 1790
Morgan Lewis, Esq.		November 8, 1791
Nathaniel Lawrence, Esq.		December 24, 1792
Josiah Ogden Hoffman, Esq.		November 30, 1795
Ambrose Spencer, Esq.		February 3, 1802
John Woodworth, Esq.		February 3, 1804
Matthias B. Hildreth, Esq.		March 18, 1803
Abraham Van Vechten, Esq.		February 2, 1810
Matthias B. Hildreth, Esq.		February 1, 1811
Thomas Addis Emmet, Esq.		August 12, 1812
Abraham Van Vechten, Esq.		February 13, 1813
Martin Van Buren, Esq.		February 17, 1815
John Woodworth, Esq.		March 27, 1819
Thomas J. Oakley, Esq.		July 8, 1819
Samuel A. Talcot, Esq.		February 12, 1821

(n) Mr. Justice COZINE died the 16th of *September*, 1798, before taking his seat on the bench.

(o) Mr. Justice RADCLIFF resigned his seat in *January*, 1804.

(p) Mr. Justice LIVINGSTON, having been appointed one of the Judges of the Supreme Court of the United States, resigned his seat in this Court, in *January*, 1807.

(q) Mr. Justice TOMPKINS, having been elected Governor of the state, resigned his seat in this Court, in *July*, 1807.

(r) He resigned his office, *May 1st*, 1822, and died *February 28th*, 1823.

(s) He resigned his office, *September 19th*, 1823, and was elected Governor of the state.

T A B L E

OF

TITLES, DIVISIONS, SUBDIVISIONS AND REFERENCES,

IN VOLUME I.

[The principal titles are printed in CAPITALS; subordinate heads and references in small letters. The Roman figures refer to the divisions of each title, the letters to the subdivisions, and the Arabic figures to the points decided under each general title, numbered in successive order, and to the pages of the Digest.]

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— of goods sold. See <i>SALE OF CHATTELS, II.</i>	— by and against sheriffs. See <i>SHERIFF.</i>
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D I G E S T,

&c.

ABSCONDING AND ABSENT DEBTORS.

[See stat. sess. 24. c. 49. (1 N. R. L. 157.)]

(a) *When proceedings may be had under the act; (b) By whom; (c) Against whom, and what property; (d) Trustees, their power and liability, and when they shall account; (e) Reference; (f) Payment of surplus to the debtor; (g) Supersedeas, discontinuing and removing proceedings.*

(a) *When proceedings may be had under the act.*

1. Proceedings under the act apply to all cases of demands arising on contract, whether consisting in debt, strictly so called, or unliquidated damages. *Lenox v. Howland*, 3 C. R. 323.

(b) *By whom.*

2. A creditor, not resident in this state, cannot proceed here by an attachment against the estate of his absent debtor. The 23d section confines this remedy to the estates of debtors who reside out of the state, and are indebted *within it*; by which mode of expression, it is understood, that the debt must be due to a person residing within the state, and not to a stranger. *Per Livingston, J., in the matter of Fitzgerald*, 2 C. R. 318. [See *quere* the 20th section of the act declares, "That any creditor residing out of this state, shall be deemed a creditor within the act; and his attorney, on producing a letter of attorney duly authenticated, and legal proof of his demand, may proceed and act in the same manner as if the creditor himself were present." This section makes no distinction between *absconding* and *absent* debtors. In regard to an *absconding* debtor, it was decided by Chancellor *Kent*, in *Robbins v. Cooper*, 6 J. C. R. 186, that a creditor residing abroad was competent to institute proceedings under the act.]

[*Note.* By the act passed April 16, 1822, sess. 45. ch. 226. it is declared, that a corporation may apply for relief under the act in the same manner as an individual; and the application may be signed by the president or secretary, or by any director, authorized by the corporation, under their common seal, and the affidavit of the debt may be made by the person subscribing the application.]

(c) *Against whom, and what property.*

3. The statute does not warrant proceedings against persons claiming merely by right of representation. *Jackson, ex. dem. Murray, v. Walworth*, 1 J. C. 372.

*4. Where, in proceedings under [*2] the act, the debtors were named, some as trustees, some as executors, &c., these additions were considered merely as words of description, so as to support the validity of the proceedings; more especially after a lapse of time, and the acquiescence of the parties interested. *Ibid.*

5. A person who has been transiently within this state, but is not a resident, cannot be proceeded against as an absconding debtor. *Matter of Fitzgerald*, 2 C. R. 318. And a person coming to this state, without any intention of settling here, is a non-resident. *Ibid.*

6. An attachment does not lie against a corporation, for the act applies only to natural persons. *MP Queen v. Middletown Manufacturing Co.* 16 J. R. 5.

7. An attachment may issue against the property of one of several partners, who absconds, for a debt due by the co-partnership, though his co-partners reside within the state, and might be arrested. *Matter of Chipman*, 14 J. R. 217.

8. So, it may issue for the separate debt of such absconding partner; but the sheriff can seize only the separate property of the absconding debtor. *Matter of Smith*, 16 J. R. 102. He cannot take the partnership effects, in such a case, for the other partners have a right to retain them, for the partnership debts. *Ibid.*

9. So, property held by the debtor, as tenant in common with another, though in possession of his co-tenant, may be taken and sold. *Mercereau v. Norton*, 15 J. R. 179. But the sheriff can sell only the undivided moiety, or interest of the debtor, and the purchaser becomes a tenant in common with the other co-tenant. *Ibid.*

10. Any property which may be seized by an execution, may be taken and sold under the attachment; as money and bank notes. *Hendy v. Dobbin*, 12 J. R. 220. *And see tit. Execution.*

11. An attachment cannot be issued by a justice of the peace, against a debtor who resides in another county, but who happened to be in the county where the justice resided, when he issued his warrant, and by his departure avoided the service of it. *Dudley v. Staples*, 15 J. R. 186. [See further, *tit. Courts of Justices of the Peace.*]

(d) *Trustees, their power and liability, and when they shall account.*

12. The trustees become vested only with the interest of the debtor who absconds; and where he is one of a co-partnership, the trustee

tees are entitled only to the debtor's share of the surplus of the joint property remaining, after the payment of the co-partnership debts. *Matter of Smith*, 16 J. R. 102.

13. Where the trustees sell the debtor's lands, and give a deed, conveying all his right and title, and the purchaser is evicted, they are not liable to refund. *Murray v. Trustees of the Ringwood Company*, 2 J. C. 278.

14. The trustees are entitled to apply for advice, as to making dividends, on due notice being given to the creditor, whose account is in question. *Case of Coochoven*, cited 1 J. R. 174.

15. The creditor cannot maintain a suit at law for his debt against the trustees, before the demand has been proved or adjusted, [* 3] and the dividend declared. The proper remedy is by petition to the equity of the Court under which the proceedings are instituted, who will either compel the trustees to do their duty, or advise them in cases of doubt or difficulty. *Peck v. Randall*, 1 J. R. 165. But it seems, that if the case has been presented to the Court, in an action against the trustees, they will take it up, and make such order as the nature of it shall require. *Ibid*.

16. Payment by a garnishee, under a judgment and execution, on a proceeding by foreign attachment in the Lord Mayor's Court of London, of a debt due by a citizen of this state, to a creditor in London, being compulsory, is a good bar to an action brought here against the debtor, by the trustees under the act; though the attachment here against the absent debtor was issued before the money of such debtor came into the hands of the garnishee, or even before the foreign attachment issued in London. *Holmes v. Remsen*, 20 J. R. 229.

17. The trustees may avail themselves of the statute of limitations, to the same extent that the debtor might do, if an action were brought against him. *Peck v. Randall*, 1 J. R. 165.

18. The exhibition of the creditor's claim to the trustees, is equivalent to the commencement of a suit, so as to prevent the statute from attaching. *Ibid*.

19. The debtor, as well as the creditors, may move that the trustees account. *In the matter of Cascaden*, 2 J. C. 107. S. C. C. C. 116.

e) Reference.

20. A deposition, taken before the trustees, may be read in evidence before referees nominated under the act, after the death of the witness, though taken by the trustees in the absence of the creditors, they being considered as agents of both parties. *Cox v. The Trustees of Pearce*, 7 J. R. 208.

21. The Court may inquire into the merits of the controversy, on the report of the referees; but they will require a strong case to induce them to set aside the report. *Ibid*.

(f) Payment of surplus to the debtor.

22. If the trustees of an absent debtor's estate admit that there will be a surplus, after the payment of all demands, the Court will,

on petition, order a part to be paid to the debtor, or his agent. *Matter of Randall*, 1 C. R. 513.

(g) Supersedeas, discontinuing and removing proceedings.

23. The creditor who has caused the attachment to be issued may, at any time before the trustees are appointed, discontinue the proceedings, and receive payment from the debtor. *Fosgate v. Mahon*, 16 J. R. 162.

24. And if such creditor receives the goods which have been attached, in payment and satisfaction of his debt, they become his property; so that he can maintain trover for them against the sheriff who seizes them under a second attachment issued by other creditors. *Ibid*.

25. A supersedeas, granted under [4] the act, is final. *Learned v. Duval*, 3 J. C. 141.

26. The Court may, on motion, examine whether the attachment was improvidently issued, and review the order of the judge by whom it was granted; and if found to have been improperly granted, may award a supersedeas. *Lenox v. Howland*, 3 C. R. 257. S. P. *M'Queen v. Middleton Manufacturing Co.* 16 J. R. 5.

27. Where an attachment had been obtained by the endorsee of a bill of exchange against the drawers, as absent debtors, and the endorser afterwards paid the amount, the Supreme Court reversed the order of a judge for a supersedeas, and allowed the attachment to proceed for the benefit of the endorser, or surety, who paid the money. *In the matter of M'Kinley and others*, 1 J. C. 137. S. C. C. C. 78.

28. The proper mode of removing the proceedings into the Supreme Court, is by certiorari, and not by an order of the Court. *Learned v. Duval*, 3 J. C. 141.

See further, *tit.* CHANCERY XIX. E.

ACCORD AND SATISFACTION.

1. Where A. and B. have suits for false imprisonment pending against each other, a mutual agreement to discontinue their respective suits, and an actual agreement accordingly, are a good accord and satisfaction. *Foster v. Trull*, 12 J. R. 456.

2. An agreement to accept a collateral thing, in satisfaction of a preëxisting debt, is executed by a delivery to a person appointed by the party to receive it, and is a good accord and satisfaction. *Anderson v. The Highland Turnpike Company*, 16 J. R. 86.

3. An accord not executed is no bar to a preëxisting demand. *Ibid*.

4. But an accord executed, is a good bar. *Watkinson v. Inglesby and Stokes*, 5 J. R. 386. *Coit & Woolsey v. Houston*, 3 J. C. 243.

5. A. pleaded, that he, together with B., being indebted to C. and several others, agreed to assign all their stock in trade and outstanding debts to C. and their other creditors, who agreed to accept the same, in full satisfaction

of their respective debts; and averred, that he and B. did deliver all their stock in trade, and assign all the debts due to them, for the use and benefit of C. and the other creditors; which delivery of stock, and assignment of debts, was received in full satisfaction by C. and the other creditors. This was held to be a good plea of accord and satisfaction, which might be pleaded *puis darrein continuance*. *Watson v. Inglesby*, 5 J. R. 336.

6. Acceptance of a judgment, as satisfaction, is a discharge of a debt of an inferior nature. *Saman v. Haskins*, 2 J. C. 195.

7. So, where the obligor pleaded, that he gave a bond to A. and B., for and on account of all his debts, on which judgment was entered, and afterwards gave a single [*5] bill to the plaintiff for a debt due *to him; and that the plaintiff afterwards accepted the said judgment in full satisfaction and discharge of the said bill; and that the defendant was, at the request of the plaintiff, taken into custody on a *ca. sa.* issued on the said judgment, and was afterwards, by his consent, discharged. On demurrer, *held*, that the plea was good; that the consent of the trustees was to be intended; and that the plaintiff, as *cestui que trust* under the judgment, had affirmed it, and accepted it in satisfaction. *Saman v. Haskins*, 2 J. C. 195. *S. P. Furman v. Haskin*, 2 C. R. 369.

8. Payment of a less sum, after the debt is due, in satisfaction of the debt, is not good by way of accord and satisfaction. *Johnston v. Brannan*, 5 J. R. 263.

9. But it is otherwise as to the interest. So, in an action by the endorsee against the endorser of a promissory note, for 933 dollars, the defendant pleaded that the maker paid to the plaintiff 952 dollars, in full satisfaction and discharge of the note, which the plaintiff accepted in full satisfaction, &c. The plea was held good, though the sum paid by the maker fell short of the whole interest due on the note at the time of payment, and did not include the costs of suit which had accrued. *Ibid*.

10. An agreement, without a seal, and which cannot, therefore, operate as a release, cannot operate as an accord and satisfaction, if the consideration be nominal, or less than the real debt. *Seymour v. Minturn*, 17 J. R. 169.

11. Though a promise by words may be discharged by *parol*, before it is broken, yet an agreement, on an adequate consideration, to pay a sum certain, cannot be discharged by an agreement to pay a less sum. *Ibid*.

12. Where a debtor gives his note endorsed by a third person, as *further security*, for a part of the debt, and which is accepted by the creditor in full satisfaction of all demands, it is a valid discharge of the whole debt, and may be pleaded in bar, as an accord and satisfaction. *Boyl v. Hichecock*, 20 J. R. 76.

13. An accord, with tender of satisfaction and refusal, is a good bar. *Coit & Woolsey v. Houston*, 3 J. C. 243.

14. So where A. agreed to deliver B. as much coal as would amount to principal, interest, and charges of a note, which B. held against A.; A., at different times, tendered

the coal to B., who made no objection to the place, or mode of delivery, though he neglected to take it away. In an action by B. against A., on the note, the tender was held (on motion for a new trial, after verdict for the defendant) equivalent to acceptance, and that it might be pleaded by way of accord and satisfaction. *Ibid*.

15. An accord executory is no bar. *Watkinson v. Inglesby & Stokes*, 5 J. R. 386. *Coit & Woolsey v. Houston*, 3 J. C. 243.

16. A plea of acceptance of satisfaction, from a stranger or third person, is not good. *Clow v. Borst*, 6 J. R. 37.

17. Plea, that the defendant delivered certain negotiable notes to a third person, in behalf of the plaintiffs, without showing that that person was an agent of the plaintiffs for that purpose, or that the notes came to the knowledge, or into the possession of the plaintiffs, and *were accepted by them [*6] in satisfaction of the debt, is bad. *Bird, et al. v. Carlat*, 2 J. R. 342.

18. Where it was agreed between the payee and one of two joint makers of a promissory note, for 71 dollars, that if the latter would pay the former 21 dollars and 55 cents, he would not call upon him for the payment of the note, but would look to the other maker for the residue; and the money was accordingly paid. This was held not to be a satisfaction, nor was it a bar to an action against both the makers. *Harrison v. Close & Wilcox*, 2 J. R. 448.

19. A receipt by a seaman, in full of all demands against the ship, her officers or owners, for wages, "and also one dollar, as a full compensation for any thing else," is not sufficient to support a plea of accord and satisfaction, in an action of assault and battery, brought by such seaman against the master of the ship; especially where the master withheld the wages, until the seaman signed the receipt. *Thomas v. M'Daniel*, 14 J. R. 185.

20. Whether accord and satisfaction can be pleaded in bar to a writ of error? *Quere. Potter v. Smith*, 14 J. R. 444.

ACTIONS IN GENERAL.

- I. Election of actions.
- II. Joinder of actions.
- III. Actions local or transitory.
- IV. When a cause of action shall be said to have accrued.
- V. Commencement of an action.

I. Election of actions.

1. For the wrongful taking of a chattel, the party may have *replevin* or *trespass*, at his election. *Pangburn v. Partridge*, 7 J. R. 140.

2. An action on the *case*, or *debt*, lies for the escape of a prisoner in execution. *Rawson v. Dole*, 2 J. R. 454.

3. Though a penalty is given by a turnpike act for injuring or destroying toll-gates, yet the company may bring an action of trespass at common law, for such injury to their prop-

erty. *Turner's Turnpike Company v. Coventry*, 10 J. R. 389. So the remedy by distress given by statute, does not take away the common law remedy by trespass. *Colden v. Eldred*, 15 J. R. 220.

4. Where a party has taken a bill or note for a precedent debt, in case of non-payment, he is not confined to his remedy on the bill or note, but may sue on his original cause of action. *Herring v. Sanger*, 3 J. C. 71.

5. But in that case, he must either show the note to have been lost, or produce and cancel it at the trial. *Holmes v. D'Camp*, 1 J. R. 34. *Angel v. Felton*, 8 J. R. 149. *Smith v. Lockwood*, 10 J. R. 366.

6. Where the defendant has covenanted to do a certain act, for which he has received a consideration from the plaintiff, and fails in the performance, the latter may either bring covenant for the breach, or disaffirm the contract, and bring *assumpsit*, to recover back the consideration. *Weaver v. Bentley*, 1 C. R. 47.

*7. Where the plaintiff has an entire demand, he cannot divide it into distinct parts, and bring separate actions for each. *Smith v. Jones*, 15 J. R. 229.

8. As, where there is an entire contract for the sale of goods, the plaintiff cannot maintain an action for one part of the goods sold, and another action for another part. *Ibid*.

9. So, where there has been a trespass or conversion by any single indivisible act, in relation to several chattels, the plaintiff cannot split his claim for damages, bringing separate actions of trespass or trover, for each particular article seized or converted: and a recovery for one part or parcel is a good bar to an action for another part or parcel. *Farrington v. Payne*, 1 J. R. 432. *S. P. Phillips v. Berick*, 16 J. R. 133.

II. Joinder of actions.

10. A count on a warranty in a sale, and a count in *assumpsit*, the deceit or misfeasance being the gist of the action in both counts, may be joined in one declaration; to which the defendant may plead not guilty. *Hallock v. Powell*, 2 C. R. 216.

11. But a count in deceit, and a money count, cannot be joined; for, one being *tort* and the other *assumpsit*, the same plea cannot apply to both. *Wilson v. Marsh*, 1 J. R. 503.

12. A count for trespass damage-feeasant, may be joined with a count for a pound-breach or rescous. *Baker v. Dumbolton*, 10 J. R. 240.

13. Causes of action, founded upon tort and upon contract, cannot be joined. *Church v. Mumford*, 11 J. R. 479.

14. But, where a declaration contained several counts, in each of which the *gravamen* stated was a tortious breach of the defendant's duty, as an attorney, as well as of the implied promise arising from an employment for hire; held, that as each count contained allegations sufficient to support it, either in tort or *assumpsit*, they were not incompatible, and might be joined in the same declaration. *Ibid*.

15. A count on a cause of action, arising after the death of a testator, cannot be joined

with a cause of action arising in his life-time. *Myers' Executors v. Cole*, 12 J. R. 349.

16. Causes of action, which admit of the same pleas, and of the same judgment, may be joined in the same declaration. *Union Cotton Manufactory v. Lobdell*, 13 J. R. 462. Thus, a count in debt, on a simple contract, may be joined with a count in debt on a judgment, though the pleas be different. *Ibid*.

17. The common money counts may be all joined with a count for goods sold and delivered, in one count. *Nelson v. Swan*, 13 J. R. 483. But not a count generally for certain lands sold and conveyed. *Ibid*.

18. Counts in trespass *vi et armis*, and in *trover*, cannot be joined in the same declaration, the judgment in each being different. *Cooper v. Bissel*, 16 J. R. 146.

19. A count on a promise by husband and wife, cannot be joined with a count by the wife *dum sola*; and if judgment is rendered in an action where they are [*8] so joined, it is error. *Edwards v. Davis*, 16 J. R. 281.

20. A declaration in trespass by husband and wife, for a personal injury to the wife, containing, also, a cause of action for which the husband alone might sue, as the loss of her company and assistance, in consequence of the battery, &c. is bad, on demurrer, though it may be good, after a verdict. *Lewis v. Babcock*, 18 J. R. 443.

III. Actions local or transitory.

21. Actions for personal injuries are of a transitory nature, and follow the person or forum of the defendant. *Gardner v. Thomas*, 14 J. R. 134.

22. Courts of this state have jurisdiction of *torts* committed on board of a foreign vessel on the high seas, when both parties are foreigners. *Ibid*. But it rests in the sound discretion of the Court to exercise its jurisdiction or not, in such a case, according to circumstances. *Ibid*.

23. An action for use and occupation is founded on privity of contract, and is therefore transitory. *Corporation of New-York v. Dawson*, 2 J. C. 335. *Low v. Hallett*, 2 C. R. 374.

24. Debt on judgment is local: so, debt on the judgment of a Court of Common Pleas must be brought in the county where the judgment was given. *Barnes v. Kenyon*, 2 J. C. 381. *Petit v. Carman*, July term, 1798. *ib. cit*.

25. So, a *scire facias* to revive a judgment. *McGill v. Perrigo*, 9 J. R. 259.

26. An action for an escape is not local to the county in which the judgment or writ, by virtue whereof the prisoner was arrested, is filed of record. Whether the venue ought not to be laid in the county in which the escape was made? *Quere. Bogert v. Hildreth*, 1 C. R. 1.

27. An action on a covenant of seisin is local. *Clarkson v. Gifford*, 1 C. R. 5.

28. In injuries to personal property, the action may be brought wherever the defendant can be taken, although the cause of action

arose in another state or country. *Glen v. Hodges*, 9 J. R. 67.

29. An action on the case against a sheriff for a false return, is within the provision of the "Act for more easy pleading in certain suits." *Sess.* 24. 3. 47. s. 1. (1 N. R. L. 155.) And the plaintiff is bound to show that the cause of action arose within the county where the act was done, and the venue is laid. *Seely v. Birdsall*, 15 J. R. 267. But the statute, in such case, applies only to acts of the sheriff done *virtute officii*; not to acts done *colore officii*. *Ibid.*

Changing and retaining the venue. *See tit. PRACTICE.*

IV. When a cause of action shall be said to have accrued.

30. Where the defendant had agreed to remove his goods from a warehouse, in May, 1803, but neglected to do so; in consequence of which, the plaintiff, in 1806, was obliged to pay damages to the person to whom he had sold it; *held*, that the cause of action accrued when the defendant neglected to remove the goods, in 1803, and *not when the plaintiff was obliged to pay damages, in 1806. *McKerras v. Gardner*, 3 J. R. 137.

31. Where A. agrees with B. to endorse the note of C., no action lies against A., for the non-performance on his part, until C. executes the note. *Ludlow v. Simond*, 2 C. C. E. 1.

32. Where, on a trial of a cause, judgment is given for the plaintiff, for a less sum than was actually due, by mistake of the Court, no action lies to recover the sum so omitted in the judgment, by mistake. *Platner v. Best*, 11 J. R. 530.

33. Matter, which would have been a defence in a former action, and which the party ought to have made, he cannot afterwards make the subject of a suit. *Cantfield v. Menger*, 12 J. R. 347.

34. So, matter which was properly offered as a defence to a former action, and rejected by the Court, cannot be made the subject of a new suit. *Grant v. Button*, 14 J. R. 377.

35. A mere liability to pay, without actual payment, gives no cause of action. *Platt v. Smith*, 14 J. R. 368.

36. Where a parol agreement is made for the sale and purchase of land, and the vendor is ready, at the time appointed, with a deed duly executed and acknowledged, but the purchaser refuses to fulfil the agreement on his part, no action lies, at the suit of the vendor, to recover the expenses of preparing the deed. *Norris v. Lane*, 16 J. R. 151. *Aliter*, if the purchaser had requested the vendor to prepare the deed, and promised to pay the expense, in case the agreement was not fulfilled on his part. *Ibid.*

V. Commencement of an action.

37. The issuing of the writ is the commencement of the action. *Carpenter v. Butterfield*, 3 J. C. 145. *S. P. Lowry v. Lawrence*, 1 C. R. 69. *S. P. Bird et al. v. Caritat*, 2 J. R. 342.

S. P. Cheetham v. Lewis, 3 J. R. 42. The suing out of the writ, not the filing of the bill, is the commencement of the suit. *Per Spencer, J. Fowler v. Sharp*, 15 J. R. 323.

38. So, in all cases, where the time is material to save the statute of limitations. *Burdick v. Green*, 18 J. R. 14.

39. And it is not necessary to show that the writ was actually returned, nor that it was actually delivered to the sheriff, but it is sufficient, if it was sent to the sheriff, or his deputy, with a *bona fide* intention to have it served. *Ibid.*

40. In a Justice's Court, the issuing the summons or warrant is the commencement of the action. *Boyce v. Morgan*, 3 C. R. 133.

41. If it appear on the record, that the action accrued after the return of the writ, it will be bad on special demurrer. *Lowry v. Lawrence*, 1 C. R. 69. *S. P.* on general demurrer, and that it would be bad after verdict. *Cheetham v. Lewis*, 3 J. R. 42.

42. If the defendant aver, that, prior to the suing out of the writ, he settled and discharged the debt of the plaintiff, it is sufficient as to the time. *Bird et al. v. Caritat*, 2 J. R. 342.

43. But a verdict will not be set aside, on a motion for a new trial, because the suit was commenced before the cause of action accrued. *Crygier v. Long*, 1 J. C. 393. *Lawrence v. Boune*, 2 J. C. 225.

See further, tit. CHANCERY II.

*ACTIONS (REAL.) [*10]

(a) *Appearance, ne recipiatur, and default of demandant and tenant*; (b) *Non-summons*; (c) *Imparlance*; (d) *Voucher*; (e) *View*; (f) *Grand assize*; (g) *Right and title of the parties*; (h) *Nonsuit for not going to trial*; (i) *Judgment*.

(a) *Appearance, ne recipiatur, and default of demandant and tenant.*

1. If the tenant intend to put the demandant out of Court, he should enter a *ne recipiatur*, on the *quarto die post*. *Sacket v. Lothrop*, 1 J. C. 249. *S. C. C. C. 91.*

2. By the rule requiring the sheriff to return the writ, *sedente curia*, the demandant is to be deemed as continuing in Court, from day to day, during the term. *Ibid.*

3. The demandant may be called on the first day of the term; and in case of non-appearance, his default may be entered, which, if he does not appear and excuse, on the *quarto die post*, he is liable to a nonsuit. *Swift v. Livingston*, 2 J. C. 112. *S. C. C. C. 122.*

4. Where the demandant was called on the first day of the term, and again on the *quarto die post*, and a *further day* was given to him by the Court to appear, on the *last day of the term*, and not appearing on that day, his default was entered; and a judgment of nonsuit thereon: *held*, that the judgment was regular; and that the Court would not set it aside, unless a sufficient excuse for not appearing on

the last day of the term was shown. *Van Bergen v. Palmer*, 18 J. R. 504.

5. The tenant must appear and plead on the *quarto die post* in the term in which the summons is returned; otherwise his default may be entered. *St. Croix v. Sands*, 1 J. R. 328.

6. After a default of the tenant, in not appearing on the summons, in an action of dower, had been regularly entered, and a writ of *grand cape* issued, the default and subsequent proceedings were set aside, at the next term, on the ground of mistake and accident, and the tenant allowed to enter his appearance. *Allan v. Smith*, 20 J. R. 477.

(b) *Non-summons.*

7. The plea of non-summons must be verified by affidavit before it can be received, and be put in on the *quarto die post*, or it will be too late at the next term. *St. Croix v. Sands*, 1 J. R. 328.

(c) *Impar lance.*

8. A special impar lance saves the rights of the party, and the tenant may afterwards vouch to warranty, &c. *Whilbeck v. Shorfelt*, 9 J. R. 265.

9. After the demandant has counted, it is of course to grant the tenant a special impar lance until the next term. *Haviland v. Bond*, 4 J. R. 309.

10. Where a special impar lance is granted to the first day of the next term, the tenant is bound to plead on that day, and is not allowed until the *quarto die post*. *Haines v. Budd*, 1 J. C. 335.

[*11] * (d) *Voucher.*

11. Where the return, or the service of a summons to the vouchee, is irregular, the tenant may have an *alias* summons. *Scofield v. Loder*, 2 J. C. 75.

(e) *View.*

12. The tenant is entitled to a view in all cases, except where restrained by the statute. *Inhabitants of Gravesend v. Voorhis and others*, 1 J. C. 237.

13. So, the demandant. *Haines v. Budd*, 1 J. C. 335.

14. When the tenant demands a view, the demandant must sue out the writ of view, and cause view to be given, or be nonsuited. *Scofield v. Lotie*, 1 J. C. 375. S. C. C. 98.

(f) *Grand assize.*

15. On an affidavit, stating that one of the electors returned on the grand assize had left the state, the Court, there being no opposition, gave leave to amend the panel by adding another. *Houghalling v. Bronk*, 3 C. R. 150.

(g) *Right and title of the parties.*

16. On the issue in a writ of right, the mere right is in question. *Nase v. Peck*, 3 J. C. 128.

17. Where the ancestor of the demandant was in possession of the premises in question 51 years ago, and died in possession 41 years ago, leaving the demandant his only son; this — held sufficient evidence to rebut the pre-

sumption of right in the tenant, arising from a possession of 38 years only, commenced by wrong. And a patent, dated in 1697, produced in evidence by the tenant, not for the purpose of deducing a title to himself, but to show a title out of the demandant, was held not sufficient to repel the conclusion in favor of the demandant, as the assize might presume a title in the ancestor of the demandant, derived from the patent. *Ibid.*

(h) *Nonsuit for not going to trial.*

18. The demandant, on stipulating to bring the cause to trial, must pay costs, as in other cases. *Philips v. Peck*, 2 J. C. 104.

(i) *Judgment.*

19. In dower and all real actions, judgment cannot be entered without motion in open Court. *Van Driner v. Christie*, 3 C. R. 139.

*ACTION ON THE CASE. [*12]

I. *Deceit.*

II. *Misfeasance*; (a) *Misfeasance of a public officer*; (b) *Enticing away a wife, or seducing a daughter, per quod, &c.*; (c) *Other cases of misfeasance*; (d) *Defence.*

III. *Malicious prosecution.*

IV. *Negligence.*

V. *Nuisance.*

I. *Deceit.*

1. Fraud or deceit, with damage, is a good cause of action. *Upton v. Vail*, 6 J. R. 181. *S. P. Barney v. Dewey*, 13 J. R. 224.

2. A false affirmation as to the credit of a third person, whom the defendant knew at the time to be insolvent, whereby the plaintiff was induced to trust him, and lost his debt, is a cause of action. *Ibid.*

3. Although the affirmation was merely verbal, without any note or memorandum in writing between the parties. *Ibid.* (Whether such an action would lie or not? *Quere. Ward v. Center*, 3 J. R. 271.)

4. But the deceit is the gist of the action, and the plaintiff must prove actual fraud in the defendant, or an intention to deceive the plaintiff, by false representations. *Young v. Covell*, 8 J. R. 23.

5. Advice rashly and indiscreetly given, but without any fraudulent intention, is not sufficient to support the action. *Ibid.*

6. Whether there is fraud or not, is a question of fact for the jury to decide; and where there is evidence on both sides, and the jury are not misdirected as to the law, the Court will not set aside their verdict. *Ward v. Center*, 3 J. R. 271.

7. In the sale of provisions for domestic use, the vendor is bound, at his peril, to know whether they are sound and wholesome; and if they are not so, an action on the case will lie against him, at the suit of the vendee. *Van Bracklin v. Fonda*, 12 J. R. 468.

8. An action on the case for a deceit lies,

for fraudulently selling land which has no real existence, notwithstanding the covenants contained in the deed of the vendor, which the vendee may treat as a nullity. *Wardell v. Fordick*, 13 J. R. 325.

9. So, where a person is induced to purchase land, by a false representation, that a certain privilege was annexed to the land, but which is not included in the deed. *Monell v. Colden*, 13 J. R. 395.

10. It seems, that the measure of damages to be recovered in such a case, is the difference between the value of the land conveyed, and the sum which the purchaser was induced to pay by the false representation. *Ibid.*

11. Where the donor of a chattel affirms it to be his, at the time of the gift, and the donee is, afterwards, evicted by the true owner, he may have an action on the case against the donor. *Barney v. Dewey*, 13 J. R. 224.

12. No action lies for representing the plaintiff's ferry not to be so good as another rival ferry, and persuading travellers to cross at the other, and not at the plaintiff's ferry. *Johnson v. Hitchcock*, 15 J. R. 185.

See tit. SALE OF CHATTELS—FRAUDS.

[*13] *II. *Misfeasance*; (a) *Misfeasance of a public officer*; (b) *Enticing away a wife, or seducing a daughter, per quod, &c.*; (c) *Other cases of misfeasance*; (d) *Defence.*

(a) *Misfeasance of a public officer.*

13. An action on the case lies against an officer, for maliciously executing process, in an oppressive and unreasonable manner, with intent to vex, harass and oppress the party. *Rogers v. Brewster*, 5 J. R. 125.

14. As, where a constable, having a warrant against the plaintiff for a military fine, refused to take property tendered by him, but took and sold his horse, with the avowed intent of hurting his feelings, and otherwise vexing him. *Ibid.*

15. An action lies against a sheriff for an act of his deputy, in taking more fees on levying an execution than are allowed by law; and whether the sheriff recognized the act of his deputy or not, need not be shown. *M'Intyre v. Trumbull*, 7 J. R. 35.

16. If an officer, having authority to attach the goods of a person, keep them in an unsafe place, or expose them to destruction, he is liable for the damage sustained. *Jenner v. Jolliffe*, 9 J. R. 381.

17. And it seems, that if a plaintiff, on a process of attachment, direct or cause an officer so to act, as to misbehave in the execution of his office, and produce the loss or destruction of the goods in his custody, the party injured has his election to bring his action either against the principal or the officer. *Ibid.*

18. An action on the case will not lie against the representatives of a deceased postmaster, for money feloniously taken out of a letter by one of his clerks. *Franklin v. Low*, 1 J. R. 396.

19. And whether it would lie against the postmaster himself, in his life-time? *Quere. Ibid.*

20. But the action must be founded on the misfeasance; *assumpsit* will not lie. Per *Spencer, J. Ibid.*

21. Where a damage is suffered by the act or omission of a public officer, contrary to his duty, the party injured may have an action on the case against him. *Barlett v. Crozier*, 15 J. R. 250.

22. But the duty to be performed must be entire, absolute and perfect, to render the officer liable for special damages, for a neglect of duty. *S. C. in Error*, 17 J. R. 439. Per *Kent, Chancellor.*

23. Therefore, no private action will lie against an overseer of highways, for an injury sustained by the plaintiff, in consequence of the neglect of the overseer to keep a bridge in repair. *Ibid. Contra, S. C. 15 J. R. 250.*

24. The party injured, in such case, can sue only for the penalty imposed by the statute, for each neglect or breach of duty. *Ibid. Contra, S. C. 15 J. R. 250.*

25. And it seems, that a private action would not lie against the commissioners of highways. *S. C. Per Kent, Chancellor.*

26. But, if a private action would lie, in such a case, the declaration ought to state specially the cause of action arising under the statute, and every fact requisite to enable the Court to judge whether there has been a breach of duty in the officer. *Ibid. Contra, S. C. 15 J. R. 250.*

*27. If a person exempt from military duty is summoned to appear at the parade, and does not claim exemption, and offer proper proof of it, no action will lie against the officer who returns him to a Court Martial, as a delinquent; unless malice express or implied be shown. *Vanderbilt v. Downing*, 11 J. R. 83.

28. An action on the case will not lie against the inspectors of an election, for refusing the vote of a person legally qualified to vote, without proving malice express or implied. *Jenkins v. Waldron*, 11 J. R. 114.

29. Case lies against a justice of the peace, for a false return to a certiorari brought to reverse his judgment, notwithstanding the judgment was affirmed, by default of the plaintiff in error. *Kutzie v. Sackrider*, 14 J. R. 195.

30. No action lies, at the suit of an individual, against a public officer, for misbehavior in office, either for misfeasance or non-feasance, unless the plaintiff can show a special damage peculiar to himself. *Buller v. Kent and others*, 19 J. R. 223.

31. In cases of tort, or misfeasance, the particular damages for which the plaintiff brings his action, must be the legal and natural consequence of the wrongful act of which he complains; and, in such case, the special damages must be particularly stated in the declaration. *Ibid.*

32. No action lies against the managers of a public lottery, at the suit of a dealer in lottery tickets, who had purchased a large number of tickets, for the purpose of selling them at a profit, on the ground, that by the improper and negligent conduct of the defendants, in managing and conducting the lottery, the pub-

lic confidence in the fairness of the drawing was wholly lost, and the demand for tickets, and the price of them, thereby so greatly diminished, that the plaintiff could not sell his tickets, which remained on his hands, and were drawn blanks. *Ibid.*

33. Where an injury to a person is caused by means of the regular process of a Court of competent jurisdiction, case, not trespass, is the proper remedy. *King v. Parks*, 19 J. R. 375.

See OFFICE AND OFFICERS.

(b) *Enticing away a wife, or seducing a daughter, per quod, &c.*

34. Case lies by a husband against his wife's father, for enticing her away, *per quod, &c.* *Hutcherson v. Peck*, 5 J. R. 186.

35. But malice, or improper motives, should be more clearly shown than would be necessary in the case of a stranger; and the presumption is in favor of the defendant. *Ibid.*

36. And the *quo animo* is the material point of inquiry. *Ibid.*

37. A daughter of the age of 19 years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement for her continuance in his house for any time. While in her uncle's house, she was seduced, and got with child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him; though, had not the misfortune happened to her, she had no intention of returning to her father. It was held, that an action on the case was maintainable by the father against her seducer; the father not having devoted himself of his pow-

[*15] er *to reclaim the services of his daughter, and the relation of master and servant was presumed from his right to her services, arising from his liability to maintain and provide for her while under age. *Martin v. Payne*, 9 J. R. 387.

38. But where the daughter is above the age of 21 years, the father cannot maintain an action, unless she is actually in his service, so as to constitute the relation of master and servant. *Nicholson v. Stryker*, 10 J. R. 115.

39. So, case lies for enticing and harboring a *servant* or *slave* of the plaintiff, notwithstanding the penalty given by the act concerning slaves, (36 Sem. c. 88. s. 15.) which is a cumulative remedy. *Schidmore v. Smith*, 13 J. R. 322.

See TRESPASS.

(c) *Other cases of misfeasance.*

40. It seems, that an action on the case will lie for putting goods on board a vessel, without the consent of the master and owner, prohibited to be imported by the laws of a foreign country, to which the vessel was destined, and which would render her liable to seizure and condemnation, and in consequence of which the plaintiff's vessel was seized, and the master compelled to pay a large sum of money to procure her release. *Smith v. Elder*, 3 J. R. 105.

41. And, if there is any objection to the jurisdiction of our Courts in such a case, it cannot be made after a plea in bar. *Ibid.*

42. No action will lie against a person in this state for suborning a witness to swear falsely in a Court in another state, whereby a judgment was rendered against the defendant in that state, contrary to the truth and justice of the case. *Smith v. Lewis*, 3 J. R. 157.

43. And it seems, that the law would be the same, had the original action been brought in this state; and it seems, also, that no action would lie against the witness who committed the perjury. *Ibid.*

44. Where Y., the assignee of a judgment against B., which was a lien on the real property of B., was about to take out execution, and seize a certain lot of land, &c., and J., having notice of the lien and assignment, with intent to defraud Y. of the satisfaction of the judgment, pulled down and carried away certain buildings from the land, whereby it was rendered of less value: held, that Y. might have an action on the case against J. *Yates v. Joyce*, 11 J. R. 136.

45. An action on the case, in the nature of waste, lies against the assignee of a lessee. *Short v. Wilson*, 13 J. R. 33.

46. But a mortgagee cannot maintain an action against the mortgagor for waste, until after a forfeiture of the mortgage, at least. *Peterson v. Clark*, 15 J. R. 205.

47. A person having an expectant interest in land, less than the inheritance, cannot maintain an action of waste. *Ibid.*

48. Case, not trespass, is the proper remedy against a person using a private road, at the suit of the party on whose application the road was laid out. *Lambert v. Hoke*, 14 J. R. 383.

49. Case lies by an assignee of a mortgagee against a purchaser from the mortgagor, subsequent to the mortgage, for removing buildings *from the premises, [*16] after they had been advertised for sale under the mortgage, and before the sale, whereby the premises sold for a less sum than they would otherwise have brought, and not sufficient to satisfy the mortgage debt; but it must be, in such case, averred and proved, that the mortgagor was insolvent, and had no other property than the mortgaged premises, out of which the debt could be satisfied. *Lane v. Hitchcock*, 14 J. R. 213.

50. Where goods are deposited with a person to be sold, at not less than a certain fixed price, and the depositary sells the goods at a less price, case, and not trover, is the proper remedy. *Serjeant v. Blunt*, 16 J. R. 74.

(d) *Defence.*

51. Where A. sued B., on a contract for the delivery of goods, and settlement was made between them, and B. gave A. a receipt in full for the balance due for the goods delivered; this was held to be no bar to a subsequent action by B. against A. for a misfeasance, in regard to goods, part of the subject of the same contract, and not delivered, but lost, as B. alleged, by the misconduct of A. *Jenner v. Joliffe*, 9 J. R. 381.

52. In an action on the case, against a constable, for a false return to a summons against the plaintiff, for a penalty alleged to have been incurred by the violation of a statute, and for which judgment was given against him by default, the constable having, in good faith, returned the summons "personally served," though served on a different person, by mistake, the defendant may show, in mitigation of damages, that the plaintiff was actually guilty of the offence, for which judgment was rendered against him. *Green v. Ferguson*, 14 J. R. 389.

III. Malicious prosecution.

53. The declaration stated, that the defendant maliciously, falsely, and without probable cause, procured a justice to issue his warrant to arrest the plaintiff, on suspicion that the cow of the defendant, which had been stolen, was in the plaintiff's possession, &c.; and on being brought before the justice, the plaintiff, after every thing had been heard and considered by the justice, was wholly acquitted and discharged by him from the supposed crime, &c. After a verdict for the plaintiff, held, that the justice had power to acquit and discharge the plaintiff, if he was satisfied there was no ground of suspicion against him; and the prosecution, therefore, being at an end, there was sufficient ground to maintain the action. *Secor v. Babcock*, 2 J. R. 303.

54. No action lies merely for bringing a suit without sufficient ground. *Vanduzor v. Linderman*, 10 J. R. 106.

55. To sustain a suit for a former prosecution, it must have been without cause, and malicious. *Ibid.*

56. To obtain a copy of the indictment, in order to ground an action for a malicious prosecution, the malice ought to appear from what passed at the trial, or from circumstances or declarations out of Court; and the judge who presided should certify that a copy ought to be granted. *The People v. Poylon*, 2 C. R. 202.

57. A certificate that the acquittal was satisfactory is not sufficient. *Ibid.* The certificate may be given *nunc pro tunc*, although the judge who presided is no longer on the bench. *Ibid.*

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*IV. Negligence.

58. Negligence is a mixed question of law and fact; and where the facts have been ascertained by a jury, whether they warrant the charge of negligence or not, is a question of law. *Foot v. Winwall*, 14 J. R. 304.

59. Where there is an immediate injury, attributable to negligence, the party injured has an election, either to treat the negligence of the defendant as the cause of action, and to declare in case, or to consider the act itself as the injury, and declare in trespass. *Blinn v. Campbell*, 14 J. R. 432.

60. A person who undertakes to do an act, without reward or consideration, is not answerable for omitting to do it, even though special damages are averred. *Thorne v. Deas*, 4 J. R. 84.

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61. And the rule equally applies to commercial questions; as, where A. and B. were joint owners of a vessel, and A. voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was lost, no action will lie against A. *Ibid.*

62. But, it seems, a factor, or commercial agent, who is entitled to a commission, will be answerable for not executing an order to insure. *Ibid.*

63. In an action against a turnpike company, for the value of a horse, killed by the fall of a bridge on the road, it was held, that the defendants were bound to bestow ordinary care and diligence in the construction of their bridges, but are not responsible for accidents, which do not arise from neglect, or want of such ordinary care and skill. *Twinsend v. President, &c. of the Susquehanna Turnpike Company*, 6 J. R. 90.

64. A public officer, who is required by law to act, in certain cases, according to his judgment or opinion, sworn to discharge his duties, and subject to penalties for the neglect of them, is not liable to a party for omission arising from mistake or want of skill, if acting *bona fide*. *Seaman v. Patten*, 2 C. R. 312.

65. An action will not lie against the master of a vessel, for running his vessel against, and injuring another, the defendant himself being ashore, and a pilot on board. *Snell v. Rich*, 1 J. R. 305.

66. Whether the owners of the ship are liable for the conduct of the pilot? *Ibid.* [See *Boucher v. Nordstrom*, 1 Taunt. 568. *Nicholson v. Mounsey*, 15 East, 384.]

67. If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to, and fires, the woodland of his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servants. *Clark v. Foote*, 8 J. R. 421.

68. A person building a house on his own ground, contiguous to or adjoining the house of his neighbor, may lawfully dig the foundation below that of his neighbor's house; and if he use due care and diligence, to prevent injury to his neighbor, he will not be liable for any consequential damage which may arise; but if he is guilty of negligence, an action on the case will lie against him. *Panton v. Holland*, 17 J. R. 92.

69. And, though the declaration charge malice, as well as negligence, proof of negligence alone is sufficient to maintain the action. *Ibid.*

70. Case lies against a sheriff for not returning an execution, *though [*18] the plaintiff may proceed by attachment. *Burk v. Campbell*, 15 J. R. 456.

71. Case lies against an innkeeper for goods lost or stolen out of his inn, without proving negligence. *Clute v. Wiggins*, 14 J. R. 175.

72. The owner of a domestic animal is not liable for injuries committed by it, unless he has received notice that it was accustomed to do mischief. *Vrooman v. Lawyer*, 13 J. R. 339.

73. It seems, that case is the proper remedy, where an agent, authorized to deliver goods on receiving sufficient security, delivers the

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goods, but neglects to take security. *Cairnes v. Bleecker*, 12 J. R. 300.

V. Nuisance.

74. Where A. granted 86 acres of land to B., reserving the streams of water, and the soil under them, with the right of erecting mill-dams, and all such part of the land as might, by such dams, be overflowed with water, &c., and B. sold 40 acres of the premises to C., with the like reservations; and C. erected a back mill and dam on his part of the land, by which the land of B. was overflowed, &c.; *held*, that, until the grantor exercised his right to erect mills and mill-dams, it could not be ascertained what part of the land would be overflowed, and the reservation was, in the mean time, inoperative; and an action on the case, therefore, by B. against C. was maintainable; and the right reserved by the grantor, being an incorporeal hereditament, a *parol* permission by him to C. to erect his mill and dam, &c. was void, and no defence. *Thompson v. Gregory*, 4 J. R. 81.

75. Where a company is authorized, by an act of the legislature, to cut a canal, no action will lie against them by the owner of the land through or near which the canal is cut, for injuries to his land, arising necessarily from the act of making it, or from its contiguity, the defendants having proceeded according to the directions of the legislature; but only for such damage as results from their neglect in keeping the canals and embankments in repair. *Steele v. Western Inland Lock Navigation Company*, 2 J. R. 283.

76. No action lies for erecting a mill-dam above the mill-dam of the plaintiff, for slight inconveniences attending the interception of the waters above, provided it does not extend to the destruction or diminution of the uses of the mill. *Palmer v. Mulligan*, 3 C. R. 307.

77. A person erecting a mill must so construct his dam, and use the water, as not to injure his neighbor below, in the enjoyment of the same water, according to its natural course; and if he so diverts the water as to injure the mill of another below, he is liable in damages to the amount of the injury sustained. *Sackrider v. Beers*, 10 J. R. 241. Per *Kent*, Ch. J. *Palmer v. Mulligan*, 3 C. R. 307.

78. A person erecting a mill and dam upon a stream of water does not, by the mere occupation, unaccompanied by such a length of time as would authorize the presumption of a grant, gain an exclusive right to the water: he, therefore, cannot have an action against a person erecting a mill and dam above his, by which the water is, in part, diverted, and he thereby damnified. *Platt v. Johnson*, 15 J. R. 213.

79. Where several owners of mill-seats on a stream of water have a common and equal right to the use of the water, though [*19] no action lies against the owner of the mill above, for the damage which the owner of the mill below may sustain from the

reasonable use of the water by the former, for his own benefit; yet the owner of the mill above has not an unlimited right to use the water as he pleases, or stop the natural flow of the stream, so as to destroy or render useless the mill below. *Merritt v. Brinckerhoff*, 17 J. R. 306.

80. Therefore, if the owner of the mill above shuts down his gate, and detains the water, for an unreasonable time, or raises his gate, and lets out the water in such an unusual quantity as to prevent the owner of the mill below from using it, or deprives him of his reasonable and fair participation in the benefit of the stream, an action on the case lies against him, at the suit of the party so injured, to the extent of the loss sustained by him. *Ibid*.

81. The defendant, being owner of a tract of land in the city of New York, surveyed and laid out the same into streets and squares for building lots, and leased some of the lots according to the map of this survey, which lots were bounded on one side by a street, as described on the map, though not actually opened: but the plan of these streets was never accepted or approved by the corporation of the city; and the commissioners, appointed by the act of the legislature of the 3d April, 1807, among other parts of the city, laid out the defendant's tract of land in a different manner, and crossing the streets proposed by his map, in different directions, and which plan of the commissioners was declared by the act to be conclusive. The defendant, who had, after giving a lease, partially opened the street proposed by him, and mentioned in the lease, after the report of the commissioners, shut that street by a fence; *held*, that the leasee could not maintain an action against the defendant for obstructing his right of way through the proposed street mentioned in the lease, there being another reasonable and convenient way left open from the premises to an established highway or street; especially, as, by the act of the legislature, no streets in the city of New York, laid out by individuals, could be established as public streets, until approved of and accepted by the corporation. *Underwood v. Stuyvesant*, 19 J. R. 181.

See NUISANCE.

When a stream or river, by length of usage, has become a public highway, so as to render an obstruction of the navigation a nuisance. *See RIVERS*.

Where the action should be case, or where trespass. *See TRESPASS*.

ACTION ON THE CASE ON *assumpsit*. *See ASSUMPSIT*.

— against a common carrier. *See COMMON CARRIER*.
— for defamation. *See SLANDER AND LIBEL*.
— for an escape. *See ESCAPE*.
— upon *trover*. *See TROVER*.

[*20] *ACTION ON STATUTE AND POPULAR ACTIONS.

(a) *When it lies*; (b) *In whom the right to the penalty attaches*; (c) *Declaration*; (d) *Discharging and compounding the action*.

(a) *When it lies*.

1. A penalty cannot be raised by implication, but must be expressly created and imposed. *Jones v. Estis*, 2 J. R. 379.

2. If a person has a right to sue at common law, and a remedy is likewise given in the affirmative, by statute, without a negative, express or implied, of the action at common law, he may avail himself of either remedy. *Almy v. Harris*, 5 J. R. 175. *Farmer's Turnpike Company v. Coventry*, 10 J. R. 389.

3. But if the party has no other right than what is derived from the statute, his remedy also must be under the statute. *Almy v. Harris*, 5 J. R. 175.

4. The remedy by distress and sale of beasts, damage-feasant, given by the statute, (*Seas* 36. c. 35. s. 19.) does not take away the common law remedy by action of trespass. *Colden v. Eldred*, 15 J. R. 220.

(b) *In whom the right to the penalty attaches*.

5. The person who first commences a *qui tam* action attaches a right in himself to the penalty, which cannot be divested by a subsequent suit, brought by any other common informer; though judgment has been first recovered in such subsequent suit, and though the act declares that a recovery for the penalty shall be a bar to all prosecutions for the same offence; for this is to be construed in regard to a recovery in the suit first commenced. *Beadleston v. Sprague*, 6 J. R. 101.

(c) *Declaration*.

6. If the statute gives no general form of declaring to a common informer, the plaintiff must state the special matter upon which his cause of action arises. *Cole v. Smith*, 4 J. R. 193. *S. P. Bigelow v. Johnson*, 13 J. R. 428.

7. If an exception, or proviso, in a penal statute, forms no part of the plaintiff's title, but merely matter of excuse for the defendant, it is not necessary for the plaintiff to negative the exception or proviso. *Sheldon v. Clark*, 1 J. R. 513. *S. P. Bennet v. Hurd*, 3 J. R. 438. *S. P. Teel v. Fonda*, 4 J. R. 304. *S. P. Hart v. Clois*, 8 J. R. 41. *Contra, Blasdel v. Hewitt*, 3 C. R. 137.

(d) *Discharging and compounding the action*.

8. In a popular action, the plaintiff cannot discharge the judgment as to the people's moiety, without payment. *Minton v. Woodworth*, 11 J. R. 474.

9. And if, in such action, the defendant, having been taken in execution, is discharged by the plaintiff, without satisfaction, such discharge is no bar to an action for an escape. *Ibid*.

*10. The parties to a *qui tam* action may lawfully agree, the plaintiff to discontinue the suit, and the de-

fendant to pay the costs; for discontinuing is not compromising or compounding a popular action, within the act to redress disorders by common informers, (1 N. R. L. 99.) and is not an offence; neither is the payment of costs by the defendant a composition. *Haskins v. Newcomb*, 2 J. R. 405.

11. It is in the discretion of the Court, under the statute, to allow the informer or plaintiff to compound on such terms as they think fit. *Bradway v. Le Worthy*, 9 J. R. 251.

12. And it is a general rule, in the exercise of this discretion, to require, as one of the terms of granting leave to compound, that the moiety of the penalty given to the people be paid; unless under special circumstances, when leave to discontinue, on payment of the costs only, will be granted. *Ibid*.

13. Where a statute inflicts a penalty, the one moiety whereof, when recovered, is to be paid into the treasury of the state, and the other moiety to go to the benefit of the person prosecuting the same to effect, a payment of the penalty to the person prosecuting will discharge the defendant, though the plaintiff has no right to discharge the judgment, or compound with the defendant, without leave of Court. *Caswell v. Allen*, 10 J. R. 118.

And see STATUTES.

Actions on particular penal statutes. See GAMING. HABEAS CORPUS. HIGHWAYS INNS AND INNKEEPERS. MAINTENANCE. TURNPIKES AND TURNPIKE COMPANIES. USURY.

ADVANCEMENT.

1. It seems, that where a parent purchases land for, and takes a conveyance in the name of, a child under age, it is not a trust for the parent, but an advancement for the child. *Jackson, ex dem. Benson, v. Malsdorf*, 11 J. R. 91.

2. But where it expressly appears to have been the intention of the parent, that it should not be an advancement, a trust will result to the parent. *Ibid*.

*AGREEMENT. [*22]

I. (a) *What constitutes an agreement*; (b) *Optional agreement*; (c) *When an agreement will be construed a conveyance in presenti, or an agreement to convey*; (d) *Date of an agreement*; (e) *Construction of particular agreements*.

II. *Consideration*; (a) *Necessity of*; (b) *Consideration of a deed or writing*; (c) *What is a sufficient consideration*.

III. *What renders an agreement void*; (a) *Disability of parties*; (b) *Want of consideration*; (c) *Illegal consideration*; (d) *Unconscientious agreement, or against public policy, or the policy of the law*; (e) *Fraud*; (f) *Duress*; (g) *Void in part*.

IV. *Performance*; (a) *What is a good performance of an agreement, and the effect of it*; (b) *Time of performance, and how enlarged or waived*; (c) *When a party will lose his right to enforce performance.*

V. *Rescinding an agreement.*

I. (a) *What constitutes an agreement*; (b) *Optional agreement*; (c) *When an agreement will be construed a conveyance in presenti, or an agreement to convey*; (d) *Date of agreement*; (e) *Construction of particular agreements.*

(a) *What constitutes an agreement.*

1. All contracts are by specialty or parol; and if written, but not sealed, they are parol agreements. *Ballard v. Walker*, 3 J. C. 60.

2. The assent of both parties is necessary to constitute an agreement. *Bruce v. Pearson*, 3 J. R. 534.

3. If a person sends an order to a merchant to send him a particular quantity of goods on certain terms of credit, and the merchant sends a less quantity of goods at a shorter credit, until the former assent to receive them, there is no agreement between the parties, and he will not be bound to pay for them; and if the goods be lost in transitu, the merchant must bear the loss. *Ibid.*

4. If one party does not accede to a promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 J. R. 470.

5. So, if a deputy sheriff promise to pay the amount of a judgment collected by him, but not the costs of entering a rule for an attachment, but the plaintiff will not accept the one without the other, the defendant is not bound. *Ibid.*

6. Where A. signs a writing, declaring that he will sell B. a house, at a certain price, &c. this is a mere proposition, not a contract or agreement. *Tucker v. Woods*, 12 J. R. 190.

(b) *Optional agreement.*

7. An agreement may be optional with one of the parties, in part or in whole, and obligatory on the other. *Disborough v. Neilson*, 3 J. C. 81.

8. As, where A. agreed to deliver [*23] B. from 700 to 1,000 barrels of *meal, at so much per barrel, and delivered 700 barrels, and afterwards tendered 300 barrels more; it was held, that it was optional with A. to deliver or not the quantity above 700 barrels, or any part of it; but that, on tender, B. was bound to receive and pay for it. *Ibid.*

9. So, upon a sale, it was agreed, that the vendee might return the thing sold within a specified time, and that the vendor would take it back, and refund the purchase money; the vendee offered to return the property within the time, but the vendor refused to take it, or refund; held, that the vendor was liable for the non-performance of the agreement; and it makes no difference that the vendee had given his obligation, or made payment, in pursuance of the agreement. *Giles v. Bradley*, 2 J. C. 253.

10. Where an agreement is alternative, the defendant, or debtor, has the right of election. *Smith v. Sanborn*, 11 J. R. 59.

11. So, where A. agrees to pay B. eight dollars an acre for land, in two several payments, at different days, and in case of default in either of the payments, A. agrees to pay B. nine dollars per acre, at a further, and specified time, it is optional with A., to pay, either at the rate of eight dollars per acre, at the first time specified, or wait until the further time, and pay nine dollars per acre; and before that day has arrived, B. cannot maintain an action on the agreement. *Ibid.*

(c) *When an agreement will be construed a conveyance in presenti, or an agreement to convey.*

12. A writing, in the form of articles of agreement, and containing a covenant to convey lands, and concluding with a penalty for the non-performance of the covenant, though it contained words of bargain and sale, or an absolute conveyance in presenti, to one of the parties, and his heirs, was held to amount to no more than an agreement to convey. *Jackson, ex dem. Ludlow, v. Myers*, 3 J. R. 388.

13. So, a writing in the following words, "This is to certify, that I. bargained and sold one equal half of lot No. 20, &c. for 14 shillings per acre, to A. B., the interest to commence from the 1st July, 1792," is an agreement for a conveyance. *Jackson, ex dem. Green, v. Clark*, 3 J. R. 424.

14. An agreement to convey, containing words of bargain and sale, in presenti, does not transfer the title. *Ives v. Ives*, 13 J. R. 235.

What will be a lease in presenti, or an agreement for a lease. See LEASE.

(d) *Date of an agreement.*

15. When a day or month is mentioned as antecedent or subsequent to a contract, and the precise day or month is not specified, it means the time nearest to the date of the contract. *Whitney v. Crosby*, 3 C. R. 89.

16. So, where a note, dated the 15th of July, is payable immediately, with interest from 1st day of June, the preceding 1st of June is meant. *Ibid.*

*(e) *Construction of particular agreements.* [*24]

17. C. and M. entered into an agreement by deed, in which M. admitted that he was responsible for 9,250 dollars on account of S., and assigned certain property in payment; but M. was, nevertheless, to offer other terms of payment in 6 months, which C. was to elect to receive or not, in 15 days thereafter. At the expiration of 6 months, M. offered his own note for 1,000 dollars, payable in 4 years; C. did not make his election, but sent the assignment back to M., who refused to receive it. C. afterwards brought an action of *assumpsit*, for the money for which M. had become responsible; held, that, by the agreement, the assignment was an extinguishment of the

original contract; that the words of the agreement, as to the offer of other terms, did not import a condition, but constituted a separate covenant; and that, M. having made an offer of other terms within the stipulated time, and no election being made by C., M. was not liable on the covenant. *Curson v. Monteiro*, 2 J. R. 308.

18. A. and B. having entered into a contract with a turnpike corporation to make and complete a certain road, afterwards made an agreement with C. to let him have a share of the profits, if any, in making the second 10 miles of the road, in proportion to the help he afforded in completing the same; the one half of it to be taken from A.'s part, and the other from B.'s part; this agreement does not constitute a partnership, and the undertaking by A. and B. is joint, and they are jointly liable to C. And where a sum was gratuitously subscribed, and paid by the inhabitants, to assist A. and B. in completing the road; held, that C. was entitled, under the agreement, to his proportion of such sum; and also to be allowed, as an advance by him, for the board and lodging of the workmen employed by A. and B. on the road. *Muzzy v. Whitney*, 10 J. R. 226.

19. A., for the sum of 100 dollars, agreed to assign over to B., certain judgments obtained by A. against G., in the state of Vermont, so as to enable B. to obtain judgment against G., and when obtained, the judgment was to be collected at the risk and expense of B. Suits having been brought in this state by B. in the name of A. against G., on the judgments in Vermont, in which he failed to recover, he brought an action against A. to recover back the money he had paid; held, that the agreement did not stipulate that judgment should be recovered in this state, on the judgments in Vermont, nor was there any implied warranty to that effect, on the part of A.; and, it not appearing but that the judgments in V. were valid, and might be recovered there, though not here, there was no breach of the agreement, or failure of consideration, so as to entitle the plaintiff to recover. *Underwood v. Morgan*, 11 J. R. 425.

20. The terms of sale of certain lands at auction were, that a certain part of the purchase money should be paid in 75 hours; that a deed should be given by the vendor, with warranty of title, except as to quit-rents on such lots as should be designated; that the purchaser should execute a bond and mortgage for the residue of the purchase money, and that the deed, bond and mortgage, should bear date on the day of sale. At the time of the sale, the premises were mortgaged, and the mortgage had been registered, and remained unsatisfied. In an action of assumption, brought by the vendor against the purchaser, for a breach of the condition of [25] sale; held, that the giving of the deed, bond and mortgage were to be simultaneous acts; that, as the plaintiff was not in situation to convey a good title, the defendant was not bound to perform the agreement on his part; that the meaning of the agreement was not merely that the plaintiff

should give a deed with warranty, but that he was able to convey an indefeasible title; and that although the mortgage was registered, and, therefore, the defendant had notice of its existence, yet that circumstance was immaterial, and, according to the true construction of the agreement, the quit-rents were the only encumbrance on the land. *Judson v. Wass*, 11 J. R. 525.

21. Where A. agreed with B., to furnish cargoes for a particular adventure, for which he was to be reimbursed by B., and to be allowed to make insurance thereon, and charge the same to B., A. can only charge the premiums of insurance actually paid by him, and not premiums on adventures not in fact insured. *Kane v. Smith*, 12 J. R. 156.

22. Where the agreement was, to deliver goods to the plaintiff, or his agent, at B., and the plaintiff was to pay the price stipulated, on the defendant's presenting receipts for the goods; held, that payment on delivery of the goods was not dispensed with, if the plaintiff himself was at the place; the provision for payment, on the production of the receipts, extending only to the case of a delivery to the plaintiff's agent. *Porter v. Rose*, 12 J. R. 209.

23. An agreement to sell land does not imply a license to enter on the land; but, at most, implies a permission to occupy as a tenant at will. *Ives v. Ives*, 13 J. R. 235.

24. Where the defendant became surety for a constable, by an instrument conformable to the act, except that it was not under seal, and the constable, having become liable for a breach of his duty, absconded, and the defendant gave his notes to the plaintiff for the amount of his claim; held, that the defect in the original security was no defence in the suit on the notes; that the defendant must be presumed to have known the defects in the instrument, and, having given his notes voluntarily, it was a waiver of any objection to the form of the security. *Raymond v. Lent*, 14 J. R. 401.

25. Where a constable was authorized by the plaintiff in an execution to take security from the defendant, and A. endorsed on the execution a promise to pay the debt and costs, while the execution was in force; held, that this was an undertaking to the plaintiff himself, and was a valid security; and that the release of the debt, by discharging the party from the execution, was a sufficient consideration in fact; and that the words "value received" were, at least, *prima facie* evidence of a sufficient consideration. *Hinman v. Moulton*, 14 J. R. 466.

26. Where A. agreed to become security for B., on the purchase of goods from C.; and B. made a note to C. for the amount, payable to him or order, which A. endorsed in blank; held, that C. might fill up the blank with an express guaranty or undertaking, for value received, on the part of A., so as to render him liable, as on an original promise to pay the money. *Campbell v. Butler*, 14 J. R. 349.

27. There was a special agreement in writing, between R. and H., relative to the sale and

exchange of two farms, in which, among other things, it was stipulated, that R. was [*26] to be allowed ten dollars per acre of the price of the farm occupied by H., as an equivalent for the release of all claims to it. The parties, afterwards, endorsed on the contract an agreement, that the price which R. was to pay, and H. to receive, for the farm of H., was forty dollars per acre; held, that the stipulation endorsed was not an absolute, independent contract, but a modification merely of the original contract to which it referred; and that both were to be taken together as one instrument, and construed according to the intention of the parties, to be collected from the whole contract; and that, there being no ambiguity on the face of it, no parol evidence was admissible to explain it. The agreement endorsed, therefore, was not that R. should pay, absolutely, 40 dollars per acre to H. for his farm; but that price, subject to the deduction of 10 dollars mentioned in the original contract. *Van Hagen v. Van Rensselaer*, 18 J. R. 420.

28. M., with others, signed an instrument, by which he engaged to pay a sum subscribed by him to B. and others, a committee appointed by the members of a church to obtain subscriptions, and contract for the repairs of the church; and the instrument contained a proviso, "that no person should be obliged to pay the sum which he subscribed, unless a sufficient sum was raised to repair the church." The committee entered into a contract with a person to repair the church, who agreed to take the subscriptions, being about the half of that sum, in payment, and to raise the residue by a sale of the pews, which he was authorized to make; held, that this was a compliance with the condition of the subscription, and that M. was liable to pay the sum subscribed by him. *McAuley v. Billenger*, 20 J. R. 89.

II. Consideration; (a) Necessity of; (b) Consideration of a deed or writing; (c) What is a sufficient consideration.

(a) Necessity of consideration.

29. A consideration is as necessary to a promise reduced to writing, as if it remained in parol. *Burnet v. Biscoe*, 4 J. R. 235. *S. P. The People v. Howell*, id. 296.

(b) Consideration of a deed or writing.

30. A covenant, of itself, imports a consideration, without averring one. *Livingston v. Tremper*, 4 J. R. 416.

31. Although an agreement is under seal, it will not preclude an inquiry into the consideration, if illegal and fraudulent. *Bruce v. Lee*, 4 J. R. 410.

32. Where the agreement has been reduced to writing, no other consideration can be shown than that mentioned in the written agreement. *Schemerhorn v. Vanderheyden*, 1 J. R. 139.

33. Where the consideration is expressly stated in a deed, and it is not said also, and for other considerations, proof of any other consideration is inadmissible. *Maigley v. Hauer*, 7 J. R. 341.

34. If not truly stated in the deed, the party must seek relief in equity, on the ground of fraud or mistake. *Ibid.*

(c) What is a sufficient consideration.

35. An agreement, made with the trustees of a religious society, by which the subscribers to the agreement engage to pay, every year, to the trustees, certain sums respectively, for the support of A. B., a minister of the gospel, so long as he shall administer the gospel in the said society, and so long as the subscribers shall reside within, &c. is valid; the preaching of the gospel by A. B. being a sufficient consideration, and the subscribers are bound so long as he shall administer the gospel, or they shall continue to reside, &c., or until the agreement is dissolved by mutual consent. *Religious Society in Whitestown v. Stone*, 7 J. R. 112. See 20 J. R. 12.

36. It was agreed between A. and B., that B. should give his promissory note to A. for a certain sum, which A. alleged was due to him for a mistake made on a settlement of accounts between them a few years before, but which mistake was denied by B., and that the note should be lodged in the hands of C.; and if B., within 60 days, should exhibit proof to C., from which C. should think B. ought not to pay the note, then it should be delivered to B., otherwise it should belong to A.; and B. insisted on producing parol proof to C., which he refused to admit. In a suit against B., on the note, held, that as C. declined to act, and did not decide, the defendant was not in default, and that his default, or the decision of C. against him, was a condition precedent to the validity of the note. *Stow v. Wadley*, 8 J. R. 124.

37. Where the plaintiffs had entered into an agreement under seal, to perform certain work, under a penalty, and were afterwards released, by parol, from a further performance of the contract; but the defendant promised them, that, if they would go on and complete the work, he would pay them for their labor, by the day; held, that there was a sufficient consideration for the promise, and that the plaintiffs might recover under the substituted agreement. *Lattimore v. Harsen*, 14 J. R. 330.

See ASSUMPSIT II.

When a consideration must be expressed, and when it may be averred. See FRAUDS.

Averment of consideration. See PLEADING. What consideration will raise a use. See BARGAIN AND SALE. Use.

III. What renders an agreement void; (a) Disability of the parties; (b) Want of consideration; (c) Illegal consideration; (d) Unconscientious agreement, or against public policy, or the policy of the law; (e) Fraud; (f) Duress; (g) Void in part.

(a) Disability of the parties.

38. In an action to recover the amount of a promissory note, delivered to the defendant by the plaintiff, pursuant to an agreement be-

tween them for the exchange of land, and which had been paid to the defendant, the plaintiff may show, that at the time of making the agreement, and giving the note, he was insane, and incapable of contracting. *Rice v. Peet*, 15 J. R. 503.

See further, *tit. INFANT I.*

(b) *Want of consideration.*

39. An agreement to give A. the re-
[*28] fusal of a farm, but no agreement *on the part of A. to take it, or other promise or consideration, is a *nudum pactum*. *Burnet v. Bisco*, 4 J. R. 235.

40. If two persons agree that they will not bid against one another at a sale by auction, but that one of them shall purchase certain articles, and divide them with the other, it is a *nudum pactum*. *Doolin v. Ward*, 6 J. R. 194. So, on an agreement for the division of a contract, or job, for making a road, put up for sale at auction. *Wilbur v. Hou*, 8 J. R. 444.

41. A promise to pay damages for the detention of a sum of money, beyond the amount detained, is a *nudum pactum*. *Phetteplace v. Steere*, 2 J. R. 442.

42. Where A. leased land to B., and it was afterwards agreed between them, that the lessee should not use the pasture without paying for it; the agreement was held to be without consideration, and void. *Tryon v. Mooney*, 9 J. R. 358.

43. Where an agreement, intended as a substitute for an existing agreement between the same parties, was drawn up, and sent to the defendant, who approved of it, and promised to execute it; but it was not executed by the plaintiff; held, that the agreement was inoperative, for want of consideration and mutuality. *Wood v. Edwards*, 19 J. R. 205.

(c) *Illegal consideration.*

44. Where it is made the duty of a person in a public trust to do an act, and he exacts a promise from the person for whose benefit it is to be done, to make him a compensation after the service is performed; the consideration is illegal, and the agreement void. *Callaghan v. Hallet*, 1 C. R. 104.

45. The capture of a vessel from a friendly power is an illegal consideration, and will not support an action for salvage. *Peck v. Randall*, 1 J. R. 165.

46. A sale of lands, out of the possession of the vendor, and held by an adverse title, is an illegal consideration, and will not support an action. *Whitaker v. Cone*, 2 J. C. 58. *Belding v. Pitkin*, 2 C. R. 147.

[See CHANCERY XXXVII. Equity will not interfere to assist the vendor, in such case, to get back the purchase money.]

47. If a person, claiming title to lands which are held adversely, employ an agent to sell those lands, agreeing to give him a portion of the proceeds, no action will lie by the agent to recover his proportion of money received, on account of such sale, by his employer. *Belding v. Pitkin*, 2 C. R. 147.

48. An insolvent gives a note to one of his creditors for the amount of his debt, to induce

him to sign the petition, with a blank in it for the date, to be filled up after his discharge; the note is fraudulent, and contrary to the policy of the insolvent law, notwithstanding the maker had a sufficiency of petitioning creditors to entitle him to his discharge, without the payee. *Payne v. Eden*, 3 C. R. 213.

49. Such a note, being void, cannot be revived by a subsequent promise to pay it. *Ibid.*

50. But it seems that a note given for a pretended title is not void in the hands of an endorsee. *Baker v. Arnold*, 3 C. R. 279.

*51. A promise by the defendant, to [*29] pay the plaintiff the costs of a suit which they had settled, in consideration that the plaintiff would not oppose his discharge under the insolvent act, is illegal and void. *Waite v. Harper*, 2 J. R. 386.

52. A., an insolvent debtor, petitioned for his discharge under the insolvent act; and, on the day appointed for the creditors to show cause why an assignment should not be made, and the insolvent discharged, the plaintiff, one of the creditors, appeared and showed cause; and it was then agreed between A. and the plaintiff, that if the latter would withdraw all opposition to the discharge, the defendant would execute a bond conditioned for the delivery of A.'s notes, which bond was accordingly executed and delivered by the defendant to the plaintiff; the bond was held void, as being a fraud upon the other creditors, for it is to be intended that if the opposition of the plaintiff had been persevered in, A. would have been shown not to be entitled to a discharge. *Bruce v. Lee*, 4 J. R. 410.

53. So, a note given by the debtor, to the creditor, to induce him to withdraw his opposition to the debtor's obtaining his discharge, is void. *Wiggin v. Bush*, 12 J. R. 306.

54. If a third person give his note for part of the debt to a creditor, in order to obtain his signature to the insolvent's petition, the note is void, as being against the policy, and in fraud of the insolvent law. *Yeomans v. Chatterton*, 9 J. R. 295.

55. And it makes no difference that the insolvent had paid or indemnified the maker of the note, evidence of which is inadmissible. *Ibid.*

56. A bond given to the plaintiff, who said he appeared in behalf of creditors, to oppose an insolvent debtor's discharge, to induce the plaintiff to withhold his opposition, is illegal and void. *Tuxbury v. Miller*, 19 J. R. 311.

57. A note given for the use of a billiard table is not illegal, unless it appears, that the person to whom it was given kept a tavern, or the money was lost at play. *Northrop v. Minturn*, 13 J. R. 85.

58. Where A., a merchant of Great Britain, by his agent, chartered a vessel of B., a merchant in New York, during the continuance of the non-intercourse laws of the United States, for the purpose of conveying a cargo of goods from New York to Fayal, there to be transported in another vessel to England; held, that the transaction was illegal and void; and that A., therefore, could not maintain an action against B., for a balance due to him on the

transaction; nor could B. set off a demand arising out of it. *Graves v. Delaplaine*, 14 J. R. 146.

59. An agreement, by a citizen of a neutral state, to deliver goods in a belligerent country, to a subject of that country, at a stipulated price, and on certain conditions, the consignor taking all risks attending the transportation, is a legal and valid agreement, in reference to the belligerent, and does not destroy the neutral character of the property. *Ludlow v. Bowne and Eddy*, 1 J. R. 1. *S. P. De Wolf v. N. Y. Ins. Co.* 20 J. R. 214.

60. The ransom of a vessel and cargo captured by an enemy is a lawful contract; and an action may be maintained, in our Courts, to recover the money agreed to be paid, by way of ransom; and it is not unlawful, in such case, for the captured to receive a [*30] passport from the enemy, to protect the property from another capture. *Goodrich v. Gordon*, 15 J. R. 6.

61. Whether a contract to convey goods from Great Britain to the United States, entered into during the existence of war between the two countries, is legal? *Amory v. McGregor*, 12 J. R. 287. See pl. 62. *Griswold v. Waddington*, 16 J. R. 438.

62. No valid contract can exist, (except that of ransom,) nor any promise arise by implication of law, between a citizen of this country and the enemy, without the permission of government. *Griswold v. Waddington*, 16 J. R. 438.

63. It is not unlawful for a citizen of this state to pay a debt, or to perform a contract, with an alien enemy, during war, if the debt be paid, or the performance be made, to the agent of such alien within this state, the contract having been made before the war. *Buchanan v. Curry*, 19 J. R. 137.

64. As, where R., a naturalized citizen, residing in this state, and W., his partner, a British subject, residing in Canada, entered into a contract, on the 11th February, 1812, with C., a British subject residing in Canada, for the sale and delivery of timber, &c., part of which was delivered prior to the declaration of war by the U. S. against G. B., on the 18th June, 1812; and the residue afterwards, on the 30th June, 1812, was delivered to the agent of C., at the place stipulated, being within the United States; such a completion of the contract was held to be lawful. *Ibid.*

(d) *Unconscientious agreement, or against public policy, or the policy of the law.*

65. An agreement for the sale of tickets in a lottery not authorized by the legislature of this state, although instituted under the authority of the government of another state, is contrary to the spirit and policy of the act, (Sess. 6. c. 12. 2 N. R. L. 187.) and void. *Hunt v. Knickerbacker*, 5 J. R. 327.

66. Forbearance to bid at a sale on execution is an unconscientious consideration, and against public policy. *Jones v. Caswell*, 3 J. C. 29.

67. An agreement between two persons, that they will not bid against one another at an

auction, but that one of them shall purchase certain articles and divide them with the other, is void, and against public policy. *Doolin v. Ward*, 6 J. R. 194. *S. P. Wilbur v. How*, 8 J. R. 444.

68. If two persons submitting cloth of their own manufacture to the judges of the county, in order to obtain the bounty given by the act, (Sess. 31. c. 186. s. 2.) agree, after the cloth has been completely manufactured, that the one obtaining the bounty shall pay the half of it to the other, the agreement is not against the policy of the act, and is valid. *Briggs v. Tillotson*, 8 J. R. 304.

69. A. and B. having executions against C., and A.'s execution being the prior lien, and C. being indebted to D., it was agreed between A. and D., that A. should pay D. 225 dollars; that, at the sale under the executions, A. should bid off the personal property of C., to the amount of A.'s execution; and that B. should bid off the real estate of D., to the amount of B.'s execution, should dispose of the same, and after satisfying his own de- [*31] mand against C., should pay the sum of 225 dollars to A.; and, A. and D. having bid accordingly, and there being a surplus in D.'s hands, A. brought an action to recover the money; held, that though there was a sufficient consideration to support the promise of D., yet the agreement was void, as being against public policy, and tending to prevent competition at sheriffs' sales under executions. *Thompson v. Davies*, 13 J. R. 112.

(e) *Fraud.*

70. Fraudulent representations will vitiate any contract. *Willson v. Force*, 6 J. R. 110.

71. If the special contract be void on the ground of fraud, the plaintiff may disregard it, and bring his action on the original consideration. *Ibid.*

72. So where, on the sale of goods, the vendor takes the note of a third person, payable at a future day, in payment, at his own risk; and there is a fraudulent representation, on the part of the vendee, as to the note, the vendor may bring his action immediately, for goods sold and delivered, against the vendee. *Ibid.*

73. So, if the defendant, having given his notes to the plaintiff for money lent, afterwards fraudulently obtain the notes from him, by executing a deed for the amount, which the plaintiff allowed to remain in the defendant's hands, on his promising to have it recorded; but he, on the contrary, kept the deed, sold the land to another, whose deed was recorded, and refused to return the deed or notes, or pay the money, the plaintiff may recover the money lent on the money counts. *Arnold v. Crane*, 8 J. R. 79.

74. The mere fact of the existence of a mortgage at the time of entering into an agreement for the sale of lands, is not evidence of fraud. *Greenby v. Cheevers*, 9 J. R. 126.

(f) *Duress.*

75. If a defendant, under arrest, agree to submit the matter in controversy to arbitra-

tion, the agreement is not void on the ground of duress. *Shepard v. Watrous*, 3 C. R. 166.

76. So, a final settlement would not be void. *Ibid.*

(g) *Void in part.*

77. If part of one entire contract be illegal and void, the whole is void. *Crawford v. Morrell*, 8 J. R. 253.

78. So, a parol contract, to pay the plaintiff for permitting certain land to remain open as a public road, and also to pay the plaintiff for certain lands in the possession of the defendant, which the plaintiff claimed, is void, the whole being one entire agreement, and the latter part being void by the statute of frauds. *Ibid.*

When void by statute of frauds. See FRAUDS.

When void for usury. See USURY.

When void by the disability of one of the parties. See Ante III. (a) and tit. INFANT.

[*32] *IV. *Performance*; (a) *What is a good performance of an agreement, and the effect of it*; (b) *Time of performance, and how enlarged or waived*; (c) *When a party will lose his right to enforce performance.*

(a) *What is a good performance of an agreement, and the effect of it.*

79. An agreement to convey a specific lot of land, containing a certain number of acres, is performed by delivering a deed of the land, according to its usual and known description, although it should afterwards be discovered that the lot contained a less quantity of acres than it was described as containing. *Mann v. Pearson*, 2 J. R. 37.

80. In *assumpsit*, on a promise to deliver a quantity of boards, at a certain time and place; plea, that the boards were ready at the time and place, and still were ready; evidence, that there were boards sufficient in quality and quantity at the place where, and at the time when, they were to be delivered, but the witness did not know to whom they belonged, is not proof of performance. *Cobb v. Williams*, 7 J. R. 24.

81. The acceptance of a deed, pursuant to articles of agreement, is *prima facie* evidence of the execution of the whole contract, and the rights and remedies under it are determined by the deed, and the original contract becomes null and void. *Houghtaling v. Lewis*, 10 J. R. 297.

82. So, where articles of agreement are executed for the sale of land, and a deed is delivered by the vendor, and accepted by the vendee, in performance of the covenant, the agreement is consummated; so that, if the quantity of the land conveyed fall short of that agreed to be conveyed and expressed in the deed, no action lies upon the original covenant. *Ibid.* Nor *assumpsit* for money had and received, to recover back a ratable part of the consideration. *Howes v. Barker*, 3 J. R. 506.

83. And whether, if the vendor afterwards

promise to make good the deficiency, any action can be maintained on such promise? *Quere. Houghtaling v. Lewis*, 10 J. R. 297.

84. Parties may enter into covenants collateral to the deed, or there may be cases in which the deed will be deemed only a part execution of the contract, if the provisions in the two instruments clearly manifest such to have been the intention of the parties. *Ibid.*

85. Where two acts are to be done, at the same time, as, when one agrees to sell and deliver, and the other agrees to receive and pay; and in an action for the non-delivery, the plaintiff must aver and prove a readiness, on his part, to pay, whether the other party was at the place, ready to deliver, or not. *Porter v. Rose*, 12 J. R. 209.

86. Where a person agreed to sell land to another, and covenanted to give a deed for the premises, at a certain time and place, the tender of a deed, without covenants or warranty, is a performance of the covenant; nor is it necessary that the wife of the vendor should join in the deed. *Ketchum v. Evertson*, 13 J. R. 359. And see 12 J. R. 486.

(b) *Time of performance, and how enlarged or waived.*

87. The time of performing a written contract may be enlarged by parol. *Keating v. Price*, 1 J. C. 22.

*88. So, the time for performing the [*33] condition of a bond may be enlarged, or the further performance may be waived by the obligee, by parol. *Fleming v. Gilbert*, 3 J. R. 528.

89. The time of payment is part of the contract, and if no time be expressed in the written agreement, the law adjudges that the money is payable immediately, and will not admit parol proof to show a different time of payment. *Thompson v. Ketchum*, 8 J. R. 189.

90. A release, by parol, of the parties of the one part of a contract under seal, to perform certain work, from a further performance of their agreement, made by one only of the parties of the other part, is valid. *Lattimore v. Harsen*, 14 J. R. 330.

91. A mere extension of the time of performance of an agreement, is not a waiver of any of its stipulations. Per *Thompson*, Ch. J. *Hasbrouck v. Tappen*, 15 J. R. 200.

92. In an agreement for the sale of land, the vendor covenanted to convey the land which was to be surveyed, free from encumbrances, by the first day of January; the land not being surveyed in time, the vendee declared that he would take no advantage on account of the land not being conveyed on the day stipulated; held, that the vendee, by consenting to enlarge the time of performance, did not waive his right to recover a sum, fixed by the agreement, as liquidated damages, to be paid by the party failing to perform on the day, even admitting that his consent amounted to an agreement; for, being by parol, it was void by the statute of frauds, and therefore could not alter, revoke, or modify, the previous valid contract. *Ibid.*

(c) *When a party will lose his right to enforce performance.*

93. If a seller will not make an assurance, when reasonably demanded, he loses the bargain; and the purchaser is not bound to wait until he is able to convey. *Van Benthuysen v. Crapsier*, 8 J. R. 257.

94. An agreement was made for the conveyance of land, which, at the time, was encumbered by a mortgage on record; the purchaser afterwards requested a conveyance, but the seller refused to convey, on the ground of his inability to make a good title, by reason of the mortgage: the refusal and inability of the seller are a discharge to the other party, who need not show a tender of payment, and are a valid defence to an action on the covenant. *Ibid.*

95. *It seems*, that after a continued neglect and inability of the seller, for six years subsequent to a request and refusal to convey, neither a court of law nor equity would interfere to enforce the performance of the agreement. *Ibid.*

96. A party who has advanced money, or done any act, in part performance of an agreement, but refuses to proceed to the completion and execution of the contract, (the other party having performed, or been ready to perform, on his part,) cannot recover back the money he has advanced, nor is he entitled to compensation for what he has done in part performance; and if the contract relates to the sale of land, the vendor, after such refusal by the vendee to proceed, or voluntary abandonment by him of the contract, may sell the land to another. *Kelchum v. Everton*, 13 J. R. 359.

97. L. being indebted to M., who [*34] held a tract of land in trust for him, W., by an agreement between him and L., became obligated to pay the debt, and received a conveyance of the land from M.; and it was agreed that W. should reconvey the land to L., on his paying certain promissory notes given by him to W.; but if the notes were not paid at the times they became due, the agreement to reconvey should be void: the notes were not paid, and W. proceeded to exercise acts of ownership over the land, by selling, &c. for his own benefit; and also brought an action against L. on the notes; held, that the election of W. to consider the agreement void was determined by his acts of ownership; and, there being then a failure of consideration, W. could not maintain the action on the notes; and his title to the land became complete and perfect. *Winter v. Livingston*, 13 J. R. 54.

See tit. CHANCERY III. As to the specific performance of an agreement in equity.

See, also, PAYMENT. TENDER.

V. *Rescinding an agreement.*

98. A. agreed to convey lands to B., when B. should deliver him a bond and mortgage for the purchase money; four years after the date of the agreement, B. gave notice to A. that he should insist on the agreement, and a

year after offered to perform it on his part; held, that A. was not liable for the non-performance, and that it was to be presumed that the contract had been rescinded, although A. had previously incapacitated himself from executing his part of it. *Ballard v. Walker*, 3 J. C. 60.

99. But mere lapse of time is not, in all cases, an objection to decreeing a specific performance of an agreement. *See CHANCERY III. C. Waters v. Travis*, 9 J. R. 450.

100. Under a parol agreement for the purchase of land, the vendee takes possession, pays part of the purchase money, and clears part of the land, and makes improvements; he afterwards tenders the residue of the purchase money, and demands a deed, but the vendor refuses to receive the money or give a deed, and takes possession of the land; these acts of the vendor amount to a rescinding of the contract, and the vendee may recover back the money paid by him, with interest, but is not entitled to any thing for his labor or improvements on the land. *Gillet v. Maynard*, 5 J. R. 85.

101. By an agreement for the sale of land, the purchaser was to be entitled to a conveyance on the payment of one half of the consideration money, which half, according to the terms of the agreement, would not be payable until after two years from the time it was executed. When the contract was made, there was a mortgage on the land, which, however, would be due, and payable, before the vendee would be entitled to a conveyance; held, that the existence of the mortgage was not evidence of fraud, so as to give the purchaser a right to disaffirm the agreement; for, it is to be presumed, that the vendor would satisfy it in time to give the purchaser a good title; that the latter ought first to have paid the one half of the purchase money, and put himself in a condition to demand a deed, before he charged the vendor with a default; and that, having made a payment on account, [*35] he could not maintain *assumpsit* for money had and received, to recover it back. *Greenby v. Cheevers*, 9 J. R. 126.

102. If, at the time of a contract for the sale of land, there was a lease outstanding, unknown to the vendee, he is not bound by the contract, but may rescind it, the vendor not being in a situation to convey a perfect title. *Tucker v. Woods*, 12 J. R. 190.

103. If the vendee has, according to the terms of the contract of sale, paid part of the consideration money, and the vendor is unable to convey a good title, the vendee may disaffirm the contract, and recover back the money which he has paid. *Judson v. Wass*, 11 J. R. 525.

104. An agreement rescinded in part is rescinded *in toto*. *Raymond v. Bearnard*, 12 J. R. 274.

105. Where a purchaser pays part of the consideration money, on a parol contract for the purchase of land, he cannot, there being no default on the part of the vendor, maintain an action to recover back the money paid. *Dowdle v. Camp*, 12 J. R. 451.

106. Where the vendee, who has advanced money, in part performance of a contract for the purchase of land, refuses to proceed to complete the performance on his part, though the vendor is ready to perform on his part, the vendor is at liberty to sell the land to another person, and the vendee cannot recover back the money which he has paid. *Ketchum v. Evertson*, 13 J. R. 359.

107. E. covenanted to convey to H. a lot of land, on condition that H. paid him 500 dollars in several instalments; H. paid the first instalment, and offered to pay the second, if E. would give him security against a certain mortgage, which was a lien on the premises at the time of the purchase; E. refused to give the security, but offered to receive the money, and perform the contract on his part; but H. refused to pay any more money; and, having entered into possession at the time of the purchase, E. brought an action and ejected him; and H. brought an action against E. to recover back the money he had paid; *held*, that H. had no right to rescind the contract, there being no fraud on the part of E., and H. not having entitled himself to demand a deed for the land. *Ellis v. Hoskins*, 14 J. R. 363.

108. A controversy having arisen between the plaintiff and defendant about a bond and mortgage of the plaintiff, held by the defendant, they entered into an agreement, that three persons, named by them, should appraise the land and premises, and ascertain what was due on the bond and mortgage, and strike the balance, and that the party against whom the balance was found, should immediately pay the same to the other party, &c. And it was further agreed that if either party should refuse to fulfil the agreement, he should pay to the other 500 dollars, "which should be considered as liquidated damages." The land was accordingly appraised, and a balance of 310 dollars found in favor of the plaintiff; *held*, that the defendant could not, on offering to pay the 500 dollars, as liquidated damages, consider the agreement as rescinded, and set off so much of the debt due to him, on the bond and mortgage, as would satisfy that amount, and have the balance certified in his favor; but that the plaintiff was entitled to recover the sum of 310 dollars, so found [*36] due to him, *but not the liquidated damages for not performing the agreement. *Gray v. Crosby*, 18 J. R. 219.

109. An agreement was entered into, in January, 1814, for the sale and conveyance of land, a part of the consideration to be paid on the first of March ensuing, and the residue to be secured by a mortgage, at which time the vendor was to execute a conveyance. The land was, at that time, encumbered with a mortgage, of which the vendee had notice. The vendee went into possession of the land, removed a nursery and some buildings from it, and made several payments on account of the principal and interest of the purchase money, but the execution of the deed and mortgage was postponed by mutual consent. In 1817, the land not having been sold under the prior mortgage, the vendee brought an

action to recover back the money paid on the agreement; *held*, that after such a lapse of time, acts of ownership, and payments made, with notice of the prior encumbrance, the vendee could not rescind the contract, especially as he could not put the vendor in *status quo*; but that if he wished to rescind it, on the ground that the vendor could not convey a good title, he ought to have expressed his determination at the time when the first payment became due; and that his remedy was in chancery, not at law. *Carroll v. Black River Manufacturing Company*, 14 J. R. 453.

110. If, however, the land had been actually sold under the prior encumbrance, before the commencement of the suit, so that the vendor could not give a title, *it seems*, the action would have been supported. *Ibid*.

111. G. agreed with H. to accept payment in tanner's bark, for a judgment against H., who, accordingly, delivered to G. six loads of bark; but not agreeing as to the price, G. immediately issued execution on the judgment; and H. then brought an action against G. for so much bark sold and delivered; *held*, that the plaintiff was entitled to recover, as the right of applying the bark in payment of the judgment was waived by G., and the agreement rescinded. *Gary v. Hull*, 11 J. R. 441.

112. Whether, if the complete performance of a contract to deliver goods be prevented by act of the government, and the defendant refuses to accept the residue of the goods, after the time stipulated for the delivery had passed, the plaintiff can sue for, and recover, for the part he has delivered, as if the contract was rescinded. *Quere. Wood v. Edwards*, 19 J. R. 205.

113. What amounts to a waiver, or rescinding of a contract. *Ibid*.

See ASSUMPSIT IV.

See further, tit. CHANCERY III. Agreement.

AGRICULTURAL SOCIETIES.

Where agricultural societies, in the several counties, are to be instituted, in order to entitle themselves to the sums appropriated, by the act of the 7th of April, 1819, (Sess. 42. ch. 107.) for the promotion of agriculture, &c., they should be formed after due public *notice to the inhabitants of the county, [*37] to meet for that purpose. *Matter of the Agricultural Society of Dutchess County*, 17 J. R. 87.

ALIEN.

I. Who are aliens.

II. Effect of alienage; (a) Disability of an alien; when he may take lands, and when and how his title will be devested; (b) Effects of the American revolution, and of the British treaty of 1794, on the estates and titles of British subjects; (c)

Disability of an alien enemy; (d) How pleaded.

III. Naturalization.

I. Who are aliens.

1. Where the husband had resided in the *United States*, both before and after the 4th of July, 1776, but the wife had always continued in the dominions of the king of *Great Britain*, she was held an alien. *Kelly v. Harrison*, 2 J. C. 29.

2. A subject of *Great Britain*, who emigrated to this country after the declaration of independence, is an alien. *Jackson*, ex dem. *Folliard*, v. *Wright*, 4 J. R. 75.

3. A person, who is a naturalized citizen of this country, cannot render himself an alien, by merely taking an oath of allegiance to a foreign nation: he must, at least, likewise change his domicile. *Fish v. Stoughton*, 2 J. C. 407.

4. W. E. came from *England*, in 1774, and resided in this state, and was an officer in the *British* army. Having been arrested in 1776, as a person disaffected to the *American* revolution, he was, in *August*, or in the beginning of *September*, 1776, a prisoner on his parole, and remained such prisoner, at *Albany*, until *December* or *January* following, waiting for a passport to join his regiment, when he either joined the *British* army, or went to *England*, where he died about the year 1800, being then a general in the *British* service; held, that he never became a citizen of this state, after it had thrown off its allegiance to G. B. and became a sovereign and independent state, but that he continued a *British* subject; so that he could not, by reason of his alienage, take lands in this state, by descent from his brother, who died in 1792. *Jackson*, ex dem. *Russel*, v. *White*, 20 J. R. 313.

II. *Effect of alienage; (a) Disability of an alien; when he may take lands, and when and how his title will be defeated; (b) Effects of the American revolution, and of the British treaty of 1794, on the estates and titles of British subjects; (c) Disability of an alien enemy; (d) How pleaded.*

(a) *Disability of an alien; when he may take lands, and when and how his title will be defeated.*

5. An alien may take by purchase. *Jackson*, ex dem. *Cukerhouse*, v. *Beach*, 1 J. C. 399. *S. P. Jackson*, ex dem. *Gansevoort*, v. *Lunn*, 3 J. C. 109.

*6. And may maintain an action for [*38] the land, which cannot be defeated by the defendant on the ground of the plaintiff's alienage. *Ibid.*

7. But the people may interfere, and defeat the alien of his title by office. *Ibid.*

8. And no title vests in the people, until office found. *Ibid.*

9. But an alien cannot take by descent, courtesy or dower; or by any other title created by act of law. Per *Kent*, J. *Ibid.* 121. But See post, exceptions to this rule in relation to *British* subjects.

10. If the next heir of the person last seized be an alien, the land does not therefore escheat, but goes to a remoter heir, if any there be, who is capable of taking. *Jackson*, ex dem. *Elmendorf*, v. *Jackson*, 7 J. R. 214.

11. Where lands were conveyed to an alien, under the act of the 2d April, 1798, (Sess. 21. c. 72.) and his agent leased the land, by a parol demise, from year to year, reserving rent, and afterwards took a promissory note from the tenant, for the arrears of rent, payable to his principal; held, that the note was void under the act. *Troup v. Mullender*, 9 J. R. 303.

12. An alien cannot be an attorney or counsel. See ATTORNEY AND COUNSEL I.

(b) *Effects of the American revolution, and of the British treaty of 1794, on the estates and titles of British subjects.*

13. The separation of two states by a revolution does not divest a previously vested right; so, where a subject of *Great Britain* died seized of lands in this state, previous to the revolution, leaving daughters who married *British* subjects, and who, or their husbands, had never become *American* subjects; their right to the lands was not affected by the revolution, and their husbands may join with them in a demise to the lessee in ejectment. *Jackson*, ex dem. *Gansevoort*, v. *Lunn*, 3 J. C. 109.

14. So, where the wife was a subject of *Great Britain* prior to the revolution, and always continued such, but the husband resided in this country both before and after that period; she was held entitled to dower out of those lands of which he was seized before the revolution, but not of those of which he was afterwards seized. *Kelly v. Harrison*, 2 J. C. 29.

15. By the treaty with *Great Britain*, in 1794, the right to transmit by descent was to remain unaffected by the revolution; and it seems that, independent of that treaty, the law would be the same. *Jackson*, ex dem. *Gansevoort*, v. *Lunn*, 3 J. C. 109.

16. A., a native of *Ireland*, emigrated to this country after the declaration of independence. In 1784, he purchased a lot of land in this state, and died in 1798, without issue, leaving a brother and three sisters living in *Ireland*. In 1804, an act of the legislature was passed, vesting the real estate of which N. died seized in L., one of his sisters, who had married an alien, in like manner as if she had been a citizen of this state at the death of A.; held, that notwithstanding the alienage of A. and his heirs, yet that the land held by him was, by the 9th article of the treaty of 1794, between *Great Britain* and the *United States*, vested in him and his heirs; and that the act of the legislature of 1804, giving the whole of his real estate to L., one of his four *heirs, [*39] in exclusion to the rest, being contrary to the treaty, was inoperative. *Jackson*, ex dem. *Folliard*, v. *Wright*, 4 J. R. 75.

17. The treaty of 1794 does not take away the plea of alienage, in actions relating to lands

acquired after that treaty, which extends merely to lands then held by British subjects. *Jackson, ex dem. Johnston, v. Decker*, 11 J. R. 418.

(c) *Disability of an alien enemy.*

18. Aliens, resident in the *United States* at the time of war breaking out between their own country and the *United States*, or who come to reside in the *United States* after the breaking out of such war, under an express or implied permission, may sue and be sued, as in time of peace; and it is not necessary for that purpose, that such aliens should have letters of safe conduct, or actual license to remain in the *United States*, but a license and protection will be implied, from their being suffered to remain, without being ordered out of the *United States* by the executive. *Clarke v. Morry*, 10 J. R. 69.

19. But an alien enemy, residing in his own country at the time war is declared, and at the time of commencing an action here, cannot maintain such action. *Bell v. Chapman*, 10 J. R. 183.

20. If he became an alien enemy after the commencement of the suit, the defendant may plead it. *Ibid.*

21. But where the plaintiff becomes an alien enemy after judgment, the Court will not, on motion, stay or set aside the execution. *Buckley v. Lytle*, 10 J. R. 117.

22. A plea of alien enemy, whether pleaded in abatement or in bar, only suspends the plaintiff's right of action during the war. *Bell v. Chapman*, 10 J. R. 183.

23. An alien enemy, resident in the enemy's country, cannot, during war, make a valid demise of land, so as to maintain an action of ejectment for lands, the title to which had been acquired under a statute of this state. *Jackson, ex dem. Johnston, v. Decker*, 11 J. R. 418.

24. The statute of April 2, 1798, (Sess. 21. c. 72.) enabling aliens to purchase and hold real estate, &c., merely secured to aliens their titles, and did not relate to the remedy. *Ibid.*

25. The object of the statute was to destroy the plea of alienage, which might work a forfeiture of the title, and not to take away a plea which merely suspends the right of action during war. *Ibid.*

See further, *tit. CHANCERY IV. Aliens. LIMITATION OF ACTIONS.*

(d) *How pleaded.*

26. Alienage may be pleaded in bar or abatement. *Jackson, ex dem. Johnston, v. Decker*, 11 J. R. 418.

27. In ejectment, the alienage of the lessor of the plaintiff may be given in evidence under the general issue. *Ibid.*

28. But where issue has been joined, on the demise of an alien, residing in *England*, claiming to hold land under the statute, (Sess. 21. c. 72.) before the declaration of war, his alienage must be pleaded, *puis darrein continuance*. *Jackson, ex dem. Smith, v. M'Connell*, 11 J. R. 421. See *Ante*, (c) pl. 24. 25.

III. *Naturalization.* [*40]

29. Naturalization has a relation back, and confirms the title of the purchaser of land during alienage. *Jackson, ex dem. Culverhouse, v. Beach*, 1 J. C. 399.

See further, *tit. CHANCERY IV. Aliens.*

ALBANY CITY.

1. Where the corporation of the city of *Albany* ordered a certain road, within the bounds of the city, to be shut up, and A., pursuant to such order, as their servant or agent, shut up the road; *held*, that the city of *Albany* was not within the act to regulate highways; (Sess. 24. c. 86.) and the corporation, by the charter, being invested with the powers of commissioners of highways, to regulate streets and highways, and A., having acted as their servant, he was not liable to the penalty given by the act relative to highways, for obstructing the road. *Bisbee v. Mansfield*, 6 J. R. 84.

2. In an action of *assumpsit*, brought against the corporation of *Albany*, to recover the amount assessed by a jury, for ground taken to widen a street, pursuant to the act of the 4th of April, 1801, (Sess. 24. c. 153.) the declaration set forth the proceedings of the Mayor's Court, and the judgment of the court confirming the assessment; the defendants pleaded *nil tiel record*, on which issue was joined; and, after trial by the record, it was *held*, that the issue was immaterial, and a replacer was awarded. *Stafford v. Corporation of Albany*, 6 J. R. 1.

3. After the assessment of damages by the jury in such case, and a judgment of confirmation thereon, the Mayor's Court cannot set aside the assessment and judgment, on the ground of a defect in the precept for summoning the jury. *Ibid.*

4. The Mayor's Court of *Albany*, in executing the powers granted to them, under the act of the 4th of April, 1801, (Sess. 24. c. 153.) as to taking the ground to widen streets, &c., act *qua* commissioners, and not judicially, as a court. *Stafford v. Corporation of Albany*, 7 J. R. 541. See *Matter of Beckman street, New York city*, 20 J. R. 269.

5. And their power must be strictly pursued: after the court have affirmed an assessment made under the act, they cannot set it aside for any cause, but are bound to pay the money according to the assessment. *Ibid.*

6. No formal record is necessary in regard to proceedings under this act; but it seems that they may be removed, by *certiorari*, into the Supreme Court. *Ibid.*

7. It seems, that the Mayor's Court of *Albany* has no jurisdiction under the act for the relief of debtors, with respect to the imprisonment of their persons, in case of a debtor imprisoned in the county of *Albany*, under an execution out of the Supreme Court; but that the Court of Common Pleas of *Albany* county have jurisdiction in such case. *M'Elroy v. Mancius*, 13 J. R. 121.

[*41] *AMENDMENT.

- I. *In what actions allowed.*
- II. *Amending process.*
- III. *Erroneous appearance, when cured.*
- IV. *Amending declaration and pleadings;* (a) *Declaration;* (b) *Want of averment;* (c) *Misrecital of a statute;* (d) *Plea;* (e) *Amendment after demurrer;* (f) *Amendment of course.*
- V. *Amending writ of inquiry.*
- VI. *Amending jury process.*
- VII. *Amending verdict.*
- VIII. *Amending record and judgment.*
- IX. *Amending execution.*
- X. *At what time an amendment may be made.*

I. *In what actions allowed.*

1. The Court may allow amendments in *penal* actions, as well as in ordinary suits. *Low, qui tam, &c. v. Little*, 17 J. R. 346.

2. But where, in a *qui tam* action under the statute against usury, the writ, which had been sued out in due time, and sent by mail to the sheriff, was lost or miscarried, and the plaintiff, supposing that it had been duly served and returned, proceeded to file his declaration, &c., the Court refused to allow an *alias capias* to issue, as grounded on a return of *non est inventus* to the former writ, or to allow a *capias* to be issued and filed, with a return therein of *non est inventus, nunc pro tunc*, so as to save the limitation. *Ibid.*

II. *Amending process.*

3. If the *capias ad respondendum* be void, no amendment can be allowed, for the cause is out of Court. *Bunn v. Thomas*, 2 J. R. 190. *S. P. Burk v. Barnard*, 4 J. R. 309.
4. Process returnable *before us, &c.* is amendable. *Morrell v. Waggoner*, 5 J. R. 233.
5. Process returnable out of term is void, and cannot be amended. *Cramer v. Van Alstyne*, 9 J. R. 386.
6. Omission of the clerk's name to a writ may be amended, on payment of costs. *Jenkins v. Pepon*, C. C. 55.
7. A writ issued in term, and tested of a preceding term, is erroneous, but may be amended, on payment of costs. *Gordon v. Valentine*, 16 J. R. 145.
8. An original *si te fecerit securum* cannot be amended by altering it to a summons; for, the writ being conformable to the *precipe*, there is nothing to amend by. *Lynch v. Mechanics' Bank*, 13 J. R. 127.
9. The defendant cannot take advantage of a defect in the direction of a *capias ad respond.*, after he has appeared to it, and pleaded; the defect being amendable. *Bronson v. Earl*, 17 J. R. 63.

[*42] *III. *Erroneous appearance, when cured.*

10. If an infant plaintiff appear, not by guardian, it is cured by verdict. *Schemerhorn v. Jenkins*, 7 J. R. 373.

11. A bail-piece, after an attempt of the bail to surrender, was not allowed to be amended, at the instance of the plaintiff, by striking out the words "trespass on the case," and insert-

ing the word *debt*, so as to make it conformable to the action in which the principal was, in fact, arrested; the plaintiff's attorney not having discovered the mistake, until after suit against the bail. *Morrell v. Pixley*, 12 J. R. 256.

IV. *Amending declaration and pleadings;* (a) *Declaration;* (b) *Want of averment;* (c) *Misrecital of a statute;* (d) *Plea;* (e) *Amendment after demurrer;* (f) *Amendment of course.*

(a) *Declaration.*

12. The plaintiff may, at any time before a default for not replying shall be entered, if the plea shall be a special plea, or a plea in abatement, or within twenty days after the service of a copy of the plea, if it shall be the general issue, amend the declaration. General Rule VIII. April, 1796.

13. A declaration may be amended after a plea in abatement. *Shute v. Davis*, 2 J. C. 336.

14. But not by adding another defendant, against whom a separate suit had been brought for the same demand. *Ibid.*

15. It may be amended by increasing the damages, there being no bail in the cause, on payment of costs, and with liberty to the defendants to plead *de novo*. *Bogart v. McDonald*, 2 J. C. 219.

16. But whether such amendment is allowable after verdict? *Quare. Livingston v. Rogers*, 1 C. R. 583.

17. On producing a certified copy of the original writ, the plaintiff will be allowed to amend his declaration in conformity. *Fallmer v. Steele*, 1 C. R. 22.

18. After issue joined, the plaintiff in *trover* was allowed to amend his declaration, by substituting the words *hyson skin* for *hyson tea*; the substantive cause of action in both cases being the same. *Heneschoff v. Miller*, 2 J. R. 295.

19. Where one of the counts in the declaration was good, and the others bad, (the defendant having moved in arrest of judgment,) the plaintiff was allowed to amend the bad counts, on payment of costs since declaring. *Livingston v. Rogers*, 1 C. R. 583. The judge certifying that no evidence was given on the bad counts; but that the evidence applied to the good counts only. *Union Turnpike Company v. Jenkins*, 1 C. R. 381—391. See post, VII. pl. 50.

20. The plaintiff cannot amend his declaration, after plea pleaded, without paying costs and giving an *imparlance*. *Holmes v. Lansing*, 1 J. C. 248. S. C. C. C. 92.

*21. If a promise, in one of the counts [*43] of a declaration, appear, by reference to the day in the preceding count, to have been laid after the breach assigned, the mistake is cured by verdict. *Allaire v. Ouland*, 2 J. C. 52.

22. In trespass, the plaintiff declared that the defendant, *simul cum* another, committed the trespass; *held*, after verdict against the defendants in Court, that the declaration, although informal, was cured by the statute of jeofails. *Rose v. Oliver*, 2 J. R. 363.

23. If it appear, from the record, that the suit was commenced before a cause of action accrued; the error is fatal, and will not be cured by verdict. *Cheatham v. Lewis*, 3 J. R. 42.

24. The plaintiff, having obtained a rule to amend his declaration, of course, no person appearing to oppose; on application of the defendant in the same term, the rule was vacated, and the amendment ordered on the usual terms. *Webb v. Wilkie*, 1 C. R. 153.

25. After the plaintiff had discontinued a former action, and commenced a new suit, which had been four times noticed for trial, the Court would not allow him to amend, by substituting or adding a new count. *Sackett v. Thompson*, 2 J. R. 206.

26. Where there is a defect, imperfection, or omission, which would have been a fatal defect on demurrer; yet if the issue joined be necessarily such as required, on the trial, proof of the facts defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the judge would direct, or the jury would have given the verdict, such defect, &c. is cured by the verdict at common law. *Pangburn v. Ramsay*, 11 J. R. 141.

27. A verdict aids a title defectively set out. *Ibid.*

28. In an action for a libel, the declaration was allowed to be amended, at the instance of the plaintiff, so as to change the venue. *Paine v. Parker*, 13 J. R. 329.

29. In an action of slander, the plaintiff laid his damages at 1000 dollars, and the jury found a verdict for the plaintiff for 4,250 dollars; the Court refused to allow the declaration to be amended, by increasing the amount of damages alleged. *Curtiss v. Lawrence*, 17 J. R. 111.

30. The plaintiff cannot amend his declaration, nor the defendant his plea, *as of course*, within the twenty days, by adding a new count or a new plea; but he must obtain leave of the Court. *Siver v. North*, 18 J. R. 310.

As to amending declaration in ejectment, by adding new devisions. See EJECTMENT.

(b) *Ward of averment.*

31. In an action of *assumpsit*, for work and labor, &c. before a Justice's Court, the want of an averment in the declaration, that the work was actually performed, after verdict and judgment, was intended to have been supplied by proof. *Owens v. Morehouse*, 1 J. R. 276.

[*44] (c) *Misrecital of a statute.*

32. A misrecital of the title of a statute in a part which does not alter the sense, when its date is truly set forth, is cured by verdict. *Murray v. Fitzpatrick*, 3 C. R. 38.

(d) *Plea.*

33. In slander, for saying of the plaintiff that he was perjured, and a particular perjury pleaded in justification, the Court will, on affidavit of the absence of the witness by whom it was to be proved, give leave to amend, on payment of costs, by pleading another perjury. *Graham v. Woodhull*, 1 C. R. 497. (*See quere.*)

34. When the defendant pleads a special

plea, to which the plaintiff replies, takes issue, and gives notice of trial, for the next circuit, the defendant cannot, though within twenty days after service of the plea, amend it, as of course, under the 8th Rule of April, 1796. *Squires v. Mallory*, 17 J. R. 3.

35. Where a plea concludes with a *similiter*, instead of a verification, and the plaintiff, without applying, goes to trial, the misleading is cured by the verdict. *Coan v. Whitmore*, 12 J. R. 353.

(e) *Amendment after demurrer.*

36. When there shall be a demurrer to a declaration, or any other pleading, not being a plea in abatement, the party against whom the demurrer shall be taken may, at any time before the default for not joining in demurrer shall be entered, amend the pleading demurred to. Gen. Rule VIII. April, 1796.

37. But not by adding a new plea. *Doyle v. Moulton*, 1 J. C. 246. S. C. C. C. 87.

38. After the Court have given their decision on a demurrer, the party may amend the pleading demurred to, on payment of the costs of the demurrer, although he has had a former amendment. *Hallock v. Robinson*, 2 C. R. 233.

39. After the plaintiff had withdrawn a demurrer to the plea, he was allowed to amend his declaration, by adding a new count. *Harris v. Wadsworth*, 3 J. R. 257.

40. Where the general issue is pleaded, and also a special plea, to which the plaintiff replies, and the defendant demurs to the replication; and, on the trial of the general issue, contingent damages are assessed, and the demurrer is afterward argued; the defendant will not be allowed to amend his special plea. *Aliter*, if the demurrer had been argued before the trial of the general issue. *Hallet v. Holmes*, 18 J. R. 28.

(f) *Amendment of course.*

41. The respective parties may amend of course, and without costs, *but [*45] shall not be entitled so to amend more than once. Gen. Rule VIII. April, 1796.

V. *Amending writ of inquiry.*

42. Where a term intervenes between the *teste* and return of a writ of inquiry, which is a miscontinuance, it is cured by the statute of jeofails. *Administrators of Dumond v. Carpenter*, 3 J. R. 183.

43. A mistake in a writ of inquiry, of the formal description of the Court before which it is returned, is cured by the statute of jeofails. *Richardson v. Backus*, 1 J. R. 59.

VI. *Amending jury process.*

44. Irregularities in the contents, or in the execution of jury process, are amendable. Per *Kent*, J. *Livingston v. Rogers*, 1 C. R. 583—587.

45. The *jurata* and *distingas*, after verdict, may be amended without costs. *Heermance v. Delamater*, 1 J. C. 220.

46. An award of a *venire* to an improper officer, on an insufficient suggestion, is cured,

after verdict, by the statute of jeofails. *Tower v. Wilson*, 3 C. R. 151.

47. A *fortiori*, if the award be to the right person. *Ibid*.

48. Where a venire is executed and returned by any other person than the sheriff, without any special suggestion or award to such person upon the record, it is an error which is not cured by the statute of jeofails. *Cooper v. Bissel*, 16 J. R. 146.

VII. Amending verdict.

49. Where part of the plaintiff's claim is good, and part bad, and the jury find entire damages; if it appear from the judge's notes that damages were given only for the part that was good, the verdict may be amended. *Executors of Van Rensselaer v. Executors of Flatner*, 2 J. C. 17.

50. So, where one count in the declaration is good, and the others bad; if the judge will certify that the evidence applied solely to that count, or (*it seems*, more correctly) that all the evidence given would properly apply to that count, as well as to the others, the verdict may be amended by applying it to the good count. *Union Turnpike Co. v. Jenkins*, 1 C. R. 381. *S. P. Highland Turnpike Co. v. M'Kean*, 11 J. R. 98. *Cooper v. Bissel*, 15 J. R. 318.

51. So, where it appears from the judge's certificate, that the evidence did not particularly apply to the bad count, the verdict may be amended on payment of costs. *Stafford v. Green*, 1 J. R. 505.

52. If the declaration contain but one count, part of the matter alleged in which is actionable, and part not, and the jury find [*46] entire damages, *it will be intended that they were given only for the actionable part. *Steele v. Western Island Lock Navigation Company*, 2 J. R. 283.

53. So, if part of the promise was made on a good consideration, and part is a *nudum pactum*, it will be intended that the jury gave damages only for the part that was good. *Phetteplace v. Steere*, 2 J. R. 442.

54. An amendment of the verdict has been allowed to be made on affidavit of the plaintiff's attorney, the Court knowing it to be correct. 1 C. R. 394 n. (a.)

VIII. Amending record and judgment.

55. A defect of the record is not amendable. *Livingston v. Rogers*, 1 C. R. 583.

56. As, where a trial has been had, without an award of a venire. *Ibid*.

57. The *nisi prius* record is always amendable by the issue roll, on payment of the costs of motion. *Tower v. Wilson*, 3 C. R. 151. *Livingston v. Rogers*, 1 C. R. 587.

58. An omission of the clerk to sign a judgment, docketed and filed, will not prejudice either parties or strangers; and the Court will order his signature to be added, *nunc pro tunc*. *Seaman v. Drake*, 1 C. R. 9.

59. A judgment had been entered upon a warrant of attorney, and the same was regularly signed and docketed; but, by the negligence of the attorney, the plea of the defendant was not signed, nor was the name of the

defendant's attorney inserted in the record; the plaintiff was allowed to amend the record, *nunc pro tunc*, though a subsequent judgment had been entered up against the defendant, on which a preference was claimed. *Close v. Gillespie*, 3 J. R. 526.

60. Continuances may be entered after judgment. Per *Kent*, *J. Livingston v. Rogers*, 1 C. R. 587.

61. The *placitum*, in a record of a Court of Common Pleas, stated, that the Court was held at the village of *Otego*, without saying at the court house; this is a matter of form only, and is cured after verdict, by the statute. *Williams v. Vanderveer*, 10 J. R. 200.

62. After an assignment of errors, and joinder, in the Court for the Correction of Errors, the Supreme Court will, on motion, amend the original record in matters of form; for the original record remains in the Court below, the transcript only being sent up with the writ of error. *Tillotson v. Cheetham*, 3 J. R. 95.

63. All defects, or errors in the record, which are properly amendable, may be amended after writ of error, in the Court above, which will disregard all defects or errors in matters of form, or which may be amended, or are aided by the statute of jeofails. *Cheetham v. Tillotson*, 4 J. R. 499.

64. Where error was assigned in this, that the judgment was entered for sixpence less than the verdict; the Supreme Court ordered *the record to be amended [*47] and the judgment affirmed, with costs to be paid by the defendant in error. *Price v. Evers*, C. C. 41.

65. A judgment record was amended by adding the name of another defendant, saving to all persons the rights which they may have *bona fide* acquired in the estate of such defendant, since the docketing of the judgment so amended. *Bank of Newburgh v. Seymour*, 14 J. R. 219.

66. Where a Court of Common Pleas refused leave to amend a general verdict, by applying the evidence to one count, and entering a *not. pros.* as to the other, the Supreme Court, on a writ of error, judgment having been entered on the verdict below, cannot grant leave to amend the record. *Cooper v. Bissel*, 15 J. R. 318.

67. *It seems*, that a Court of Errors cannot grant an amendment by an inquiry into facts *dehors* the record. *Ibid*.

68. A record, on which judgment was entered for the defendant, on a plea of *non est factum*, with notice of special matter to be given in evidence at the trial, was amended by striking out the judgment, and entering a judgment of nonsuit, so as to accord with the truth of the case. *Lee v. Curtis*, 17 J. R. 86.

69. Where an executor pleaded a false plea, and the judgment and execution were *de bonis testatoris, si non, de bonis propriis*, &c. after a return of *nulla bona* to the execution, the Court allowed the judgment and execution to be amended, so as to be of the *lands and tenements* also. *Lansing v. Lansing*, 18 J. R. 502.

70. Where the clerk of the Supreme Court

made a mistake in the assessment of damages, on a promissory note, which was not discovered until after the judgment roll was filed, and the defendant had paid the amount of the judgment to the plaintiff's attorney, and satisfaction thereof had been entered, and the defendant refused to correct the mistake; the Court, on motion, ordered the entry of satisfaction, and all proceedings in the cause, subsequent to interlocutory judgment, to be vacated, and the report of the clerk of the assessment of damage, the record of the judgment, and the satisfaction thereof, to be taken off the files of the Court, and cancelled, and the damages to be reassessed by the clerk, allowing the defendant credit for the amount paid by him: *provided*, the defendant did not, in twenty days, pay to the plaintiff the sum omitted by the clerk, by mistake, in the assessment of the damages. *Mechanics' Bank v. Minthorne*, 19 J. R. 244.

IX. Amending execution.

71. An execution, erroneous by the insertion of too large a sum, is amendable by the judgment. *Bissel v. Kip*, 5 J. R. 89.

72. An execution, returnable out of term, is not void, but voidable only, and may be amended. *Cramer v. Van Alstyna*, 9 J. R. 386.

73. The return to an execution may be amended, on payment of costs. *Williams v. Rogers*, 5 J. R. 163.

74. A *f. fa.* may be amended after it has been returned satisfied. *Phelps v. Ball*, 1 J. C. 31. *S. C. C. C. 63.*

75. Where a *f. fa.*, after it had been [*48] levied, was burnt, by accident, in the house of the deputy sheriff, the Court ordered a new *f. fa.* to be made out and delivered to the sheriff. *White v. Lovejoy*, 3 J. R. 448.

76. A *ca. sa.*, on which the defendant had been taken, was allowed to be amended by adding the *testatum*. *McIntyre v. Rowan*, 3 J. R. 144.

77. If an action of false imprisonment be brought for taking the plaintiff in execution on a *ca. sa.*, in which the costs are, by mistake, larger than those actually awarded, the Court will give leave to amend the execution; and the papers on which the application is made may be entitled as in the suit for false imprisonment. *Holmes v. Williams*, 3 C. R. 98.

78. Variances between a writ of *venditioni exponas* and the record, were allowed to be amended twice, each time after the plaintiff had been nonsuited by reason of such variance. *Sugden v. McCoon*, C. C. 59.

X. At what time an amendment may be made.

79. After argument of a cause and judgment therein, and the term ended, it is too late to move to amend. *Kilpatrick v. Rose*, 9 J. R. 78. *S. P. Currie v. Henry*, 3 J. R. 140.

80. The Court will allow a suggestion of the death of one of the defendants, pending the original action, to be entered after a writ of error has been brought. *Hamilton v. Holcomb*, 1 J. C. 29. *S. C. C. C. 61.* *S. P. Dumont v. Carpenter*, 2 J. R. 184.

81. The Court, where error is brought, may make such amendments as might have been made by the Court below. *Pease v. Morgan*, 7 J. R. 468. *Cheetham v. Tillotson*, 4 J. R. 499.

82. In error from a Court of Common Pleas, the Supreme Court allowed the defendant in error to amend his declaration, on paying his costs, in the Court below, subsequent to the declaration, by averring that the plaintiffs in error were partners, &c. *Pease v. Morgan*, 7 J. R. 468.

83. After an assignment of errors, it is too late to move that the return to a writ of error be amended. *Dumond v. Carpenter*, 3 J. R. 141.

Amending interrogatories on an attachment. *See ATTACHMENT II.*

Amending cases. *See PRACTICE.*

Amending *certiorari* and return. *See CERTIORARI TO A JUSTICE'S COURT IV.*

*APPRENTICE. [*49]

1. An infant cannot be bound an apprentice, unless he is party to, and executes, the deed or indenture. *Matter of McDoules*, 8 J. R. 328.

2. If the father has executed the indenture, he is bound by it, although the infant is not; and it is for the infant alone to take advantage of his not being a party to the deed. *Ibid.*

3. Where an infant, not party to the indenture, was brought up on *habeas corpus*, the Court refused to order him to be delivered to the father, there being no evidence of restraint on the part of the master, but gave the infant leave to go where he pleased. *Ibid.*

4. If, in an indenture of apprenticeship, it be stated, that the apprentice binds himself with the consent of his father, and his father actually signs and seals the indenture with the son, though the father is not named in the indenture as a party, yet he is bound for the son, and is responsible to the master, in case the apprentice leaves his service before the expiration of the term fixed by the indenture. *Mead v. Billings*, 10 J. R. 99.

5. Where an apprentice is employed by a third person, without the knowledge or consent of his master, the master is entitled to all his earnings, whether the person who employed him did, or did not know that he was an apprentice. *James v. Le Roy*, 6 J. R. 274.

6. But, in the case of a hired servant, the employer must have notice of his being the servant of another, to make him answerable. *Ibid.*

7. Where an apprentice ran away from his master, and entered on board of a ship, and signed articles, by which he engaged to perform the whole voyage, and to forfeit his wages in case of desertion or embezzlement; and, during the voyage, he deserted, having been guilty of embezzlement; *held*, that the master was entitled to recover his whole earnings from the ship owners, during the time he

was on board, without any deduction for wages advanced to the apprentice, though neither the owners nor captain knew that he was an apprentice. *Ibid.*

8. The discharge of an apprentice, by an order of three justices, does not affect the validity of the indentures, so as to prevent the master from setting them up as a defence, in an action against him, to recover the value of the services of the apprentice. *Schermerhorn v. Hull*, 13 J. R. 270.

9. Where a person is relieved, by his own application, by an overseer of the poor, without a previous order for that purpose, it is sufficient to authorize the overseers to bind out the children of such person, as poor apprentices; the want of an order coming in question only in a settlement of the overseer's accounts, and does not invalidate the indenture of apprenticeship, so as to prevent the master from using it as a matter of defence. *Ibid.*

10. Where an indenture of apprenticeship, in the introductory part, stated, that A., by and with the consent of B., his guardian, had bound himself apprentice to C., and after stating the respective obligations and duties of the master and apprentice, concluded, "In witness, the *said parties have hereunto set their hands and seals;" and the indenture was signed and sealed by A., B., and C.; held, that B., the guardian, was not liable to an action of covenant by C., the master, for a breach of the indenture, on the part of the apprentice, as it contained no covenant on his part, and it was apparent that B. became a party merely to render the binding valid under the statute, (Sess. 24. c. 11. s. 2.) which requires the assent of the guardian to be expressed in the indenture, and signified by his sealing and signing the same. *Ackley v. Hoskins*, 14 J. R. 374.

11. Though an indenture of apprenticeship is not assignable, or transmissible, yet the assignment, as between the old and new master, would be valid as a covenant for the services of the apprentice; and if the apprentice continued to serve his new master, there would be no failure of the consideration of the assignment. *Nickerson v. Howard*, 19 J. R. 113.

ARREST.

1. The delivery to the sheriff of a *ca. sa.* against a prisoner in his custody, who had been admitted to the limits, is not, *ipso facto et eo instanti*, an arrest so as to place the defendant in custody on the execution, and render the sheriff liable for an escape. *Tracy v. Whipple*, 8 J. R. 379.

2. An arrest may be made on the return day of a writ. *Adams v. Freeman*, 9 J. R. 117.

3. Where a writ was served on Sunday, and the sheriff returned *cepi corpus*, on which the plaintiff proceeded, and obtained judgment, by default, and execution; the Court ordered

all the proceedings to be set aside, with costs, on condition that no action should be brought against the sheriff for a false imprisonment. *Rob v. Maffat*, 3 J. R. 257.

4. Where a person lets out part of his house, and reserves for himself and occupies an inner room, and, the outer door being open, an officer enters to execute civil process; he is justified in breaking open the inner door in order to arrest the party. *Williams v. Spencer*, 5 J. R. 352.

5. Where the front door of the defendant's house was generally kept fastened, and the usual entrance was through the back door, and the sheriff, having entered by the back door, while it was open, in the night, broke open the door of an inner room in which the defendant was with his family, and arrested him, the arrest was held lawful. *Hubbard v. Mack*, 17 J. R. 127.

6. A private person cannot, of his own authority, arrest a person who has been engaged in an affray, or breach of the peace. *Phillips v. Trull*, 11 J. R. 486.

7. But during the affray, any person may, without a warrant from *a [*51] magistrate, restrain any of the offenders, in order to preserve the peace. Per *Platt, J. Ibid.*

8. All persons whatever, who are present when a felony is committed or a dangerous wound given, are bound to apprehend the offender. Per *Platt, J. Ibid.*

ARREST OF SHIPS OR VESSELS.

(See Stat. Sess. 22. c. 1. 1 N. R. L. 130. Sess. 40. c. 60.)

1. If, under the act authorizing the arrest of ships, (Sess. 22. c. 1. 1 N. R. L. 130.) the residence of the owner be put in issue, and found against him, it cannot be urged, for error, that the declaration did not aver the owner to be a non-resident. *Murray v. Fitzpatrick*, 3 C. R. 38.

2. Under the same act, the plaintiff may recover beyond the amount of his bills, annexed to his declaration, if the sum be within the damages laid; and costs may also be recovered. *Ibid.*

3. The costs are a *lien* upon the vessel; but the manner in which the judgment is to be carried into effect must be determined by the Court below. *Ibid.*

4. Under the act, (Sess. 22. c. 1.) and the act in amendment thereof, (Sess. 40. c. 60.) the *lien* on the vessel ceases (1) when she has left the state; (2) when, after being arrested, the owners give bonds with sureties, &c.; and (3) when, after being arrested, no security is given, but the vessel is removed to another port or place in the state, for more than twelve days after the arrest. *Denison v. Schooner Appolonia*, 20 J. R. 194.

5. The *proviso* in the act (Sess. 40. c. 60.) does not apply to a case, where the vessel was removed, and continued absent from the port

or place where the supplies and materials were furnished, more than twelve days before the arrest. *Ibid.*

6. These statutes extend only to ships or vessels navigating the ocean, or, at most, to such as sail coastwise, from port to port. A ferry-boat plying across a river, as, from the city of New-York to the opposite shore of Jersey, is not liable to attachment, under these statutes. *Birkbeck v. Hoboken Horse Ferry-Boats*, 17 J. R. 54.

[*52]

*ARSON.

1. Setting fire to a dwelling-house, inhabited at the time, by which a part only of the house is consumed, is *arson*, within the first section of the act, (Sess. 36. c. 29.) and punishable with death. *The People v. Butler*, 16 J. R. 203.

2. Setting fire to a jail by a prisoner, merely for the purpose of effecting his escape, is not *arson*. *People v. Cotteral*, 18 J. R. 115.

3. Nor is it a *wilful burning of an inhabited dwelling-house*, within the meaning of the first section of the statute, declaring the punishment of crimes, (Sess. 36. c. 20.) though the jail is to be deemed an inhabited dwelling-house, within the statute. *Ibid.*

ASSAULT AND BATTERY.

1. It is no justification, that the defendant claimed title to the land on which the assault was committed, and of which the plaintiff had peaceable possession, and entered and used such force as was necessary to expel the plaintiff. *Hyatt v. Wood*, 3 J. R. 230.

2. On an indictment for an assault and battery, the trial will not be stayed, because a civil suit is pending, to recover damages for the same assault and battery, though, it seems, judgment, after conviction, may be stayed until the decision of the civil suit. *The People v. The Judges of Genesee*, 13 J. R. 85.

See TRESPASS. FALSE IMPRISONMENT.
PLEADING. COSTS.

ASSIGNMENT.

- I. *What is assignable, and the effect of an assignment.*
- II. *How far the interest of an assignee will be protected at law.*

1. *What is assignable, and the effect of an assignment.*

1. Mere *choses in action* cannot be assigned at common law. *Greenby v. Wilcocks*, 2 J. R. 1.

2. If a grantor, at the time of executing a

conveyance, be not seized, the covenant of seisin is broken immediately, and the deed becomes a mere *chase in action*, which the grantee cannot assign. *Ibid.*

3. If A. receive from B. an order on his agent, to pay A. a certain *sum, [*53] out of such debts of B. as shall come into the hands of the agent, the order, and the acceptance of it, fix the fund irrevocably, and is an assignment of the debts to such extent as shall be necessary to satisfy the order. *Peyton v. Hallet*, 1 C. R. 363. *S. P. M'Menomy v. Ferrers*, 3 J. R. 71. [In the first case, the order was not accepted, and the question arose as to the competency of the person holding the order to be a witness; and though the Court decided, that he had such an interest as rendered him incompetent, yet *Lewis*, Ch. J., was of opinion, that as the order had never been accepted, nor the fund out of which it was to be paid come into the hands of the witness, he had no interest in it; and *Van Ness*, J., in *M'Menomy v. Ferrers*, refers to the case of *Peyton v. Hallet*, for the principle as above stated.]

4. A person assigns all his interest in a crop growing on the land of C.: this is a complete sale or transfer of the property, and any action brought by the assignee must be in his own name. *Carter v. Jarvis*, 9 J. R. 143.

5. The assignee of a *chase in action* takes it subject to all the equity which existed between the original parties. *Chamberlain v. Gorham*, 20 J. R. 144. *Bank of Niagara v. M'Cracken*, 18 J. R. 493. *Furnan v. Haskin*, 2 C. R. 300. And See CHANCERY VI. Assignment.

6. A note, endorsed after it has become due, cannot be set off, in an action brought by the assignee of the maker, against the endorser. *Anderson v. Van Allen*, 12 J. R. 343.

7. Where A. delivers to B. a note, to receive the amount, and apply it to the payment of a note from A. to B., this is an equitable assignment of the note, and vests an authority coupled with an interest in B., and B. will not, therefore, be guilty of a conversion, by refusing to redeliver the note to A. *Canfield v. Monger*, 12 J. R. 346.

8. An obligation or covenant may be assigned by writing, not under seal. *Dawson v. Coles*, 16 J. R. 51.

9. The assignment of a *chase in action* need not be by writing under seal: a delivery of it, for a valuable consideration, is sufficient. *Prescott v. Hull*, 17 J. R. 284. *S. P. Briggs v. Dorr*, 19 J. R. 95.

10. A judgment may be assigned by parol, or writing without seal. *Ford v. Stuart*, 19 J. R. 342.

- II. *How far the interest of an assignee will be protected at law.*

11. Courts of law will take notice of, and protect, the rights of assignees against all persons having either express or implied notice of the trust or assignment of *chases in action*. *Johnson v. Bloodgood*, 1 J. C. 51. *Wardell v. Eden*, 2 J. C. 121. *S. P. Van Vechten v. Graves*, 4 J. R. 403. *Littlefield v. Storey*, 3 J. R. 425. *Anderson v. Van Allen*, 12 J. R. 343. *Briggs v. Dorr*, 19 J. R. 95.

12. A special notice need not be shown; but it is enough if the party has such a knowledge of facts and circumstances, as is sufficient to put him on inquiry. *Anderson v. Van Allen*, 12 J. R. 343.

13. The assignor of a *chose in action* [*54] cannot defeat a suit brought "in his name by his assignee, by a release to the defendant who has notice of the assignment. *Andrews v. Beecker*, 1 J. C. 411. *S. P. Raymond v. Squire*, 11 J. R. 47.

14. And, to a release pleaded, the plaintiff may reply the assignment, and that the defendant had notice of it. *Ibid.*

15. So, to a plea of payment. *Littlefield v. Storey*, 3 J. R. 425.

16. Where the assignor of a judgment enters up satisfaction on the record, after notice to the defendant of the assignment, the Court, on motion, will order the entry of satisfaction to be vacated. *Wardell v. Eden*, 2 J. C. 121. 258. *S. C. 1 J. R. 531. note. S. C. C. C. 137.*

17. A., a stockholder in an insurance company, assigns his stock to B.; the company are payees of notes made by A., one of which became due before the company had notice of the assignment; *held*, that the company might apply the dividends, accruing on the stock of A., until such time as B. was entitled to have a transfer made to him, to the payment of that note, but could not retain for notes falling due after notice of the assignment. *Bates v. New-York Insurance Company*, 3 J. C. 238.

18. A. gave B. a receipt for lumber, to a certain amount, which was to be appropriated to the payment of a debt from B. to A.; B. afterwards assigned the receipt to C., who gave A. notice of the assignment, and brought an action, for goods sold and delivered, against A., in the name of B.; although, in this case, the receipt was not, in the first instance, assignable, by reason of its appropriation to a specific purpose, yet, as the defendant had put it out of his own power to apply the amount to that purpose, and, as the parties had altered the appropriation, *held*, that an action would lie for the benefit of the assignee, which could not be defeated by a settlement between the plaintiff and defendant, after notice to the latter. *Eels v. Fisch*, 5 J. R. 193.

19. Direct and positive notice of the assignment of an instrument, or something equivalent, is necessary, in order to charge the defendant with a fraudulent payment to the plaintiff. *Meghan v. Mills*, 9 J. R. 64.

20. The plaintiff, holding a note, not negotiable, or due-bill, of the defendant, assigned it to A., by merely endorsing it in blank; A. called on the defendant, and demanded payment; *held*, that this was not sufficient notice, but that he ought to have produced the note, and stated explicitly his interest. *Ibid.*

21. Where a covenant is assigned, notice of the breach from the assignee is sufficient to support an action. *Van Feltzen v. Graves*, 4 J. R. 403.

22. A bond, executed by the plaintiff, and assigned to the defendant by the obligee, before the commencement of the action, may be set off. *Tuttle v. Beebe*, 8 J. R. 152. *S. P.*

23

Raymond v. Squire, 11 J. R. 48. [See *Wake v. Tinkler*, 16 East, 36.]

23. A. conveyed land to B., with covenant of seisin, and B. conveyed to C. for a valuable consideration; it was afterwards discovered that A. was never seised, and so the covenant was broken; and B., to reimburse C. for the money that he had paid, agreed that he "should have the benefit of the cove- [*55] nant, and executed and delivered to him a letter of attorney to sue A. in his name; the letter of attorney was *held* equivalent to a formal assignment of the covenant, and that a release from C. to A., who had notice of the assignment, was void. *Raymond v. Squire*, 11 J. R. 47.

24. Where an action is brought in the name of an assignor, by the assignee, or a person beneficially interested, the defendant cannot avail himself of the plaintiff's want of interest, or that some other person than the one for whose benefit the suit is brought, is the party beneficially interested. *Raymond v. Johnson*, 11 J. R. 488.

25. The assignee of a bond may maintain trover for it, in his own name, against the obligor, who has got it into his possession, and converted it. *Clowes v. Hawley*, 12 J. R. 484.

26. And such bond being conditioned for the conveyance of a certain lot of land by the obligor to the obligee and his assigns, if it appears that the obligee or the plaintiff has done every thing requisite, on his part, to entitle him to a conveyance, the damages which he will be entitled to recover, will be the value of the land which was to be conveyed. *Ibid.*

27. Where an assignee recovers judgment in the name of his assignor, and takes out a *ca. sa.*, giving the sheriff notice of his equitable interest; and the sheriff, having arrested the defendant, suffers him to escape, the assignee may maintain an action against the sheriff, in the name of the assignor, which the sheriff cannot defeat, by taking a release from the nominal plaintiff. *Martin v. Hawks*, 15 J. R. 405.

28. Where an obligation, or covenant for the payment of money, having been assigned, and notice thereof given to the obligor or covenantor, an action is brought by the assignee, in the name of the assignor, upon the obligation or covenant, to which the defendant pleads a former recovery and satisfaction, the plaintiff may reply the assignment, and notice thereof to the defendant, and notice to him, that the former action was not prosecuted by the authority, nor for the benefit of the assignee. *Danson v. Coles*, 16 J. R. 51.

29. A plaintiff who had assigned his interest in a *chose in action*, before suit, cannot be a witness for the defendant, as to his demands, so as to impair the rights of the assignee. *Frear v. Evertson*, 20 J. R. 142.

See further, *tit. CHANCERY VI. Assignment.*

*ASSUMPSIT. [*56]

I. When an action of *assumpsit* will lie.

II. What consideration will support an *assumpsit*; (a) Benefit to the defendant, or a

third person, or trouble and inconvenience, or loss to the plaintiff; (b) Forbearance of suit; (c) Submission to arbitration; (d) Mutual promises; (e) Prior equitable or moral obligation; (f) Assumpsit will not lie without a consideration, or on a gratuitous undertaking, unless the party enter on the performance; (g) Or on a past consideration, without a request.

III. Assumpsit on an express promise.

IV. Assumpsit on an implied promise, and the general indebitatus assumpsit; (a) When a party may recover on the implied promise, notwithstanding an express agreement; (b) Money paid; (c) Goods sold; (d) Work and labor; (e) Account stated; (f) Money had and received.

I. When an action of assumpsit will lie.

1. A promise by A. to B., for the benefit of C., will enable C. to maintain an action against A. *Schemhorn v. Vanderheyden*, 1 J. R. 139. *S. P. Weston v. Barker*, 12 J. R. 276. [*S. P. 3 J. C. R. 229.—7 J. C. R. 57.*]

2. Although, in some cases, an action may be maintained on a promise, the consideration of which moves from a third person, by the party in whose favor the promise is made; yet, when neither the consideration moves from the plaintiff, nor the promise is made to him, nor for his benefit, an action cannot be maintained. *Shear v. Overseers of Hillsdale*, 13 J. R. 496.

3. If a notary, to whom a note is given to demand payment and protest, promises to the holder to give notice to the endorsers, so as to enable him to recover his money, and the notary gives notice to the second endorser, but not the first, and the holder afterwards recovers the full amount from the second endorser, the notary is not liable on that promise to the second endorser, for not having given notice to the first endorser. *Morgan v. Van Ingen*, 2 J. R. 204.

4. If a plaintiff in a suit, having, for a valuable consideration, promised the defendant to discontinue the suit, should, notwithstanding, proceed, and obtain judgment against the defendant, the latter may maintain an action for the breach of the promise. *Cobb v. Curtiss*, 8 J. R. 470.

5. And the action is sustainable, not on the ground that the amount of a judgment for money not due, or which had been unconscientiously recovered, can be recovered back, but for the breach of an agreement, which breach would be the same, even if the former recovery had been for a just debt. *Ibid.*

6. If one party does not accede to a promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 J. R. 470.

7. So, if a deputy sheriff promise [*57] to pay the amount of a judgment collected by him, but not the costs of entering a rule for an attachment, but the plaintiff will not accept the one without the other, the defendant is not bound. *Ibid.*

8. Assumpsit is the proper form of action, where there is a warranty, express or implied, in the sale of chattels, for a breach of the con-

tract. *Executors of Evertson v. Miles*, 6 J. R. 138.

9. It will not lie against a governor of this state, in the name of the people, to recover back any part of money received by him, under acts of the legislature, to defray the incidental charges arising in and about administering the government of the state; for, what shall be deemed incidental charges not being defined by law, they must necessarily be left to the discretion of the executive, under the control only of the legislature; and the propriety of the expenditures is not a subject of judicial cognizance. *The People v. Lewis*, 7 J. R. 73.

10. It lies against a sheriff, for the amount of goods sold by him under an execution, though the purchaser, to whom the goods are delivered, refuse to pay for them. *Denton v. Livingston*, 9 J. R. 96.

11. If, at the request of B., A. sends the goods of B. to the agent of A. to be sold, and the agent sells them on a credit to a person who becomes insolvent before the day of payment, A. is not liable for the amount. *Alexander v. Fink*, 12 J. R. 218. See *Herring v. Marvin*, 5 J. R. 393.

12. *Indebitatus assumpsit* lies by the holder of a note payable to bearer, or by the endorser of a note, against the maker. *Pierce v. Crafts*, 12 J. R. 90.

13. Where, on a submission to arbitration, the parties mutually executed promissory notes to each other, as security for the payment of the sum which might be awarded; and the arbitrators, having awarded in favor of A., delivered to him the note of B., the other party, and B. endorsed the note to C., who compelled B. to pay the amount, and he brought an action against A., to recover back the amount, on the ground that the award was void; held, that B. could not recover against A. if he could have insisted on the invalidity of the note as a defence to the action of C.; or, if such defence was then inadmissible, he must show that he could not have availed himself of it, by averring that the note was transferred before it became due. *Batley v. Button*, 13 J. R. 187.

14. Assumpsit lies on an implied promise, against a corporation. *Dunn v. Rector of St. Andrew's Church*, 14 J. R. 118. *S. P. Danforth v. Scotchrie Turnpike Company*, 12 J. R. 231. And see 10 J. R. 484. 7 J. R. 541. 7 Cranch, 299.

15. It lies to recover the consideration money for land sold. *Shepard v. Little*, 14 J. R. 210. *S. P. Per Thompson, Ch. J. Velie v. Myers*, 14 J. R. 162. *S. P. Bowen v. Bell*, 20 J. R. 338. And the acknowledgment of payment contained in the deed is not conclusive evidence to defeat the action. *Shepard v. Little*, 14 J. R. 210.

16. It lies against a stockholder of a turnpike company, at the suit of the company, on his promise, in writing, to pay for the shares for which he has subscribed, in instalments, notwithstanding the remedy *given in the act, to exact, in case of [*58.] non-payment, a forfeiture of the shares and all previous payments. *Goshen Turnpikes Company v. Hurta*, 9 J. R. 217. *Union Turn-*

pike Company v. Jenkins, 1 C. R. 381. S. C. 1 C. C. E. 86. See post II. pt. 35.

17. A person becoming a stockholder of an incorporated company by signing an agreement, by which the subscribers promise to pay the company 100 dollars for every share set opposite to their names, in such manner and proportion, and at such time and place, as shall be determined by the trustees of the company, is liable, in an action of *assumpsit* at the suit of the company, for the instalments directed by its trustees to be paid. *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 238.

18. Where the plaintiffs had entered into an agreement under seal, to perform certain work under a penalty, and were, afterwards, released from the agreement by the defendant, by parol, and he promised the plaintiffs, that if they would go on and complete the work, he would pay them for their labor by the day; *held*, that as the plaintiffs might have released themselves from the agreement by incurring the penalty, there was a sufficient consideration to support the promise of the defendant, and that the plaintiffs might recover on the substituted agreement. *Lattimore v. Harsen*, 14 J. R. 330.

19. Where an ejectment cause was referred by consent of the parties, and the land in question surveyed; *held*, that the party succeeding in the cause, who had paid the expenses attending the survey, was entitled to recover half of the expenses from the opposite party, there being some evidence of an agreement that they should be borne equally, and such expenses not being admissible in the taxation of costs. *Lov v. Vroeman*, 15 J. R. 238.

20. Where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, and furnished him with necessaries, he may maintain *assumpsit* against the overseer, although no order had ever been made for the relief of the pauper. *King v. Buller*, 15 J. R. 281.

21. *Assumpsit* does not lie where there is an express contract under seal, or a debt of record, though the party has expressly promised to perform such contract, or to pay the judgment. *Andrews v. Montgomery*, 19 J. R. 162.

22. A judgment fairly obtained in another state is conclusive evidence of a debt; *assumpsit*, therefore, will not lie on such a judgment. *Ibid.* Contra. *Hubbell v. Coudrey*, 5 J. R. 132.

23. *Assumpsit* will not lie on a foreign judgment in ejectment for damages in costs, in the name of *John Doe*, a nominal plaintiff. *Doe v. Penfield*, 19 J. R. 308.

24. Where a note, made in renewal of a former note, on a usurious consideration, was passed by the defendant to the plaintiff, in part payment of the consideration for the sale and conveyance of land, and the plaintiff failed to recover on the note on the ground of usury; *held*, that he might maintain *assumpsit* against the defendant on the original contract; the note being considered as a nullity. *Stewart v. Payne*, 19 J. R. 294.

*25. No valid contract can exist, [*59] nor any promise arise, by implication of law, from any transactions during war, between a citizen of this country and the enemy, without the permission of the government. *Grinsold v. Waddington*, in error, 16 J. R. 438.

26. And if, after the war has ceased, an action is brought against a citizen here, upon any contract arising out of such illicit intercourse, the defendant may set up the illegality of the transaction as a defence. *Ibid.*

27. *Assumpsit* will not lie on an illegal consideration; as, if one requests another to do an act which he knows at the time will be a trespass, and promises to indemnify him. *Coven-try v. Barton*, 17 J. R. 142.

28. But if the party who does the act, at the instance of another, does not know at the time that he is committing a trespass, the promise to indemnify is valid. *Ibid.*

29. No action can be maintained on a promissory note, given for the consideration money, on the sale of a slave, contrary to the statute. *Helm v. Miller*, 17 J. R. 296.

II. *What consideration will support an assumpsit*; (a) *Benefit to the defendant, or a third person, or trouble and inconvenience, or loss, to the plaintiff*; (b) *Forbearance of suit*; (c) *Submission to arbitration*; (d) *Mutual promises*; (e) *Prior equitable or moral obligation*; (f) *Assumpsit will not lie without a consideration, or on a gratuitous undertaking, unless the party enter on the performance*; (g) *Or on a past consideration without a request.*

(a) *Benefit to the defendant, or a third person, or trouble and inconvenience, or loss, to the plaintiff.*

30. An injury to one party, or a benefit to another, is a sufficient consideration for a promise; and it is not necessary, that the act to be done by one party should be beneficial to the other, but it is enough if it be detrimental to the plaintiff, or deprive him of a right which he before possessed. *Miller v. Drake*, 1 C. R. 45. *Powell v. Brown*, 3 J. R. 100.

31. That the plaintiff, at the request of the defendant, entered into the land of A., which the defendant claimed as his own, is a sufficient consideration to support a promise from the defendant to indemnify the plaintiff. *Allaire v. Ouland*, 2 J. C. 52.

32. A., B., and C., were the joint owners of a vessel and the cargo, then on a distant voyage, and were jointly interested in the earnings and profits of the voyage, of which vessel A. was master, who died during the voyage: after the death of A., an agreement between B. and D., that D. should receive from B. the effects of A. in the vessel and her earnings, in like manner as A. was entitled to receive them according to the agreement among the owners; and also B. agreed to account with D. for the vessel, her earnings, profits and losses, in like manner as he was bound to do to A.; in consideration of which, D. promised to pay B. any demands which he had against A. at the time of his death, or against his share in the vessel;

[*60] **held*, that the consideration would not support the promise; for, unless the accounts were liquidated, and a balance found to be due to A., the consideration was not for the benefit of D., and there was nothing to show that there was a loss or trouble to B. *Powell v. Brown*, 3 J. R. 100.

33. A promise by one person to do an act for the benefit of a third, is a good consideration to support an action, by the person making the promise. *Miller v. Drake*, 1 C. R. 45.

34. A promise by a constable to a defendant, against whom he has an execution issued from a Justice's Court, that if the defendant will deliver property as security, he will not sell it under thirty days, is without consideration and void. *Goodale v. Holbridge*, 2 J. R. 193.

35. The interest acquired by subscribing for shares in the stock of an incorporated company, is a good consideration to support an action against the subscriber. *Union Turnpike Company v. Jenkins*, 1 C. R. 381. This case was afterwards reversed in the Court of Errors, (1 C. C. E. 86.) but without affecting the decision on this point, as the decision in that Court appears to have been understood by the Supreme Court, in *Goshen Turnpike Company v. Hurin*, 9 J. R. 217. [See *Highland Turnpike Company v. McKean*, 11 J. R. 98. *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 238. See *ante*, pl. 16, 17.]

36. A declaration in *assumpsit* stated a promise from the plaintiffs to the defendant, not to require the payment of a certain note, endorsed by the defendant to the plaintiffs, in consideration whereof the defendant promised the plaintiffs, to indemnify them from one third of all loss which they might sustain in consequence of their endorsement of certain notes for a third person; that the plaintiffs had never required payment of the note, and that they had sustained a loss to a certain amount; *held*, that the declaration was bad, in not stating that the third person was insolvent; otherwise there was no consideration for the defendant's promise, either of benefit to himself, or of loss to the plaintiff; besides, the insolvency of the maker must be averred, because the promise of the maker must be construed to mean, that he would pay one third part of the loss, provided it could not be recovered of the maker of the notes, and not merely, that the defendant should be liable, in the first instance, for one third of the loss. *Myers v. Morse*, 15 J. R. 425.

37. Where a party in a suit becomes entitled to costs from the opposite party who (the costs being taxed) promises to pay the bill, the promise is founded on a sufficient consideration, and will support an action. *Warner v. Booge*, 15 J. R. 233.

38. Mere voluntary labor or service, without the privy or consent of the defendant, however beneficial to him, as in saving his property from destruction by fire, will not support an *assumpsit*. *Bartholomew v. Jackson*, 20 J. R. 28. See 5 J. R. 272.

39. Payment of part of the debt by the

debtor, is not a consideration which will support a promise to forbear to sue. *Pabodie v. King*, 12 J. R. 426.

40. Where, a constable having a defendant in execution, A. promised, that if the officer would release the defendant, he would pay the amount of the execution, if he failed to redeliver the party to the officer on a certain day, and the constable accordingly released **him*; *held*, that, the constable having no authority to take security for the redelivery of the party, the promise was void, and no action would lie against A. on the promise. *Wheeler v. Bailey*, 13 J. R. 366.

(b) Forbearance of suit.

41. Forbearance to sue is a sufficient consideration for a promise to pay the debt of another. *Elting v. Vanderlyn*, 4 J. R. 237.

42. Forbearance, generally, is a sufficient consideration, without setting forth a specific time; especially, if there was, in fact, a total forbearance for a long time. *Ibid*.

(c) Submission to arbitration.

43. A submission to arbitration is a good consideration for a note deposited with the arbitrators as security for the sum to be awarded, and on which they endorse the sum awarded, to be paid by the maker. *Shephard v. Watrous*, 3 C. R. 166.

(d) Mutual promises.

44. Mutual promises must be simultaneous. *Livingston v. Rogers*, 1 C. R. 583.

45. So, if it be stated, that, in consideration of the plaintiff's promise, the defendant, *afterwards, to wit, on the same day*, promised, the promise on the part of the plaintiff will not be a consideration, although laid to have been made *at the request* of the defendant. *Ibid*.

46. Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time. *Tucker v. Woods*, 12 J. R. 190. *S. P. Keep v. Goodrich*, 12 J. R. 397; and if not alleged to have been made concurrently, it is good ground for arresting the judgment. *Ibid*.

47. Two persons presenting cloth to the judges of the county, in order to obtain the bounty given by the act, (Sess. 31. c. 186. a. 2.) agree that the one who shall obtain the bounty shall pay half of it to the other; the promises are mutual, and one is a consideration for the other, although there was a condition annexed to the promise of one of the parties, and the other was unconditional. *Briggs v. Tillotson*, 8 J. R. 304.

(e) Prior equitable or moral obligation.

48. The debt of an insolvent or bankrupt, is due in conscience, notwithstanding his discharge, and therefore the old debt is a sufficient consideration for a new promise to pay it. *Scouton v. Eislord*, 7 J. R. 36.

49. A discharge under the insolvent act does not bar a previous contract, but only suspends the remedy; and the previous consid-

eration is sufficient to support a new contract. *Shippey v. Henderson*, 14 J. R. 178.

[*62] 50. But if the promise were conditional, as that the defendant "would pay, provided he could do it without distressing his family," the plaintiff must show that he could pay without distressing his family. *Scouton v. Eisdord*, 7 J. R. 38.

51. If a person, for whose benefit a note has been made, but who, however, is not a party to it, promise to pay the amount to the holder, the prior equitable obligation is a good consideration to support the *assumpsit*. *Stewart v. Eden*, 2 C. R. 150.

52. Where a bond and warrant of attorney had been given as security for a usurious loan, and a judgment was entered upon the bond, which was set aside by the Court, on application of the defendant, who, afterwards, promised to pay the original debt; held, that, notwithstanding the usurious security, the money actually lent remained a debt in equity and conscience, and was a sufficient consideration to support an express promise of repayment, on which *assumpsit* would lie. *Early v. Mahon*, 19 J. R. 147.

53. And, in such case, the defendant is not allowed to object, that though the judgment was set aside, the bond still remained valid, contrary to the decision of the Court and his own admission; but the plaintiff is entitled to judgment on the new promise of the defendant, on stipulating to bring into Court and cancel the bond and warrant of attorney, or usurious securities. *Ibid*.

54. Whether a mere moral obligation is a sufficient consideration to support an implied promise? *Quere. Overseers of Toga v. Overseers of Seneca*, 13 J. R. 360.

55. If the moral obligation is accompanied with an express promise to pay, the action will be supported. *Doty v. Wilson*, 14 J. R. 378. *S. P. Per Kent, J. Stewart v. Eden*, 2 C. R. 150. But, as *Spencer, J.*, observes, in *Smith v. Ware*, (13 J. R. 257.) "there is much nice learning in the books, upon the point of moral obligation, and as to what is or is not a sufficient consideration to uphold a promise;" and the result of the cases on this head, he thinks, is admirably summed up in a note to 3 *Bos. and Pull.* 249. "An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

56. Where money has been paid, and a receipt taken, and afterwards, the party to whom the money was paid brings an action for the same money, and recovers, by reason of the omission of the defendant to produce the receipt; a subsequent promise by the plaintiff, that if the defendant had the receipt he would refund the money, is valid, being founded on a moral and equitable obligation. *Bentley v. Morse*, 14 J. R. 463.

57. Where land is sold, and described in a deed, "as supposed," to contain a certain quantity of acres, and afterwards a deficiency is discovered, there is no moral obligation on the grantor to compensate the grantee for such deficiency; and a promise to pay for the same is, therefore, without consideration, and will not support an action. *Smith v. Ware*, 13 J. R. 257.

*[f] *Assumpsit will not lie without a* [*63] *consideration, or on a gratuitous undertaking, unless the party enter on the performance.*

58. *Assumpsit* will not lie for the non-performance of a promise made without consideration, notwithstanding the plaintiff may have sustained special damages. *Thorne v. Deas*, 4 J. R. 84.

59. Where the defendant has engaged for the performance of some act by a third person, a consideration must be alleged. *Bailey v. Freeman*, 4 J. R. 260.

60. There is neither a legal nor moral obligation on the owner of land to pay for the work and labor done upon it by one who has entered without his consent, or any color of right, and held the possession against him. *Fraser v. Hardenbergh*, 5 J. R. 272. See 20 J. R. 28.

61. It is, therefore, not such a consideration as will support an *assumpsit*; besides, there having been no request, express or implied, on the part of the defendant, it is a past or executed consideration. *Ibid*.

62. A promise to pay damages for the detention of a sum of money beyond the amount detained, is a *nudum pactum*. *Phetteplace v. Steere*, 2 J. R. 442.

63. A mere naked promise, to pay the already existing debt of another, is void. *Leonard v. Vredenburg*, 8 J. R. 29.

64. But where the guaranty, or promise to pay the debt of another, is made at the same time with the contract, to which it is collateral, is incorporated into it, and becomes part of it, the whole is one contract, and the want of consideration, as between the plaintiff and guarantee, cannot be alleged. *Ibid*.

65. A promise by A. to B., that B. might pass and repass over the land of A., is a mere gratuitous license or promise; and if A. shut up the fence, so that B. cannot pass, no action lies. *Dexter v. Hazen*, 10 J. R. 246.

66. Where the defendant gratuitously undertakes to do a thing, and enters upon the performance of it, the consideration is sufficient to bind him to perform it according to the terms of the agreement. *Rutgers v. Lucet*, 2 J. C. 92.

67. And his entering upon the performance is a sufficient consideration for his acting with diligence and good faith. *Ibid*.

(g) *Or on a past consideration, without a request.*

68. A past or executed consideration will not support an *assumpsit*, unless laid to have been done at the request of the defendant; or at least it must appear that he was under a

moral obligation to do the act, or procure it to be done. *Comstock v. Smith*, 7 J. R. 87. See *note*, pl. 55.

69. The reason why a past consideration, beneficial to the defendant, must be laid to have been done upon request, is, that it is not reasonable that one man should do another a kindness, and then charge him with a recompense. Per *Kent*, *J. Livingston v. Rogers*, 1 C. R. 583. [See 20 J. R. 28.]

70. A past consideration, beneficial to the defendant, to which he afterward assents, is sufficient to support an *assumpsit*. *Doty v. Wilson*, 14 J. R. 378. For the benefit to the defendant, connected with his [*64] *subsequent express promise, is equivalent to a previous request. *Ibid*.

71. As, where a defendant taken on a *ca. sa.*, was allowed to go at large by the sheriff, and the plaintiff in the execution having recovered against the sheriff for the escape, the amount of which was paid by the sheriff, the defendant, afterwards, promised to pay the same to the sheriff, such promise will support an action. *Ibid*.

72. A request, in order to support a promise, may be inferred, from the beneficial nature of the consideration, and the circumstances of the transaction; and it is the province of the jury to determine, from the evidence, whether a request can be inferred or not. *Oatfield v. Waring*, 14 J. R. 188. But the beneficial nature of the act or service alone is not sufficient. 20 J. R. 28.

73. A promise to pay, founded on a past consideration, may be good, if the past services are alleged to have been done on request; and if not so laid, a request may be implied from the beneficial nature of the consideration, and the circumstances of the case. *Hicks v. Burhans*, 10 J. R. 243. *Livingston v. Rogers*, 1 C. R. 583.

74. A promise by the defendant, in consideration that the plaintiff had, before that time, sold and conveyed to him a certain farm, to pay for it, without alleging that it was conveyed at the request of the defendant, is founded on a past consideration, and is void. *Comstock v. Smith*, 7 J. R. 87.

A consideration must not be illegal or unconscientious, or against public policy, or the policy of the law. See AGREEMENT III.

When the consideration must be expressed in the note or writing. See FRAUDS.

Promise to pay, or acknowledgment of a debt, barred by the statute of limitations. See LIMITATION OF ACTIONS.

III. *Assumpsit on an express promise.*

75. *Assumpsit* will lie on an express promise, by one partner, to pay a balance due the other; but not on an implied promise. *Casey v. Brush*, 2 C. R. 293.

76. It lies on an express promise, by a deputy sheriff, made, on request, to pay over to the plaintiff money collected by him on execution; but a clear and absolute promise must be proved. *Tuttle v. Love*, 7 J. R. 470.

77. It lies against a devisee, upon his *express* Vol. I. 5

promise to pay a specific sum, bequeathed as a legacy, and charged on the land devised, made after the executors had assented to the legacy, and in consideration of the devisee's having become seised of the land under the devise. *Beecker v. Beecker*, 7 J. R. 99. See 3 J. R. 189. 18 J. R. 428. [As to what will be equivalent to an express promise by the devisee. See LEGACY.]

78. An express promise, in writing, from an overseer of the poor to pay a debt due to the plaintiff from a pauper, of whose property he has the management and control, and whose money he receives, is a valid agreement, and founded on a valuable consideration. *Holly v. Rathbone*, 8 J. R. 148.

*79. If A., being bound to indemnify B. in a certain suit in which he was arrested, request C. to become special bail for B., and promise to indemnify him; it is an original undertaking by A., and C. is entitled to recover against him the expenses he had been put to in endeavoring to obtain a surrender of B. *Harrison v. Sautel*, 10 J. R. 242.

80. A promise to pay A. and B. certain debts, due to them from C., does not extend to a debt due to A. or B. separately. *Gold v. Phillips*, 10 J. R. 412.

81. Where several persons are engaged in a joint transaction, the proceeds of which are received by a third person, who promises to pay each partner his respective portion; *assumpsit* will lie on the express undertaking of the defendant, and he cannot object that there are others jointly concerned with the plaintiff. *Bunn v. Morris*, 3 C. R. 54.

81. On a motion, in arrest of judgment, the promise stated in the declaration will be presumed to have been an express promise. *Beecker v. Beecker*, 7 J. R. 99.

83. Where the contract has been reduced to writing, the action must be brought on the written agreement alone, and nothing which has passed verbally between the parties will support the action. *Mumford v. McPherson*, 1 J. R. 414. *S. P. Wilson v. Marsh*, id. 503. See *post*, IV. (a) 86, 87, 88, 89, 90, 91, 92, 93, (d) 122.

84. In an action on a marriage promise, the plaintiff need not prove an offer to marry, if the other party had put it out of his power to make the offer. *Johnston v. Caulkins*, 1 J. C. 116.

85. A., being indebted to B. on a judgment, delivered to him a horse as security. B. afterwards took out execution on the judgment, and sold the horse at auction, and became the purchaser at the sale for eight dollars, and promised to allow A., or pay him whatever the horse should sell for, over and above the eight dollars, and he afterwards sold the horse for twenty-five dollars; *held*, that A. was entitled to recover of B. the seventeen dollars in an action of *assumpsit*, the judgment having been satisfied; that there was a sufficient consideration for the promise of B., the sale of the horse on the execution being a violation of his trust; but that, at any rate, the promise was a waiver of all right under that sale, and

the horse must be deemed to have remained on the terms of the original agreement, and that A., by bringing his action to recover the seventeen dollars, ratified the subsequent sale. *Delamater v. Rider*, 11 J. R. 533.

IV. *Assumpsit on an implied promise, and the general indebitatus assumpsit*; (a) *When a party may recover on the implied promise, notwithstanding a special agreement*; (b) *Money paid*; (c) *Goods sold*; (d) *Work and labor*; (e) *Account stated*; (f) *Money had and received*.

(a) *When a party may recover on the implied promise, notwithstanding a special agreement*.

86. Where the plaintiff declares on [*66] a special agreement, seeking to *recover thereon, but fails altogether; he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered. *Tuttle v. Mayo*, 7 J. R. 132.

87. And the plaintiff may recover on the general count, whether he has attempted to prove the special agreement or not. *Linningdale v. Livingston*, 10 J. R. 36.

88. And it seems, that the defendant may, in such case, give the special agreement in evidence, in order to lessen the quantum of damages; but if offered merely to defeat the action, by showing a failure of performance on the part of the plaintiff, it is immaterial, and may be rejected. *Ibid*.

89. But where there is a count on a special agreement, and a general count for goods sold and delivered, the plaintiff cannot resort to the general count, if the goods were, in fact, sold under the special agreement, and the plaintiff might, if he had framed the special count properly, have recovered upon it. *Robertson v. Lynch*, 18 J. R. 451.

90. It seems, that where there is a covenant to pay money, and part has been paid, *assumpsit* will lie on the implied promise to pay the balance. *Danforth v. Schoharie Turnpike Company*, 12 J. R. 227.

91. Where the special agreement subsists in full force, the plaintiff cannot recover under the money counts, but the remedy is on the contract. *Raymond v. Bearnard*, 12 J. R. 274. *S. P. Jennings v. Camp*, 13 J. R. 94. *Wood v. Edwards*, 19 J. R. 205. *Clark v. Smith*, 14 J. R. 326.

92. So, where there is an express contract for a stipulated amount, and mode of compensation for services, the party rendering the services cannot waive the contract, and resort to an action on a *quantum meruit*, or an implied *assumpsit*. *Champlin v. Buller*, 18 J. R. 169.

93. Where A. sells and delivers goods to B., who agrees to pay for them in work and labor; and A. brings an action against B., on the agreement, which is defeated by proof that B. had offered to perform his part of the agreement, but was prevented by the act of A., the latter will not be permitted to waive the agreement, and recover back from B. the

original consideration. *Wilt v. Ogden*, 13 J. R. 56.

94. And in such a case, the defendant, who is sued on the contract for the non-performance, may show, under the general issue, that he offered to perform the contract on his part, but was prevented by the plaintiff. *Ibid*.

95. Where a party, having entered into a special contract, and performed a part of it, abandons it, without the consent or default of the other party, he cannot maintain an action on the implied *assumpsit*, for the labor actually performed. *Jennings v. Camp*, 13 J. R. 94.

96. Where a contract is entire, a full performance is a condition precedent to the plaintiff's right of action. *Ibid*. *S. P. Thorpe v. White*, 13 J. R. 53. *McMillan v. Vandertip*, 12 J. R. 165.

97. Where the declaration contains a special count on a promissory note, and, also, the common counts for money lent, &c. goods sold, &c., the plaintiff may elect the count on which to give the note in evidence. *Burdick v. Green*, 18 J. R. 14.

98. The law will not imply a promise by a client to his attorney, *who [*67] has brought a suit for a less sum than 250 dollars, in the Supreme Court, to pay full costs. *Scott v. Elmendorf*, 12 J. R. 315.

(b) *Money paid*.

99. In an action for money paid, the equity of the transactions between the parties will be taken into consideration. Per *Kent*, Ch. J. *Coulon v. Green*, 2 C. R. 153.

100. If an officer, having an execution, without demanding the amount from the defendant, and without his request, pay it over to the plaintiff, he cannot maintain an action against the defendant for the money paid. *Jones v. Wilson*, 3 J. R. 434. *S. P. Menderback v. Hopkins*, 8 J. R. 436.

101. So if a collector of taxes voluntarily pay over the defendant's tax to the treasurer, without his request, and there has been no subsequent promise to repay, the action is not maintainable. *Beach v. Vandenburg*, 10 J. R. 361. *S. P. Overseers of Wallkill v. Overseers of Mamakating*, 14 J. R. 87.

102. To sustain an action for money paid, it must appear that money was actually advanced. *Cumming v. Hackley*, 8 J. R. 202. [*See Tuttle v. Mayo*, 7 J. R. 132.]

103. If the plaintiff has given a bond for the debt of the defendant, it is not a payment, and the action will not lie. *Ibid*.

104. But the giving of a negotiable note may, in some cases, be equivalent to a payment of money. *Ibid*.

105. If a surety have actually paid money for his principal, the law implies an *assumpsit*, and the proper form of action is *indebitatus assumpsit*, for money paid. *Powell v. Smith*, 8 J. R. 249.

106. A. and B., being jointly interested in a transaction, execute a bond, with C. as surety; E., at the request of A., and on his promise to repay him, pays the amount of the bond to the obligee. Although *assumpsit* may lie by E., against A. and B. jointly, for the money

advanced, yet no action will lie against the surety; for the request of A. will not enure at his request. *Edmendorph v. Tappen*, 5 J. R. 176.

107. If the endorser of a bill of exchange, on its becoming due, pay the amount of it to the endorsee, the latter having never demanded payment of the acceptor, he pays it in his own wrong, and cannot maintain an action for money paid against the drawer. *Munroe v. Easton*, 2 J. C. 75.

108. F., as agent of C., effected insurance, and, for his own accommodation, gave his own note, with an endorser, to the insurers for the premium; but C., without the knowledge of the endorser, had previously paid F., his agent, the amount of the premium; the policy was afterwards assigned by the insured to the plaintiff; a loss happening, the insurers paid it, after deducting the amount of the premium, and delivered up the note to the plaintiff, with a receipt endorsed on it; *held*, that the plaintiff could not maintain *assumpsit* against the endorser of the note for money paid to his use, the deduction of the premium being regarded as payment by F., the maker, and as a satisfaction of the note, which was not endorsed to the plaintiff, so that he could sue upon it as an endorsee. *Coulon v. Green*, 2 C. R. 153.

*109. Where A. transferred stock in [*68] a turnpike company to B., and which, at the time, appeared by the books of the company to be fully paid up, by a credit of interest on the amount paid, pursuant to a resolution of the directors, but this resolution was, afterwards, repealed, and the stockholders were called upon to pay in the amount before allowed for interest; and, in consequence, B. paid that sum on the shares so transferred to him; *held*, that B. could not maintain an action for so much money paid to the use of A., against him, there being no fraud or warranty. *Cunningham v. Spier*, 13 J. R. 392.

110. Where a party has paid a judgment recovered against him, for an entire demand, to which a person, not party to the suit, was jointly liable with himself, he cannot have an action against that person, for contribution, as for money paid to his use. *Murray v. Bogert*, 14 J. R. 318.

(c) Goods sold.

111. In order to maintain an action for the price of service of a chattel, the plaintiff must show a delivery, or offer to deliver. *Babcock v. Stanley*, 11 J. R. 178.

112. If a person sends an order to a merchant to send him a particular quantity of goods, on certain terms of credit, and the merchant sends a less quantity of goods, at a shorter credit; until the former assent to receive them, there is no agreement between the parties; and if the goods be lost by the way, there can be no implied *assumpsit* to pay for them. *Bruce v. Pearson*, 3 J. R. 534.

113. Where there is a special agreement between the parties for goods to be delivered by

the plaintiff, and also for work to be done by the plaintiff in relation to those goods, and, after delivery, the defendant refuses to have the work done; the plaintiff may abandon the agreement, and bring his action on the general count for the goods delivered. *Linningdale v. Livingston*, 10 J. R. 36.

114. In an action for the price of a chattel, the defendant may prove deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or, if the unsoundness of the chattel produced only a partial diminution of the value, he may show the fact in mitigation of damages. *Beecker v. Vrooman*, 13 J. R. 302.

115. Where the defendant sold the plaintiffs a note of a certain corporation, and also two shares of the stock of the company, for which he was to be paid in whiskey, fraudulently representing the company to be good and responsible, when, in fact, he knew them to be insolvent; and the plaintiffs executed their notes to deliver the whiskey at a future day, which they delivered accordingly; and, afterwards, discovering the insolvency of the company, tendered to the defendant the note and stock received of him, and brought their action for the price of the whiskey; *held*, that the special contract was vitiated by the fraud of the defendant, by which the presumption that the note and stock were taken in payment was repelled; and that, had the plaintiffs been sued for the whiskey, this fraud would have been a good defence to the action; and the plaintiffs, therefore, might recover for the whiskey delivered, *on the [*69] count for goods sold and delivered. *Pierce v. Drake*, 15 J. R. 475.

(d) Work and labor.

116. Where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child; and he lived, and worked for him above eleven years, and his uncle said that his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising any thing to the nephew, or making him any compensation; *held*, that an action, or an implied *assumpsit*, would lie against the executors for the work and labor performed by the nephew, for the testator. *Jacobson v. Executors of Le Grange*, 3 J. R. 199.

117. The plaintiff, after he came of age, lived and worked with his father, the defendant, who said that he would reward him well, and provide for him in his will; *held*, that the plaintiff could not recover compensation for his services in the life-time of his father. *Patterson v. Patterson*, 13 J. R. 379.

118. But, it seems, that if the defendant should die without providing for the plaintiff in his will, the plaintiff would then be entitled to his action for a reasonable compensation for his services. *Ibid*.

119. No action lies, by a physician, for medicine administered to, and attendance on, a slave, without the knowledge or request of the master, in a case not requiring instant and im-

mediate assistance. *Dunbar v. Williams*, 10 J. R. 249.

120. But, it seems, if medical or other assistance be rendered to the slave, in a case of such pressing necessity as not to admit of a previous application to the master, the person rendering the assistance would be entitled to an action to recover a compensation from the master, on the implied *assumpsit*, arising from the legal obligation of the master to make the requisite provision for his slave. *Ibid*.

121. Where a contract is entered into for the sale of lands, under which the plaintiff enters and clears, and makes improvements, and the contract is afterwards rescinded, by reason of the defendant's refusal to convey; the law will not imply a promise, on the part of the defendant, to pay the plaintiff for his labor and improvements. *Gillet v. Maynard*, 5 J. R. 85.

122. Where there is a special agreement between the parties, and work has been done by the plaintiff, but not in pursuance of the agreement, he may recover on a *quantum meruit*. *Linningdale v. Livingston*, 10 J. R. 36.

123. Where A. applied to B. for his advice how to draw a sum of money from Scotland; and, according to B's advice, drew a bill of exchange in favor of B., who endorsed and negotiated it, and, the bill being returned protested, B. had to pay damages, &c.; held, that B., having acted as the agent of A. and in good faith, without any view to his own benefit, was entitled to recover of A. the damages, &c. so paid by him, as so much money paid for the use of A. *Ramsay v. Gardner*, 11 J. R. 439.

*124. Where one person employs [*70] the slave of another, the law implies a promise to pay the master for the services of the slave. *Cook v. Husted*, 12 J. R. 188.

125. A physician who furnishes medicine to, and attends upon, a pauper, cannot recover for his services from the overseers of the poor, unless performed at their request, or they have subsequently promised to pay for them. *Everts v. Adams*, 12 J. R. 352.

126. Where a servant is hired for a year, at a certain rate per day, it is an entire contract, and the servant cannot recover his wages until the expiration of the year. *Thorpe v. White*, 13 J. R. 53. And see *Jennings v. Camp*, 13 J. R. 94. *Webb v. Duckingfield*, 13 J. R. 390. ante pl. 95.

127. So, if a servant or laborer agrees to serve a certain length of time, to be paid at a certain stipulated rate for each determinate portion of work performed, and leaves his master before the expiration of the time, he can maintain no action to recover the price of the work actually done, at the rate agreed upon; for the contract is entire, and the mode of payment adopted by the parties does not disjoin it. *M^r Millan v. Vanderlip*, 12 J. R. 165.

128. But if, before the expiration of the year, the hirer gives the servant a note for the amount of the wages then earned, it is no defence, in an action on the note, that the payee left the service of the maker before the year, or the time for which he was originally hired. *Thorpe v. White*, 13 J. R. 53.

129. In an action to recover the price of labor, the defendant may show that the work was not done faithfully and in a workmanlike manner, in order to reduce the amount of the plaintiff's recovery. *Grant v. Button*, 14 J. R. 377. See *Beecker v. Vrooman*, 13 J. R. 302. ante pl. 114.

130. Labor and service voluntarily done and performed by the plaintiff, for the defendant, without his privity or request, however meritorious or beneficial it may be to the defendant, as, in saving his property from destruction by fire, affords no ground for an action. *Bartholomew v. Jackson*, 20 J. R. 28.

(e) Account stated.

131. The stating an account is in the nature of a new promise. *Holmes v. D'Camp*, 1 J. R. 34.

132. The defendant gave to the plaintiff a written memorandum of items of account, and he promised to pay to the plaintiff, or order, the amount specified, being for the value of a protested bill, &c.; and added, "The above is to be paid out of one half of the proceeds of provisions and lumber, addressed Messrs. H. & M., at B., after deducting your account;" held, that, whether the writing amounted to a promissory note or not, it was good evidence in support of a count on an *insimul computasent*. *Montgomery v. Ivers*, 17 J. R. 38.

133. The clause providing for the payment out of the proceeds, &c. was a qualified assignment of those proceeds, and an authority to H. & M. to discharge the debt. *Ibid*.

134. But the plaintiff was not entitled to recover the amount of the "de- [*71] fendant personally, without showing first, either that there was no such fund as the one designated, or that it was insufficient to pay the debt, or that he had applied to the holders of the fund, and had not obtained satisfaction out of it. *Ibid*.

(f) Money had and received.

135. A., a stockholder in an insurance company, assigned his stock to the plaintiff, who paid several instalments on it, but the company refused to transfer the stock, unless the plaintiff would pay them the amount of certain notes made by A., of which they were the holders, and which were not yet due; A. being insolvent, the plaintiff had no other way of indemnifying himself, but by procuring a transfer, and, accordingly, paid the money; held, that this payment was compulsory, and that the plaintiff might recover the money back. *Bates v. New-York Insurance Company*, 3 J. O. 238.

136. *Assumpsit* lies against a collector of the customs, to recover back tonnage duty, or light money, wrongfully demanded, and paid compulsorily, or in order to obtain a clearance, which was refused until the money was paid, without showing any notice to the collector not to pay over the money to the government of the United States. *Ripley v. Gelston*, 9 J. R. 201.

137. Where a vessel was seized under the non-intercourse acts of Congress, and the seizure was withdrawn, and the property liberated by

the custom-house officers, but the marshal refused to deliver it up to the plaintiff, without an order of the clerk of the District Court, who refused to give an order until his fees, and those of the attorney of the district, were paid, and the owners paid the fees demanded; *held*, that the payment of them not being a voluntary act, being exacted by the officer, *colore officii*, as a condition of the order for a redelivery, the exaction of them was illegal, and the costs might be recovered back, in an action of *indebitatus assumpsit*, at common law. *Clinton v. Strong*, 9 J. R. 370.

138. Though it belongs exclusively to the Court in which a suit has been originally instituted, to award costs; yet, if the suit be discontinued for want of cause, without any decision of the Court, the exaction of costs is an act *in pais*, and the money may be recovered back, by a suit against the officer, in any Court of competent jurisdiction. *Ibid*.

139. Where an agent receives goods, on condition to pay B., a creditor of the principal, and who is ignorant of the arrangement, a sum of money out of the proceeds, and the goods are sold; B. may have an action, for money had and received, against the agent, notwithstanding the principal had previously assigned the goods to C., without the knowledge of the agent. *Neilson v. Blight*, 1 J. C. 205.

140. *Assumpsit* lies by one tenant in common against another, who has sold the thing held in common, and received the money. *Seldon v. Hickock*, 2 C. R. 166. *S. P. Coles v. Coles*, 15 J. R. 159.

141. Where a person receives the money of another, and applies it to his own use, the law implies an *assumpsit* in favor of the [*72] person *to whom it ought to have been paid. *Administrators of Dumond v. Carpenter*, 3 J. R. 183.

142. Two persons go to a bank at the same time, and one deposits money there, which the other claims as his own, and has it carried to his account, but without the knowledge of the person depositing it, who does nothing to countenance the mistake; an action lies for its recovery, by the real owner of the money, against the bank. *Winter v. Bank of New-York*, 2 C. R. 337.

143. Where the defendant has covenanted to do a certain act, for which he has received a consideration from the plaintiff, and fails in the performance, the latter may disaffirm the contract, and bring *assumpsit* to recover back the consideration. *Weaver v. Bentley*, 1 C. R. 47. *But see ante* IV. (a) pl. 91.

144. After an agreement for the conveyance of lands has been executed by payment of the consideration, and delivery of the deed, in which the number of acres is expressed, if the vendee should find a deficiency in the quantity, he cannot bring an action for money had and received, to recover back a proportional part of the consideration money; his relief, if any where, is in equity. *Houses v. Barker*, 3 J. R. 506.

145. Positive evidence is not in all cases necessary, that the defendant had received money belonging to the plaintiff; but where, from the

facts proved, it may be fairly presumed that he had received the plaintiff's money, this action is maintainable. *Tuttle v. Mayo*, 7 J. R. 132. [See *Cumming v. Hackley*, 8 J. R. 202. See *Beardsley v. Root*, 11 J. R. 464.]

146. An action for money had and received will not lie against a public officer, to recover back money which he has collected by the direction of his official superior. *Potter v. Benness*, 1 J. R. 515.

147. So, it will not lie against an overseer of highways, for money collected by him under an assessment by the commissioners of highways. *Ibid*.

148. An assurer, who has paid a loss on a policy, cannot recover it back, unless he make out affirmatively a clear case of mistake as to the fact or the law. *Elting v. Scott*, 2 J. R. 157.

149. But whether a person who has paid money under a mistake of the law, and with full knowledge of the facts, can, in any case, upon that ground only, sustain an action for money had and received, *dubitat*. *Ibid*.

150. A. remitted 500 pounds to B., in London, to pay a bill for the same sum, drawn by his attorney, C., on B., pursuant to an agreement between them. The bill having been presented for payment before the funds had reached the hands of B., it was returned protested. Afterwards, another bill, for 112 pounds 10 shillings, drawn also by C., as attorney of A., in favor of D., was presented to B., who accepted and paid it, out of the 500 pounds, which had, in the mean time, come to his hands. *Held*, that though the 500 pounds were placed in the hands of B. for a specific purpose, yet C. had no right of action against D., to recover back the money paid to him, but must look to the other parties, to rectify the mistake, if any was made. *Dey v. Murray*, 9 J. R. 171.

*151. It does not lie, to recover [*73] back money voluntarily paid by the plaintiff, in order to obtain the performance of an agreement, for which he had no legal remedy. *Hall v. Shultz*, 4 J. R. 240.

152. A. verbally agreed to buy in the land of B., which was to be sold on execution, and reconvey it to him, on payment of the money advanced, and a reasonable compensation for his trouble; and A., having bought the land, refused to reconvey it to B., unless he paid 300 dollars beyond the sum advanced. A., having paid the money, cannot recover it back; for, the original agreement not being in writing, and consequently void, could not be enforced, and the reconveyance was to be considered in the light of a new purchase, for which B. was entitled to ask what he pleased, and, consequently, the payment of the 300 dollars was voluntary. *Ibid*.

153. And whether it lies in any case to recover back money voluntarily paid by the party, to obtain property illegally withheld from him, and for the recovery of which the law gives him an action? *Quere. Ibid*.

154. It does not lie, to recover back the amount of a judgment in an inferior Court, on the ground that the money was not due,

and had been unconscientiously recovered. *Cobb v. Curtiss*, 8 J. R. 470.

155. Money collected under a regular judgment cannot be recovered back in a new suit, on the ground that evidence has since been discovered of a good defence, which existed before the judgment. *White v. Ward*, 9 J. R. 232. [See 1 J. C. 436.]

156. If the maker of a note, which was endorsed after due, have previously paid it to the payee, and, in an action by the endorsee, neglect to set up the payment in bar, he cannot afterwards bring *assumpsit* for money had and received, against the payee. *Loomis v. Pulver*, 9 J. R. 244.

157. Where a bill of exchange was drawn by A., on B., in London, which came by endorsement to D., who remitted it to E., in payment of a debt, and, having been protested for non-payment, the protest, with the first of the set, was returned to D., and the amount of the bill, with damages, was paid to D., by the maker, who was ignorant that the drawer had, a few days after the protest, paid the amount of the bill, with all charges, on the second of the set of exchange, to E.; held, that the payment to E. was valid, and, D. having been paid under mistake of the fact, A., the drawer, might recover back from D. the money which he had paid him. *Durkin & Henderson, v. Cranston*, 7 J. R. 312. [See ante pl. 148, 149.]

158. Though an action for money had and received cannot, in general, be supported, unless the defendant has, in fact, received money; yet where an attorney or agent has discharged a debt due to his principal, and applied that debt to the payment of a debt which he himself owed to his principal's debtor, the amount of the debt which he has so discharged may be recovered in this form of action. *Beardsley v. Root*, 11 J. R. 464.

159. So, where an attorney issued execution on a judgment recovered by his client, and became himself the purchaser of the land sold under the execution, and paid for the same [*74] by discharging the judgment *against the defendant; held, that his client might maintain this action against him. *Ibid.*

160. It seems, that the taking negotiable paper is equivalent to the receipt of money, so as to authorize the maintaining of this action. *Ibid.* And see *Tuttle v. Mayo*, 7 J. R. 132.

161. *Assumpsit* lies to recover back money paid on a contract which has been rescinded. *Gillet v. Maynard*, 5 J. R. 85. *S. P. Raymond v. Bearnard*, 12 J. R. 274.

162. As where part of the purchase money of goods, which the plaintiff had agreed to call for and take away, within a certain time, was paid in advance, and the plaintiff did not call within the time, and, afterwards, demanded the goods, which the defendant refused to deliver; held, that the plaintiff was entitled to recover back the money paid in advance. *Raymond v. Bearnard*, 12 J. R. 274.

163. A demand, in such a case, before bringing the action, is not necessary. *Ibid.*

164. A tender of the money by the defendant will not extinguish the right of action, but merely preclude claim of interest. *Ibid.*

165. If the receiver of the money of another be directed by the principal to pay it over to a third person, and he expressly promises to pay it, such third person may maintain an action in his own name against the receiver, for so much money received to his use. *Weston v. Barker*, 12 J. R. 276. See ante I. pl. 1, 2, 3.

166. So where A. assigns securities to B. in trust, to dispose of part of the money to be received thereon to certain specified purposes, and to hold the balance subject to the order of A., and B. accepts the trust, and A. directs him to pay the balance to C.; an action for money had and received may be maintained by C. against B., to recover the balance; the acceptance of the trust being equivalent to an express promise to the person to whom A. should order the money to be paid. *Ibid.*

167. Money paid in advance, on account of services to be performed, may be recovered back, in case of non-performance, in an action for money had and received. *Wheeler v. Board*, 12 J. R. 363.

168. And the defendant is not bound to show a performance of the agreement on his part, but the plaintiff must prove a non-performance. *Ibid.*

169. Where A. becomes surety to the owner of a vessel, that certain seamen, shipped on board the vessel, shall proceed on the voyage, and the seamen receive wages in advance, which they pay to their surety as an indemnity, in case they should desert before the commencement of the voyage, the owner cannot maintain an action for money had and received, against the surety, for the money so advanced. *Dodge v. Lean*, 13 J. R. 508.

170. A., the administrator of an intestate's estate, under an order of the surrogate, sold certain land of the intestate, and took a bond and mortgage from the purchaser, for the purchase money; he, afterwards, drew an order upon the purchaser, in favor of B., for part of a debt due from his intestate to B., stating in the order, that the amount should be credited on the bond and mortgage; but the purchaser refused to pay the [*75] order, as the bond and mortgage had been assigned to C.; held, that A. having received the full amount of the bond and mortgage from the assignee, and being credited for the amount of the debt due to B., in his account with the surrogate, was liable, in his individual capacity, for the amount, as for so much money had and received to the use of B. *Mosher v. Hubbard*, 13 J. R. 510.

171. Where land is sold by the loan officers, for arrears due on a mortgage, the title of the mortgagor is entirely divested; and he cannot, afterwards, compel the purchaser to reconvey it to him, on payment of the purchase money; and, where there is no previous agreement to that effect, the purchaser will not be deemed a trustee for the owner; and, even if there was such a parol agreement, it would be void by the statute of frauds; and, therefore, where the owner of land mortgaged, and sold by the loan officers, paid the purchaser a sum of money to release his interest, he cannot maintain an action for money had and received,

to recover it back as received unconscionably, whether there was a previous parol agreement or not. *Sherrill v. Crosby*, 14 J. R. 358.

172. Where, on a parol agreement for the exchange of lands, which is void by the statute of frauds, the plaintiff delivered to the defendant the promissory note of a third person as a pledge, to be forfeited in case of the plaintiff's non-compliance with the agreement, and the defendant received payment of the note; *held*, that the plaintiff might recover the amount, in *assumpsit* for money had and received from the defendant, the delivery of the note being without consideration. *Rice v. Peet*, 15 J. R. 503.

173. Where the plaintiff claimed a sum of money of the defendant, who denied it, but promised, that if the plaintiff would swear to the correctness of the claim, he would pay it; and the plaintiff made affidavit accordingly; *held*, that the promise was valid, and, in an action of *assumpsit* to recover the amount sworn to, it was not competent to the defendant to prove, that the plaintiff had sworn falsely, or was mistaken in his affidavit. *Brooks v. Bull*, 18 J. R. 337.

174. Where money is paid by the plaintiff to the defendant by mistake, notice of the mistake, and demand of repayment, before bringing the action to recover it back, are not necessary; for the party receiving the money paid under a mistake of facts, is not a bailee or trustee, nor does his duty to return arise upon request. *Ulrica Bank v. Van Gieson*, 18 J. R. 485.

175. But if notice and demand were necessary in such a case, putting a letter containing such notice and demand in the post office, directed to the defendant, would be sufficient. *Ibid*.

176. *Assumpsit* for money had and received, does not lie against two defendants, without showing a joint contract, or that both received the money. *Manaham v. Gibbons*, 19 J. R. 109. 427.

177. Where the plaintiff purchased of a constable, at a sale under an execution issued by a justice, all the title and interest in a lease, or term for years, and paid part of the consideration money, and the constable refused to execute a conveyance of the premises, [*76] or to return the money paid; *held*, that there was a failure of consideration, as such an interest in land could not be sold, under an execution from a Justice's Court; and the plaintiff was, therefore, entitled to recover back the money paid. *Putnam v. Westcott*, 19 J. R. 73.

178. B. received from S. eight doubloons of gold, of the value of 122 dollars, which he afterwards paid to H., who endorsed that sum on the note of B. to him. H., a few days thereafter, returned the doubloons to B. as being light, and not of the value of 122 dollars, and B. took them back, and returned them to S. who received them, and promised to have them changed, and pay to B. 122 dollars, in other money. B. became insolvent, and in a settlement of accounts with S., he was credited

the 122 dollars; *held*, that an action for money had and received would not lie, at the suit of H. against S., to recover back the value of the doubloons, as the property in them had, by the redelivery to B., become transferred to him, and the payment on the note, by his taking them back, was virtually rescinded. *Hawkins v. Stark*, 19 J. R. 305.

179. To entitle a purchaser to recover back part of the consideration money, paid on a contract for the purchase of land, he must show that he has tendered the purchase money, and demanded a deed, so as to put the vendor in default. *Hudson v. Swift*, 20 J. R. 24.

180. Whether, in such case, the purchaser must not prepare and tender a conveyance to be executed by the vendor? *Quære. Ibid*.

181. A borrower, who has paid more than the legal rate of interest, is not confined to the remedy given by the statute, but may bring *assumpsit* for money had and received, to recover the excess of interest: but to maintain the action, he must show, that he has paid, or offered to pay, all the principal lent, and the lawful interest. *Wheaton v. Hubbard*, 20 J. R. 290.

See ante I. III.

See tit. AGREEMENT V. INSURANCE. WAGER. BILLS OF EXCHANGE, &c. USE AND OCCUPATION. SALE OF CHATTELS.

Pleadings in *Assumpsit*. See PLEADINGS.

*ATTACHMENT. [*77]

- I. *In what cases an attachment will be granted, and what will be admitted in excuse.*
- II. *Rule to shew cause, attachment, and subsequent proceedings.*

- I. *In what cases an attachment will be granted, and what will be admitted in excuse.*

1. If a witness merely disobeys a *subpoena*, the Court will, in the first place, grant a rule to shew cause. *Jackson v. Mann*, 2 C. R. 92.

2. But where he positively refuses to obey, an attachment will be granted in the first instance. *Andrews v. Andrews*, 2 J. C. 109. S. C. C. C. 119.

3. Bringing an action in the name of another person, without his privity or consent, is a contempt; and if the nominal plaintiff be non-suited, an attachment will be granted against the person who brought the suit, for the costs. *Butterworth v. Slagg*, 2 J. C. 291.

4. Denying any criminal or disrespectful design in publications reflecting on proceedings before the Court, will not justify the party, if they appear to the Court to amount to a contempt. *The People v. Freer*, 1 C. R. 485. 518.

5. But it is otherwise, if the facts charged amount only to a constructive contempt; and where the persons against whom the attachment is prayed came into Court, and disavowed, on oath, any intentional disrespect to, or contempt of, the Court, or any idea of influencing the course of justice, in the decision of a cause, and declaring that the publications complained of were resolutions passed at a public meeting

of the electors, and intended solely to influence the election of governor, the Court refused to make the rule for an attachment absolute. *The People v. Few*, 2 J. R. 290.

See CONTEMPT.

II. Rule to show cause, attachment, and subsequent proceedings.

6. Where the rule to show cause was delayed in the clerk's office, so that it could not be served in time, the Court ordered it to be renewed. *Waddington v. Chamberlin*, 2 C. R. 251.

7. On a rule to show cause, the defendant need not appear in person. *The People v. Van Wyck*, 2 C. R. 333. But the contrary is intimated in *The People v. Freer*, 1 C. R. 485.

8. Until the attachment against the sheriff is granted, the proceedings are entitled in the names of the parties in the civil suit. *Folger v. Hoogland*, 5 J. R. 235. *S. P. Matter of Bronson*, 12 J. R. 460.

9. But after the attachment has been granted, all the proceedings must be in the name of the people. *Ibid.*

*10. But, it seems, that affidavits to [*78] support a motion for an attachment against a printer of a newspaper, reflecting on the parties or proceedings in a cause pending in the Court, need not be entitled at all; and if entitled erroneously, they cannot be read. *Matter of Bronson*, 12 J. R. 460.

11. Whether they may not be entitled in the civil suit pending? *Quære. Ibid.*

12. The attachment is merely process to bring the party into Court to answer, which must be done, in every case, before the party can be convicted of a contempt. *Jackson v. Smith*, 5 J. R. 115.

13. If his answers show that no contempt has been committed, the party is entitled to his discharge; but, if the contempt be admitted, the Court proceeds to pronounce judgment according to the circumstances of the case. *Ibid.*

14. After the defendant is brought up on an attachment, the plaintiff must file his interrogatories in four days; and the defendant enter into a recognizance of 100 dollars, to appear *de die in diem*. *Herring v. Tylee*, 1 J. C. 31. *S. C. C. C. 64.*

15. The clerk must take the defendant's answers to the interrogatories filed, and report the same to the Court. *Ibid.*

16. Interrogatories, after the defendant has answered, may be amended, when the amendment does not relate to new matter, but is intended to explain an ambiguity, and obtain a fuller answer. *Ibid.*

ATTACHMENT against an attorney for misconduct. See ATTORNEY AND COUNSEL V.

— against a sheriff, for not returning process, or bringing in the body. See BAIL. SHERIFF.

— against a sheriff, for not returning an execution. See SHERIFF.

Foreign, when it may be pleaded. See PLEADING.

— against absconding and absent debtors. See ABSCONDING AND ABSENT DEBTORS.

ATTAINDER.

(a) *Effect of a conviction under the act of attainder of 1779; (b) Proceedings under the act, and how they are to be construed, and when valid; (c) Acts of the 12th May, 1784, 1st May, 1786, and 29th March, 1797, in relation to forfeited estates.*

(a) *Effect of a conviction under the act of attainder of 1779.*

1. By the act of attainder of October 22, 1779, the real and personal property of persons adhering to the enemies of the state was forfeited to the state. *Sleight v. Kane*, 2 J. C. 236.

2. So that one attainted by the act cannot sustain an action for rent ^{due} [*79] to him previous to the passing of the act, or make it a set-off in an action by his lessee. *Ibid.*

3. Attainder of the husband is not a bar to the wife's dower. *Palmer v. Horton*, 1 J. C. 27.

4. Lands descending to the defendant between the indictment and judgment, were forfeited by the act. *Jackson, ex dem. Pell, v. Prevost*, 2 C. R. 164.

5. By the act of attainder a condition was not forfeited; so that if the person attainted might, by performance of a condition, have vested an estate in himself, yet, after his attainder, the state cannot, by their performing it, vest the estate in him, and thereby subject it to forfeiture under the statute. *Jackson, ex dem. Gratz, v. Catlin*, 2 J. R. 248. *S. C. in error*, 8 J. R. 520.

6. A person attainted under the act is considered as *civilitur mortuus*. *S. C. 2 J. R. 248.*

(b) *Proceedings under the act, and how they are to be construed, and when valid.*

7. Proceedings under this act are to be construed by the rules in cases of attainder, and not by the ordinary course of judicial proceedings. *Jackson, ex dem. St. Croix, v. Sands and another*, 2 J. C. 267.

8. So, where the conviction contains an incomplete description of the person convicted, but not a false description, or repugnant to the truth, as, where *Joshua Temple De St. Croix* was convicted by the name of *Joshua De St. Croix*, it may be supplied, and the identity of the person ascertained by parol proof. *Ibid.*

9. If the addition of *junior* be omitted to the name of the person indicted, it will not vitiate the proceedings, the jury having expressly found him to be the person intended. *Jackson, ex dem. Pell, v. Prevost*, 2 C. R. 164.

10. A person who removed within the British lines, during the American war, and died there, in June, 1777, was presented by the grand jury, and indicted on the 5th May, 1780, for an offence charged to have been committed on the 15th of April, 1777, and, being convicted, judgment was signed the 14th July, 1783, and his estate forfeited and sold: the proceedings were regular; for the act extended to persons who were dead at the time of the indictment and conviction, as well as to such as were living, and the judgment on the attainder

was valid and effectual. *Jackson, ex dem. Williams, v. Stokes*, 3 J. R. 151.

11. The Court will not order a judgment under this act to be signed *nunc pro tunc*. *Scamman v. Miller*, 1 J. R. 148.

12. A conviction, after the preliminary articles of peace with Great Britain were signed, is void. *Jackson, ex dem. Robinson, v. Munson*, 3 C. R. 137.

13. The judgment, and not the signing the roll, is to be considered as the time of conviction; so that a judgment rendered in 1781, the record of which was not signed until 1783, is a good conviction, and not within the provisions of the treaty of peace with Great Britain. *Jackson, ex dem. The People, v. Snyder*, 1 J. R. 520.

[*80] **(c) Acts of the 12th May, 1784, 1st May, 1786, and 29th March, 1797, in relation to forfeited estates.*

14. After judgment for the plaintiff in ejectment, against the tenant, claiming as a purchaser from the commissioners for the sale of forfeited estates, the Court ordered the writ of possession to be stayed, until the plaintiff should make compensation to the tenant for his improvements, pursuant to the act of the legislature, passed the 12th May, 1784. *Jackson, ex dem. Robinson, v. Munson*, 1 J. R. 277.

15. The act of May 1st, 1786, to amend the act of May 12th, 1784, for the speedy sale of confiscated estates, is retrospective, and affects prior titles. *Brown v. Mitchell*, C. C. 84.

16. The act, limiting the period of bringing claims and prosecutions against forfeited estates, passed the 29th March, 1797, (sess. 11. c. 52.) does not extend to, or bar the claims of, the widows of persons attainted, of their dower in the estates forfeited, and sold by the commissioners of forfeitures. *Hogle v. Stewart*, 8 J. R. 104.

ATTORNEY AND COUNSEL.

- I. Admission of attorneys and counsel.
- II. Agents of an attorney.
- III. Duty and authority of an attorney.
- IV. Privilege of attorneys and counsel.
- V. Misconduct of an attorney, and how far a client will be protected in his dealings with his attorney.
- VI. Attorney's lien and remedy for his costs.

I. Admission of attorneys and counsel.

1. Serving a regular clerkship with a practising attorney for seven years, is necessary, in order to obtain an admission to practise as an attorney of the Supreme Court. General Rule I. October, 1797.

2. But, pursuing classical studies for four years, or less, after the person shall be fourteen years of age, will be accepted in lieu of an equal portion of time of clerkship. *Ibid.*

3. And, in such case, application must be made to a judge, who, on examination, will make an order purporting the length of time that it hath satisfactorily appeared to him that the person has pursued classical studies, and

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ordering the length of time that his clerkship shall continue. *Ibid.*

4. The order must be annexed to a certificate by the attorney, (which certificate is required in every case,) certifying that the person hath commenced a clerkship with him; which certificate must be filed, and the clerkship will be deemed to have commenced on the day of filing. *Ibid.*

*5. The certificate of clerkship [*81] should state that the clerk had served a clerkship regularly in the office of the attorney. 3 J. R. 261.

6. A clerk, to be entitled to admission, must have been in the office with, and under the personal direction of, the attorney. 4 J. R. 191.

7. The oath of office only is to be administered to persons admitted as attorney or counsel of the Supreme Court. Reg. Gen. Feb. 1805. 2 C. R. 387.

8. No person, not a natural born or naturalized citizen of the United States, can be admitted an attorney or counsellor of the Supreme Court. Reg. Gen. Aug. 1806. 1 J. R. 528.

9. But previous to this rule, alienage was no bar to admission. 2 C. R. 386.

10. Every attorney of the Supreme Court, having practised as such for three years, may be admitted as counsel. Reg. Gen. Nov. 1804. 2 C. R. 261.

11. Every person who has regularly pursued juridical studies, under a professor or counsellor at law, for four years, within this state, is entitled to a license to practise as counsel in this Court. Reg. Gen. Nov. 1803. 1 C. R. 494.

12. Every person who shall have been admitted as counsellor in any other state, and practised with reputation as such for four years in such state, is entitled to a license to practise as counsel in this Court. *Ibid.* But, by a rule of Friday, February 17, 1809, this part of the rule of Nov. 1803, is annulled. 4 J. R. 192.

13. It seems that the new constitution (Art. VI.) has not abrogated the provisions of the act to suppress duelling, which requires counsellors, attorneys, and solicitors, to take the oath prescribed in that act, in addition to the usual oath of office. *Matter of Oaths of Attorneys*, 20 J. R. 492. *Contra*, per Sanford, Ch. In the matter of Wood, 1 Hopk. Ch. Rep. 6.

II. Agents of an attorney.

14. Every attorney residing in Albany or New-York, must have an agent in the other of those places, and every attorney residing elsewhere, an agent in each of those places. Gen. Rule VIII. Jan. 1799.

15. The agent must be an attorney, and his appointment must be in writing, signed by the attorney, and filed in the clerk's office in the city where the agent shall reside. *Ibid.*

16. But deputy clerks, in either of the offices in this state, may be appointed agents. 4 J. R. 498.

17. The clerk must keep a book of the names of agents, and the attorneys appointing them; the latter in alphabetical order. *Ibid.*

18. Every attorney must have an agent residing in the village of Utica. Reg. Gen. Aug. 18, 1809. 4 J. R. 498.

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As to service of papers on an agent. See PRACTICE.

[*82] *III. Duty and authority of an attorney.

19. An attorney is not bound to proceed in a suit, unless the client pays his costs; nor will the Court compel him to proceed, without his costs are paid or secured. *Castro v. Bennett*, 2 J. R. 296.

20. If any attorney of the Supreme Court takes a counsellor into partnership, who is not an attorney, the attorney must have the whole and exclusive charge and superintendence of the attorney's business, for which he is responsible, so that no person can take any part in the conduct of the suit, on the ground of the partnership, whose office is kept at a different place from that of the attorney. *Matter of John Woodward*, 4 J. R. 289.

21. Where the evidence of a debt then due is left with an attorney, who gives a general receipt for it, it will be presumed that he received it for the purpose of collection; and if an action be brought against him for his negligence, by which the debt was lost, it is incumbent on him to show that he received it specially, and for some other purpose. *Executors of Smedes v. Elmendorf*, 3 J. R. 185.

22. Where an attorney appears for a party, the Court will look no further, but will proceed as if he had sufficient authority, and leave the party to his action against him. *Jackson, ex dem. Smith, v. Stewart*, 6 J. R. 34.

23. If an attorney appear for a defendant, (whether process has been served or not,) without his authority, and confess judgment, [or let it go by default,] the judgment is regular, and will not be set aside; but the attorney is liable to an action. *Denton v. Noyes*, 6 J. R. 296. See JUDGMENT.

24. The Court, in this case, ordered the attorney to show cause why an attachment should not issue against him. *Ibid*.

25. The general authority of the plaintiff's attorney ceases with the judgment, or, at least, with the issuing an execution within the year. *Jackson, ex dem. McCrea, v. Bartlett*, 8 J. R. 361.

26. The plaintiff's attorney, from his general character of attorney, has no authority to discharge the defendant from execution on a *ca. sa.* without satisfaction. *Ibid*. *S. P. Kellogg v. Gilbert*, 10 J. R. 220. See *Crary v. Turner*, 6 J. R. 51.

27. The attorney cannot enter a *retrazit*. Per *Kent*, Ch. J. *Ibid*.

28. The power of the plaintiff's attorney, after judgment, extends only to the issuing of execution and receiving the debt. Per *Kent*, Ch. J. *Ibid*.

29. A verbal authority to an attorney to appear in a cause, is not sufficient to enable him to release the interest of a witness. *Murray v. House*, 11 J. R. 464.

30. A plaintiff's attorney, by his general authority as attorney, cannot purchase land sold under an execution issued in the cause, for the benefit of, and as trustee for, his client. *Beardsley v. Root*, 11 J. R. 464.

31. An attorney, who receives a note

from his client to collect, is warranted by his general retainer, to bring a second suit on the note, after being nonsuited in the first, for want of due proof of the execution of the note. *Scott v. Elmendorf*, 12 J. R. 315.

IV. Privilege of attorneys and counsel.

32. An attorney defendant cannot, by plea, waive or destroy his privilege, for it is not allowed for his own sake, but for the sake of the Court, and the suitors in it. *Scott v. Van Alstyne*, 9 J. R. 216. See pl. 47.

33. It is sufficient for a plaintiff, proceeding by bill, that the defendant is an attorney *prouit patet per recordum*. *Ibid*.

34. If an attorney wish to get rid of his privilege, he must apply to the Court, who will strike his name off the roll, unless the application is made to avoid an impending censure of the Court. *Ibid*.

35. Where an attorney is sued in an inferior Court, in which he is privileged from arrest, the cause cannot be removed into the Supreme Court by *habeas corpus cum causa*. *Webb v. Cleveland*, 9 J. R. 266.

36. The privilege of attorneys of inferior Courts, from arrest by process from the Supreme Court, does not extend beyond the time of their necessary attendance on those Courts. *Gibbs v. Loomis*, 10 J. R. 463.

37. A counsellor of the Supreme Court is entitled to privilege. 2 C. R. 387.

38. An attorney who has ceased to practise for one year, and has entered into a different employment, loses his privilege. *Brooks v. Patterson*, 2 J. C. 102. S. C. C. 133.

39. Attorneys and counsellors are not privileged from serving in the militia. In the matter of *Bliss*, 9 J. R. 347.

40. Though their common law privileges cannot be taken away by general words in a statute, yet they may by its manifest intent. *Ibid*.

41. An attorney, sued jointly with others, is not entitled to privilege. *Tiffany v. Driggs*, 13 J. R. 252.

42. An attorney, sued in a Justice's Court, jointly with another defendant, cannot plead in abatement, that the Court of which he is an attorney is then sitting. *Ibid*.

43. Where process is issued out of a Justice's Court, against an attorney or counsellor, and served during the term or session of the Court of which he is an attorney or counsel, the defendant may plead his privilege in abatement, although the process was returnable after the term. *Gilbert v. Vanderpool*, 15 J. R. 242.

44. In suits against attorneys, not only the bill or declaration and notice to plead, but notices of all subsequent proceedings in the cause, must be served, personally, on the defendant or his agent. *Bridgeport Bank v. Sherwood*, 16 J. R. 43.

45. And, whether an attorney is sued by writ or bill, he is equally entitled to personal service of the declaration, and notice of subsequent proceedings. *Brown v. Childs*, 17 J. R. 1.

46. An attorney or counsel of the Supreme Court, who is a party to a suit, has no privilege as to the venue. *King v. Burr*, 20 J. R. 274.

*47. But now, by the statute, (Sess. [*84] 36 c. 48.) passed April 21, 1813, all officers of the S. Court, Courts of C. P. and Chancery, are made liable (except during the actual sitting of such Courts) to arrest on *mesne* process, and may be held to hail like other persons. *Secor v. Bell*, 18 J. R. 52.

48. Attorneys and other officers were always subject to be taken in execution; and they are relievable from the arrest only on motion, and under the circumstances of the case. *Ibid.*

49. If an attorney or counsellor of the Court be taken on a *ca. sa.*, during his attendance on Court, he may be discharged, on motion, and affidavit, &c. *Ibid.*

50. A judge at the circuit, or sittings, may, also, discharge him, under the like circumstances. *Ibid.*

51. A sheriff cannot take notice of the privilege of an attorney, nor can he discharge him from his custody, under the process of the Court, on his producing a writ of privilege; and if he do so, he is liable, as for an escape, for the amount of the debt, &c. *Ibid.*

52. And the privilege of attorneys, &c. from arrest, except during the actual sitting of the Court, being now taken away, they stand on the same ground as other persons, in respect to costs; and, if sued in the S. Court, by bill, during term, and less than 50 dollars is recovered, they are not liable for costs. *Foster v. Garney*, 13 J. R. 465.

V. *Misconduct of an attorney, and how far a client will be protected in his dealings with his attorney.*

53. The Court will relieve, in a summary way, against the misconduct of an attorney. *The people v. Smith*, 3 C. R. 221.

54. So, where an attorney retained money collected for his client, the Court ordered him to exhibit his counter demands, and pay the balance within a limited time, or that an attachment issue. *Ibid.*

55. So, for refusing or neglecting to pay over money collected for his client, a rule was granted for the attorney to show cause why an attachment should not issue. *The People v. Wilson*, 5 J. R. 368.

56. The Court will always look into the dealings between attorney and client, and guard the latter from imposition. *Starr v. Vanderheyden*, 9 J. R. 253.

57. And where a judgment was entered by an attorney, on a bond and warrant, against his client, and part of the sum for which the judgment was given included costs, the Court directed the clerk to inquire into the consideration of the bond, and to require the attorney to adduce proof of the consideration, or answer to interrogatories on oath; and the costs included in the bond to be taxed, and to make report thereon to the Court; and, in the mean time, all proceedings on the judgment to be stayed. *Ibid.*

58. A judgment, confessed by a client to his

attorney, will be permitted to stand only as a security for what is actually due. *Ibid.*

59. Where a person is made a lessor in ejectment, without his authority, and the plaintiff afterwards becomes nonsuit, the plaintiff's attorney, *and not the lessor, [*85] is liable for the costs. *The People v. Bradt*, 6 J. R. 318.

60. So, if A., not having any interest in the land, permit B. to use his name, as a lessor of the plaintiff in ejectment, on condition that he should not be at any further expense, and B. employs an attorney to bring the suit in the name of A., without informing him of the condition annexed to the authority, and A. is compelled to pay costs, he has a remedy, not only against B. but against the attorney, although the latter was ignorant of the condition. *Bradt v. Walton*, 8 J. R. 298.

VI. *Attorney's lien and remedy for his costs.*

61. In an action by an attorney for his costs, though he need not prove the original employment, yet he must show some recognition of him, by his client, as attorney, in the progress of the suit. *Hotchkiss v. Le Roy*, 9 J. R. 142.

62. Evidence that he acted as attorney, and that he was considered as such by the attorney of the opposite party, is insufficient. *Ibid.*

63. If the defendant pay to the plaintiff his debt and costs, after notice from the plaintiff's attorney not to do so, he pays the costs in his own wrong. *Pinder v. Morris*, 3 C. R. 165.

64. But where there is no notice to the defendant, or collusion between him and the plaintiff to deprive the attorney of his costs, the Court will permit him to enter satisfaction. *Ibid.*

65. A settlement of the costs, by the defendant, in whose favor they are awarded, with the plaintiff, is valid, if made without any notice from the defendant's attorney of any claim, or lien, and without any collusion to deprive the attorney of his costs. *The People v. Hardenbergh*, 8 J. R. 335.

66. The claims which an attorney may have on his client for extra services, or for counsel fees, make no part of the attorney's lien upon the taxed costs, or which the court will protect against the interference of his client. *Ibid.*

67. In several suits between the same parties, if the defendant has judgment in some, and the plaintiff recovers damages in others, the costs on the judgment for the defendant may be set off against the damages recovered by the plaintiff, but not against his costs. *Cole v. Grant*, 2 C. R. 105. *S. P. Devoy v. Boyer*, 3 J. R. 247.

68. Where the plaintiff, in the Supreme Court, recovers less than 50 dollars, the lien of his attorney extends only to the balance due after deducting the defendant's costs, and does not affect the equitable right of set-off between the parties; and that, notwithstanding the plaintiff is insolvent. *Porter v. Lane*, 8 J. R. 357.

69. Whether, in an action by an attorney against his client, to recover his fees, the defendant can set up the plaintiff's negligence in

conducting the suit, in bar? *Quære. Runyan v. Nichols*, 11 J. R. 547.

70. Such a defence, however, must be pleaded, or notice given, that it is intended to be insisted on at the trial; the defendant cannot give it in evidence under the general issue. *Ibid.*

*71. A defendant in a suit for an [*86] attorney's bill, cannot contest the items at the trial, but should apply to the Court, to have the bill taxed. *Scott v. El-mendorf*, 12 J. R. 315.

72. As between the attorney and client, the former is entitled to Common Pleas costs only, where the charges arise from his employment in a suit for the recovery of a sum less than 250 dollars; especially, where he brings his action on the implied *assumpsit*, arising from his retainer. *Ibid.*

73. The attorney has a *lien* on a judgment recovered by his client, for his costs; and if the defendant, after notice from the attorney, pay the amount of the judgment to the plaintiff, without satisfying the attorney for his costs, such payment is in his own wrong, and he is liable for the costs taxed. *Martin v. Hawks*, 15 J. R. 405.

74. A plaintiff obtained a judgment of six cents damages, with costs; the plaintiff's attorney gave notice to the defendant, to pay the amount of the judgment to him, and not to the plaintiff, and issued a *ca. sa.*, and directed the sheriff to pay over the money, when collected, to him, he being entitled to the whole amount except the six cents damages. The defendant was arrested on the *ca. sa.*, and the sheriff voluntarily suffered him to escape, and the attorney brought an action, in the name of the original plaintiff, against the sheriff, for the escape; *held*, that the sheriff could not avail himself of a release by the original plaintiff, in bar of the action, such release, executed after notice to all the parties of his *lien* for the costs, being a fraud on the attorney. *Ibid.*

When the attorney is liable to the opposite party for costs. See COSTS VII.

Costs in an action against an attorney. See COSTS II.

Private attorney, or attorney in fact. See PRINCIPAL AND AGENT.

Bill against an attorney. See PRACTICE.

ATTORNMENT.

1. An attornment by the husband of a guardian in *socage*, is void as against her children. *Jackson*, ex dem. *Sinsabaugh*, v. *Sears*, 10 J. R. 435.

2. Where land was mortgaged, and the mortgagor covenanted, that, on default of payment, the mortgagee, his heirs, &c. might enter; and, the mortgage having become forfeited, after the death of the mortgagee, C., who had married one of the daughters and devisees of the mortgagee, entered and took possession; *held*, that C. must be deemed to have taken possession on behalf of all the heirs

and devisees, and the tenants having attorned to him, the attornment was valid. *Jackson*, ex dem. *Livingston*, v. *De Lancey*, 11 J. R. 365.

3. Where a person enters upon land without title, and the tenants *sur- [*87] render their possession, and attorn to him, the attornment is void. *S. C.* 13 J. R. 537.

4. A void attornment is not the commencement of an adverse possession. *Ibid.*

5. An acquiescence on the part of a landlord, that his tenant should pay the rent to a third person, is sufficient to render an attornment valid. *Jackson*, ex dem. *Sherrill*, v. *Brush*, 20 J. R. 5.

6. A tenant of a mortgagor in possession, after the mortgage has become forfeited, during the continuance of the lease from the mortgagor, may attorn to, and take a lease from the mortgagee; and, in an action brought against him by the mortgagor for rent, under his lease, he may set up the attornment as a legal defence. *Jones v. Clark*, 20 J. R. 51. (By the statute, (Sess. 36. c. 63. s. 28. 1 N. R. L. 434.) attornments to strangers are declared to be void; but attornments made pursuant to, or in consequence of, any judgment at law, or decree, or order of Chancery, or with the privity and consent of the landlord or lessor, to any mortgagee, after the mortgage has become forfeited, remains as before.)

See LANDLORD AND TENANT.

AUDITA QUERELA.

1. An *audita querela* is a regular suit, in which the parties may plead and take issue, &c. *Brooks v. Hunt*, 17 J. R. 484.

2. An *audita querela* is in the nature of an equitable suit, in which the equitable rights of the parties will be regarded. *Waddington v. Vredenbergh*, 2 J. C. 227.

3. Where a party would take advantage of some matter of fact, as a release or payment, in discharge of a judgment, the proper course is by *audita querela*. *Wardell v. Eden*, 2 J. C. 258. *S. C.* 1 J. R. 531, note (a).

4. It seems, that the writ of *audita querela*, being an equitable remedy, is applicable rather to the case where the defendant is entitled to relief against a judgment, than to the case of an execution irregularly issued. *United States' Bank v. Jenkins*, 18 J. R. 305.

5. Where two suits are brought at the same time, for the same cause of action, and proceed, *part passu*, to judgment and execution, a satisfaction of either judgment may be shown upon *audita querela*, in discharge of the other. *Bourne v. Joy*, 9 J. R. 221.

6. A party who obtains his discharge under the insolvent act, after judgment, may be relieved by *audita querela*. *Baker v. Judges of Ulster*, 4 J. R. 191.

7. A *feoffee*, or purchaser of lands, or part of lands, subject to a judgment, cannot have an *audita querela*, *quia tunc*, against the *lands, or that part of them of which [*88]

he is *scoffee* or purchaser. *Waddington v. Vredenberg*, 2 J. C. 227.

8. It is usual to grant the same relief, on motion, as might be obtained by *audita querela*. *Baker v. Judges of Ulster*, 4 J. R. 191.

9. The writ must be allowed in open court, and is not of itself a *supersedeas*, which may be granted or not, according to the circumstances of the case. *Waddington v. Vredenberg*, 2 J. C. 227.

10. The proper process, where the party is not in actual custody, or where he sues *quia timet*, is a *venire facias*. *Ibid*.

AWARD.

I. *The submission, and parties to it; the effect of the submission, and how it is to be construed.*

II. *Arbitrator and umpire.*

III. *What is a good award; (a) How the arbitrators are to decide, and the effect of their decision; (b) An award must correspond with the submission, and what will be a sufficient conformity to it; (c) It must be final; (d) Certain; (e) And mutual; (f) What intendment will be made in support of an award; (g) Void in part.*

IV. *Performance of, and action to enforce, an award.*

V. *When an award will be set aside.*

I. *The submission, and parties to it; the effect of the submission, and how it is to be construed.*

1. A guardian may submit on the behalf of his ward, and the decision of the arbitrators will be conclusive. *Weed v. Ellis*, 3 C. R. 253.

2. A submission is to be expounded, not according to the strict technical meaning of the words, but according to their signification in common parlance. *Munro v. Alaire*, 2 C. R. 320.

3. A submission of all demands extends to real as well as personal property. *Ibid*.

4. A submission touching *divers other matters*, as well as those particularly mentioned, is equivalent to a general submission of all questions between the parties, and, under it, general releases may be awarded. *Ibid*.

5. Under a general submission of all causes of action, an allegation of a fraud in a sale is included. *De Long v. Stanton*, 9 J. R. 38.

6. Where a submission is general, of all actions, causes of actions, suits, &c., parol evidence is inadmissible, to show that the arbitrators awarded concerning a matter which was not in controversy between the parties, at the time of the submission. *Ibid*.

7. Where there is a submission of [*89] *all the demands*, which either *party had against the other, the award is a conclusive bar to an action for any demand, subsisting at the time of the submission and award, though the plaintiff can show, that the demand for which he sues was, by mistake, omitted to be laid before the arbitrators, and

was not considered or decided by them. *Wheeler v. Van Houten*, 12 J. R. 311.

8. A bond of submission cannot be revoked by parol. *Van Antwerp v. Steuart*, 8 J. R. 125.

9. A party to an arbitration bond may revoke the submission, or power, before an award is made; and the arbitrators cannot, after such revocation, proceed to make an award; but the penalty of the bond is, thereby, forfeited. *Allen v. Watson*, 16 J. R. 205.

II. Arbitrator and umpire.

10. Where a submission is to the arbitration of two, and if they cannot make their award within the time limited, that then they may appoint an umpire, the two arbitrators may appoint the umpire before they proceed to act on the matters submitted, and within the time limited. *McKinstry v. Solomons*, 2 J. R. 57. S. C. 13 J. R. 27. in error.

11. So, where arbitrators, or appraisers, in case of their disagreement, are authorized to choose an umpire. *Van Cortlandt v. Underhill*, 17 J. R. 405.

12. Where an umpire was appointed of and concerning the premises, and it was stated, that he took upon himself the burthen of the umpirage, it is to be intended, that he awarded concerning the subject-matters submitted. *McKinstry v. Solomons*, 2 J. R. 57. 13 J. R. 27.

13. Persons chosen by the parties to a lease, pursuant to an agreement contained in it, for that purpose, to appraise the value of buildings erected on the demised premises during the term, are to be considered as arbitrators, and their appraisement has the force and effect of an award. *Van Cortlandt v. Underhill*, 17 J. R. 405.

III. *What is a good award; (a) How the arbitrators are to decide, and the effect of their decision; (b) An award must correspond with the submission, and what will be a sufficient conformity to it; (c) It must be final; (d) Certain; (e) And mutual; (f) What intendment will be made in support of an award; (g) Void in part.*

(a) *How the arbitrators are to decide, and the effect of their decision.*

14. Arbitrators are to decide *secundum allegata et probata*, and their decision on the matter is final. *De Long v. Stanton*, 9 J. R. 38.

15. Where there are no legal objections appearing on the face of the award, it is final, and nothing *dehors* the award can be pleaded or given in evidence against it, except misconduct or corruption in the [*90] arbitrators. *Newland v. Douglass*, 2 J. R. 62. *Barlow v. Todd*, 3 J. R. 367. *Perkins v. Wing*, 10 J. R. 143.

16. An award of land pursuant to a submission, is sufficient to enable the party to whom it is awarded to recover in ejectment, and is a good defence to an action of trespass. *Sellick v. Addams*, 15 J. R. 197.

17. The award of land to one of the parties, stops the other from setting up a title to the

land awarded. *Per Thompson*, Ch. J. *Shepard v. Ryers*, 15 J. R. 497.
And see post V.

(b) *An award must correspond with the submission, and what will be a sufficient conformity to it.*

18. The authority given in the submission must be strictly pursued. *Pratt v. Hackett*, 6 J. R. 14.

19. It must be confined to the subject-matter of the submission. *Solomons v. McKinstrey*, 13 J. R. 27.

20. So, where the submission was, that the award should be delivered to the parties in difference on or before a certain day; in an action on the bond, the defendant pleaded, that no award was ready to be delivered to the parties, &c.; replication, that, though no award was ready to be delivered to the defendant, yet that an award was made, and ready to be delivered to the plaintiff, and was delivered to him, is bad, on general demurrer. *Pratt v. Hackett*, 6 J. R. 14.

21. Where the submission does not provide, that an award may be made by less than the whole number of arbitrators, an award by part of them, without the others joining, is bad. *Green v. Miller*, 6 J. R. 39.

22. If the subjects submitted be described by different names in the submission and the award, it will be sufficient if it appear that the same thing was intended in both. *Munro v. Alaire*, 2 C. R. 320.

23. A submission, *touching divers other matters*, as well as those particularly mentioned, is equivalent to a general submission of all questions between the parties, and, under it, general releases may be awarded. *Ibid.*

24. If special matters be submitted, and a general release awarded, it will enure only to the matter submitted. *Ibid.*

25. The condition to a bond of submission was, that the party should perform the award of the arbitrators, or a major part of them, so as the award be made in writing, under their hands and seals, &c. and ready to be delivered to the parties in difference, or any of them requiring the same, on or before the 1st of *September*. The arbitrators, on the 25th of *August*, made an award in writing, under their hands, which was produced, and twice read over to the parties, who appeared to be satisfied; and the defendant paid 63 dollars, being the fees of the arbitrators, and part of the sum awarded to be paid, and did not then demand a duplicate or copy of the award; but afterwards, on the 1st of *September*, made a demand of the award, or a copy, from several of the arbitrators, which was refused.

[*91] In an action on the *bond, *held*, that the conduct of the defendant at the time of the publication of the award, was a waiver of a more formal delivery of the award, and concluded him from alleging, afterwards, that it was not delivered according to the condition; and that the evidence of part performance was admissible to show such acquiescence. *Perkins v. Wing*, 10 J. R. 143.

26. A misrecital of the submission will not vitiate an award. *Doble v. Best*, 11 J. R. 103.

27. So, where a submission is special of one matter only, and the award recites a general submission of all matters, &c. referring to the arbitration bond, *as by the said bond may more fully appear*, the recital may be rejected as immaterial, and the award, being of a sum of money to be paid in full of the differences expressed in the recital of the bond, is good. *Ibid.*

28. Where there is a proviso in the bond of submission, that the award shall be in writing under the hands and seals of the arbitrators, an award in writing, but not under seal, is bad. *Stanton v. Henry*, 11 J. R. 133.

29. Where, on a submission to three arbitrators, one dissents from the award of the other two, who execute the award without the one dissenting, the award is valid. *Batley v. Button*, 13 J. R. 187.

30. An award, requiring one of the parties to the submission to cause a third person, whom it did not appear he had any right to dispossess, to deliver up the possession of land to the other party, is void. *Martin v. Williams*, 13 J. R. 264.

31. By an act of the legislature, passed the 8th of *June*, 1812, commissioners were appointed to settle disputes and controversies between persons claiming land under the patent of *De Bruyn*, and the possessors of land within that patent, who made their award as directed by the act; *held*, that the award could not be invalidated *as against law*, on the ground that a previous decision of the Court of Errors had fixed the boundaries of that patent differently from the commissioners, this being within the scope of the authority given to them by the act; nor, because it was not coextensive with the submission, which empowered the commissioners to award upon other claims than those derived from the patent, as it did not appear that such other claims had been brought before them; nor was the award *uncertain*, in awarding lands to the parties "according to their respective possessions," without further defining them, this being capable of being reduced to certainty; nor was it uncertain in the statement of the bounds of the patent, as no uncertainty as to the lines was affirmatively shown, and the commissioners, who viewed the land, annexed a map to their award, which might be referred to, to elucidate any obscurity; and that, although the commissioners had exceeded their powers in awarding as to lands without the patent of *De Bruyn*, yet that did not vitiate the whole award. *Jackson*, ex dem. *Van Allen*, v. *Ambler*, 14 J. R. 96.

32. Under a general submission, in which there is no mention of the *costs* of the arbitration, the arbitrators may, notwithstanding, award as to the costs. *Strang v. Ferguson*, 14 J. R. 161.

*33. Where A. and B. submit to [*92] arbitration a suit between C. and D., an award in that suit is not binding on the parties to the submission. *Vosburgh v. Bame*, 14 J. R. 302.

34. An award must decide on all the points or questions contained in the submission, otherwise it will be void; but then it must appear that the points not decided upon were actually in controversy between the parties. *Jackson, ex dem. Van Alen, v. Ambler*, 14 J. R. 96.

35. Under a general submission of all controversies and demands, the arbitrators may award as to real property; and, where an award settles the boundary of land, it is sufficient to enable the party to whom the land has been awarded to bring an action of ejectment; and is a justification in an action of trespass brought by the other party. *Sellick v. Addams*, 15 J. R. 197.

(c) *It must be final.*

36. An award must be final. *Purdy v. Delavan*, 1 C. R. 304.

37. An award of payment of a specific sum is final, and sufficient, without directing a release: from the party to whom it is paid, although the award state, that the party has a just claim *even to more, if insisted upon*. *M'Kinstry v. Solomons*, 2 J. R. 57. *S. P. S. C.* 13 J. R. 27.

38. If the award direct that, should any errors be found in the calculation, on proof thereof, the defendant is to refund the amount, this does not open the merits of the dispute, but the award remains final and valid. *Ibid.* *S. C.* 13 J. R. 27.

39. Where a suit is submitted to arbitration, it is not sufficient that the arbitrators determine the damages to be paid by the defendant to the plaintiff, with costs, or award in favor of the defendant, with costs, to be paid by the plaintiff; but they must also direct the suit to be discontinued or released, otherwise the award is not final. *Vosburgh v. Bame*, 14 J. R. 302.

(d) *Certain.*

40. An award must be certain. *Purdy v. Delavan*, 1 C. R. 304. *S. P. Jackson, ex dem. Van Alen, v. Ambler*, 14 J. R. 96.

41. But certainty, to a common intent, is sufficient. *Ibid.*

42. So, where parties to a suit submit their controversies to arbitrators, an award that *the said suit shall no further be prosecuted*, is sufficiently certain, and is a good bar to another action for the same cause. *Ibid.*

43. An award referring to certain extrinsic circumstances, is sufficiently certain. *Jackson, ex dem. Van Alen, v. Ambler*, 14 J. R. 96.

44. An award to finish the house, or to pay for the stove, without stating what house, or what stove, is void for uncertainty. *Schuyler v. Van Der Veer*, 2 C. R. 235.

45. An award to pay the costs of the arbitration, where no suit has been depending, without stating how much should be paid, is void. *Ibid.*

46. An award, that if A. should give B. good and sufficient security for the payment of certain sums of money, that then B. [*93] should do a *certain act on his part, without defining the nature and extent of the security to be given by A., is void

for uncertainty. *Jackson, ex dem. Stanton, v. De Long*, 9 J. R. 43.

(e) *And mutual.*

47. It is not requisite that the same acts, in the same unqualified manner, should be awarded on each side, to render the award mutual. *Munro v. Alaire*, 2 C. R. 320.

48. It is no objection, that one party is to perform something on his part, before the other releases, when matter is awarded to be done by that other, independent of the releases. *Ibid.*

49. An award, ordering the payment of a sum of money, carries in itself a mutuality, as it must be held to be in satisfaction of the matter submitted. *Weed v. Ellis*, 3 C. R. 253. See *Purdy v. Delavan*, 1 C. R. 304.

(f) *What intendment will be made in support of an award.*

50. An award may be intended, from circumstances set forth, to have been in writing, although the fact is not averred. *Munro v. Alaire*, 2 C. R. 320.

51. An award, stated to be in the form following, and in the body of it, as set forth, referring to the date, will be intended to be in writing; and the imperfection, if any, will be cured by the other party's answering over. *Ibid.*

52. It is not necessary to aver that an award is ready to be delivered, for that is implied, from the allegation that it is made. *Ibid.*

53. When the umpire was appointed of and concerning the premises, and it is stated that he took upon himself the burthen of the said umpirage, and made the award, it will be intended that the award was of and concerning the subject-matters submitted. *M'Kinstry v. Solomons*, 2 J. R. 57. *S. P. S. C.* 13 J. R. 27.

54. Words written in the margin of an award, by the arbitrators, in a distinct sentence, are to be considered as part of the award, and to receive the same construction as if inserted in the body of it. *Platt v. Smith*, 14 J. R. 368.

55. Where, in a copy or counterpart of an award, delivered to one of the parties, the word *dollars* was omitted; but in the other part, which was shown to the party at the same time, the word was properly inserted, the award was held good, and the omission in the copy immaterial. *Ibid.*

56. Where sworn copies of the award are delivered to the parties by the arbitrators, and received without objection, this will be deemed a waiver of their right to receive the original award. *Sellick v. Addams*, 15 J. R. 197.

(g) *Void in part.*

57. If an award be good in part, and bad in part, both parts, however, being dependent, the whole will be void; and it will not be sufficient *to assign the breach [*94] in the part which is good. *Schuyler v. Van Der Veer*, 2 C. R. 235.

58. Where part of an award, which is void, is not so connected with the rest as to affect the justice of the case, the award is void *pro tanto only*. *Martin v. Williams*, 13 J. R. 264.

59. Where part of an award is void, by reason of the arbitrators having exceeded their powers, it does not vitiate the residue of the award. *Jackson*, ex dem. *Van Allen*, v. *Ambler*, 14 J. R. 96.

IV. *Performance of, and action to enforce, an award.*

60. Payment of the sum awarded is equivalent to a final discharge from the party to whom paid; and from the payment a discharge will be presumed. *McKinstry v. Solomons*, 2 J. R. 57. *S. P. Per Kent*, J. *Purdy v. Delavan*, 1 C. R. 304.

61. No action lies on the penalty of an arbitration bond, for the non-performance of an award, where the award is not made within the time specified in the condition of the bond; though the parties, by an agreement under their hands and seals, had enlarged the time for making the award, and the award was made within such enlarged time. *Freeman v. Adams*, 9 J. R. 115.

62. In such case, the proper remedy is on the submission implied in the agreement to enlarge the time. *Ibid.*

63. A set-off is allowable against an award, in an action on the arbitration bond. *Burgess v. Tucker*, 5 J. R. 105.

64. So, an award for the payment of money may be set off. *Ibid.*

65. Notwithstanding a set-off, allowed in an action, on an arbitration bond, extending beyond the sum awarded, the penalty of the bond remains as security for all future breaches of the condition. *Ibid.*

66. Where an award creates a new duty instead of that which was in controversy, the party has his remedy on the award, and cannot resort to the original cause of action, for the award is a good bar to that action. *Armstrong v. Masten*, 11 J. R. 189.

67. Where fees are awarded to be paid by one of the parties to the arbitrators, it seems, that the other party cannot recover them, in an action on the award, at least, without actual payment by him. *Platt v. Smith*, 14 J. R. 368.

68. Under the plea of no award, the defendant may show that the arbitrators awarded on a matter not submitted to them. *Macomb v. Wilber*, 16 J. R. 227.

V. *When an award will be set aside.*

69. The matters submitted cannot afterwards be litigated, except where there has been corrupt or improper conduct in the arbitrators. *Shephard v. Watrous*, 3 C. R. 166. *S. P. Barlow v. Todd*, 3 J. R. 367.

70. So, if an action of slander be [*95] submitted, and the arbitrators award a sum of money for words which are not actionable, the Court will not interfere. *Shephard v. Watrous*, 3 C. R. 166.

71. The evidence of the arbitrators is inadmissible, to show a mistake, in making up their award. *Newland v. Douglass*, 2 J. R. 62.

72. Although Chancery may relieve, in the case of an award, yet there is no remedy for a mistake or miscalculation, in a Court of common law, where the submission is not

within the statute. *Ibid.* *S. P. Barlow v. Todd*, 3 J. R. 367. *S. P. Cranston v. Executors of Kenney*, 9 J. R. 212.

73. And, although the submission be made a rule of Court, the award cannot be inquired into, except for corruption or gross partiality. *Ibid.*

74. An award cannot be impeached, on the ground that it is against law, especially where the matter is referred to arbitrators, by an act of the legislature. *Jackson*, ex dem. *Van Allen*, v. *Ambler*, 14 J. R. 96.

75. Where the submission was pursuant to an act of the legislature, the award cannot be drawn in question, unless the arbitrators have exceeded their powers, or executed them imperfectly. *Ibid.*

76. If arbitrators refuse to hear evidence pertinent and material to the controversy, it is such a misconduct, as will vitiate the award in a Court of Chancery. *Van Cortlandt v. Underhill*, on appeal, 17 J. R. 405.

77. So, partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts, by either of the parties, if the knowledge of such facts would have produced a different result, are sufficient causes for setting aside an appraisement. *Ibid.*

78. So, if seems, if the assessment of damages, or appraisement, be so numerous and exorbitant as to induce a belief that the arbitrators must have been corrupt, or grossly partial, their appraisement or award may be set aside. *Ibid.*

See further tit. CHANCERY II. *Award.*

*BAIL.

[*96]

I. *Actions bailable and not bailable.*

II. *Discharging defendant without bail, or on filing common bail; and of mitigating bail.*

III. *Bail to the sheriff.*

IV. *Proceedings and action on the bail bond; (a) When and how the plaintiff may proceed on the bail bond; (b) When and on what terms the bail will be relieved.*

V. *Proceedings against the sheriff.*

VI. *Bail to the action; (a) Filing and giving notice of bail; (b) Exception, justification, and waiver of bail; (c) Filing common bail.*

VII. *Proceedings against bail on their recognizance; (a) Execution against the principal, and action against the bail; (b) When bail are fixed; (c) Surrender of principal in discharge of his bail; (d) Bail relieved, on their principal being discharged, as an insolvent, or bankrupt; (e) Other grounds for relief or discharge.*

VIII. *Bail in criminal cases.*

I. *Actions bailable and not bailable.*

1. In an action for slander, except slander of title, and for a libel, the plaintiff is not entitled to hold the defendant to bail, unless some

special cause be shown. *Clason v. Gould*, 2 C. R. 47.

2. An affidavit, merely stating the charge against the plaintiff, and that the same is false and malicious, is insufficient. *Ibid.*

3. And a judge's order to hold to bail in such case will be discharged. *Ibid.*

4. To authorize a judge's order to hold to bail in an action for a libel, the affidavit must not only state the libel, or cause of action, but some special reason for granting the order. *Norton v. Barnum*, 20 J. R. 337.

5. Although the contract, on which the action is brought, was made in a foreign country, by the laws of which, only the property, and not the person of the defendant, is liable, yet he may, notwithstanding, be held to bail here. *Smith v. Spinella*, 2 J. R. 198.

6. In an action of debt, to recover the penalty given by the 14th section of the act concerning distresses, rents, &c., the defendant may be held to bail. *Watts v. Taylor*, 13 J. R. 305.

7. In an action for damages, for the non-delivery of goods, pursuant to contract, the defendant may be held to bail, without a judge's order. *Bunting v. Brown*, 13 J. R. 425.

8. If a defendant is arrested, and held to bail in an action not bailable, an affidavit of cause of action, subsequently made, will not support the arrest. *Ibid.*

9. A person who has been arrested [*97] in another state, and discharged from imprisonment, under an act of the legislature of such state, may be arrested, and held to bail here, for the same cause of action, at the suit of the same plaintiff. *Peck v. Hozier*, 14 J. R. 346. [See *Sicard v. Whale*, 11 J. R. 194.]

10. Where the plaintiff is nonprossed for want of declaring, or discontinues the suit, on payment of costs, he may arrest the defendant *de novo*. *Ibid.*

II. Discharging defendant without bail, or on filing common bail, and of mitigating bail.

11. If a person be arrested before the debt is due, he should apply to the Court, or a judge, to be discharged. *Crygier v. Long*, 1 J. C. 393. & C. C. C. 103.

12. After filing bail, and pleading in chief, the application will be too late. *Ibid.*

13. A defendant will be discharged, on producing a certificate under the bankrupt law of the United States, obtained in another state. *Jones v. Emerson*, 1 C. R. 487.

14. On showing cause why a defendant, who has been arrested, should not be discharged on filing common bail, the affidavit of the debt or demand of the plaintiff must be positive, otherwise the Court will order the defendant to be discharged. *Welsh v. Hill*, 2 J. R. 100.

15. Counter affidavits may be received, at the discretion of the Court, or of a judge, at his chambers. *Ibid.*

16. But where the plaintiff swears positively to a debt, it would be improper to receive them. *Ibid.*

17. In an action by a consignee, for the non-delivery of goods, on affidavit by the plaintiff,

stating, that he could not certainly know that the goods in question were actually shipped, yet he had no doubt that they were shipped, as he received a regular invoice of them, and a bill of lading, signed by the defendant; that the goods were contained in trunks, one of which, on being opened, was found entirely empty, and several others partly empty, and had evidently been opened; a demand of the goods missing, and tender of the freight, and defendant's residence in *Liverpool*; held, that this was sufficient to prevent the defendant from being discharged on common bail. *Watkinson v. Laughton*, 4 J. R. 307.

18. In an action for a publication *prima facie* libellous, in which the defendant had been held to bail, by order of a judge, for 1000 dollars, on an affidavit of his being a transient person, resident out of the state, the Court would not discharge him, on filing common bail, or reduce the bail. *Van Vechten v. Hopkins*, 2 J. R. 293.

19. On a motion of the defendant to set aside a judge's order to hold to bail, a *supplemental* affidavit of the plaintiff, to cure the defect of his original affidavit, is not admissible. *Norton v. Barnum*, 20 J. R. 337.

20. A person arrested while attending a reference, was not discharged on motion, without notice to the plaintiff; but the Court granted a rule to show cause, and a stay of proceedings in the mean time. *Grover v. Green*, 1 C. R. 115.

*21. Where the creditor and debt- [*98] or reside in another state, and the debtor obtains his discharge under the insolvent law of that state, and is, afterwards, arrested at the suit of the creditor, in this state, for the same debt, the Court will not discharge him from the arrest, on filing common bail, nor order an *exoneratur* to be entered on the bail-piece. *Sicard v. Whale*, 11 J. R. 194.

22. If the sum in which a defendant is held to bail be too large, application may be made to a judge to mitigate it. *Bunting v. Brown*, 13 J. R. 425.

III. Bail to the sheriff.

23. If the Court, and place of the defendant's appearance, be substantially set forth in the bail bond, it is sufficient. *Stevens v. Clancy*, 1 J. R. 521.

24. If the sheriff, on arresting the defendant, take from him the promissory note of A., endorsed by the defendant in blank, as security, the assignment or transfer is illegal and void, being contrary to the statute concerning sheriffs; (1 N. R. L. 423.) and, in an action by the sheriff, as endorsee, against the maker, the latter may avail himself of the fact to defeat the action. *Strong v. Tompkins*, 8 J. R. 98.

25. If, after the arrest, and before the defendant has given bail, he is delivered over by the sheriff, by whom he was arrested, to his successor, the assignment will not affect his right to be discharged on giving bail. *Richards v. Porter*, 7 J. R. 137.

26. The sheriff is bound to give the plaintiff no other notice of his having taken a bail bond, than by his endorsement on the writ. *Ibid.*

27. If the former sheriff do not deliver the writ to the new sheriff, but returns it himself, *cepi corpus in custodia*, and the new sheriff lets the defendant to bail, he will not be liable to the plaintiff for not giving him notice; for the irregularity was in the old sheriff, in not handing over the writ. *Ibid.*

28. If, from a change of attorneys, a bail bond, taken by a plaintiff deputed to arrest, be lost, the Court will, after verdict, grant the plaintiff leave to file common bail, *nunc pro tunc*. *Nespiet v. Whipple*, 3 C. R. 88.

IV. Proceedings and action on the bail bond;

(a) *When and how the plaintiff may proceed on the bail bond*; (b) *When and on what terms the bail will be relieved.*

(a) *When and how the plaintiff may proceed on the bail bond.*

29. After bail has been put in to the action, the plaintiff cannot take an assignment of the bail bond, unless the bail has been regularly excepted to. *Ferris v. Phelps*, 1 J. C. 249. *S. C. C. C. 91.* *Caines v. Hunt*, 8 J. R. 358.

30. Where a bail bond is taken in [*99] a Court of Common Pleas, and *the bail reside out of the county, an action may be maintained by the assignee of such bond in the Supreme Court, who will grant relief to the bail on the same terms as if the bond had been taken in the Supreme Court. *Haswell v. Bates*, 9 J. R. 80.

31. So, where the bail resided in the county where the suit was brought, and the principal in another county, and the action on the bond was against both. *Gardiner v. Durham* and another, 12 J. R. 459. *See Davis v. Grille*, 7 J. R. 318.

32. But the bail are bound to pay Common Pleas costs only. *Ibid.*

33. Actions on recognizances of bail, or bail bonds taken in suits in the Court of Common Pleas, must be brought in the Court of the county in which the suit was originally commenced, if the parties to the recognizance, or bond, reside within the jurisdiction of such Court, and not be brought in this Court. *Burtus v. McCarty*, 13 J. R. 424.

34. Proceeding in the original suit, is a waiver of the proceedings on the bail bond. *Huguet v. Hallet*, 1 C. R. 55.

35. If the plaintiff proceed in the original suit, before the costs of the bail bond suit are paid, he cannot afterwards proceed on the bail bond to obtain them; and the Court will set aside the proceedings in the bail bond suit, on payment of the plaintiff's costs up to the time when special bail was entered and notice given. *Ibid.*

36. The plaintiff, after proceeding on the bail bond to judgment, and charging the principal and bail in execution, cannot waive these proceedings by filing common bail in the original suit, and proceeding to judgment therein; but is concluded, by his election to proceed on the bail bond. *Beecker v. Simmons*, 7 J. R. 119.

37. Where a sheriff, on being served with an attachment, for not bringing in the body of a defendant, pursuant to a rule of the Court,

procured a person (on promise of indemnity) to put in special bail in the original suit; *held*, that the sheriff could not maintain an action on the bail bond; for, there being an appearance according to the condition of the bond, the defendant might plead *compensat ad diem proventus patet*, &c. *Mathison v. Forbes*, 19 J. R. 292.

38. The sheriff, in such case, on being served with an attachment, should pay the debt and costs in the original suit, and then bring his action on the bail bond, or against the defendant, for so much money paid. *Ibid.*

(b) *When and on what terms the bail will be relieved.*

39. Bail to the sheriff will be relieved in all cases, upon the return of the writ against them. *Bulkley v. Colton*, 1 J. R. 515. *S. P. Haswell v. Bates*, 9 J. R. 80. *S. P. Ellis v. Berry*, C. C. 57.

40. The Court will not exercise its equitable power to relieve bail, until after a forfeiture of the condition. *Bird v. Mabbett*, 1 J. C. 31. *S. C. C. C. 65.*

41. If the principal die, and the bail afterwards be sued, proceedings will be staid, on payment of costs, on the return of the writ against them. *Bulkley v. Colton*, 1 J. R. 515.

42. In an action on a bond, conditioned for the payment of money, the bail below will be discharged on payment of the condition of the *bond in the original [*100] action, interest and costs, together with the costs of the bail bond suit. *Trudwell v. McKel*, 2 J. C. 340.

43. Where irregular notice of bail was given, but the plaintiff had not put the bail bond in suit at the subsequent term, the bail were relieved, on payment of costs, and justification, if required. *Gelston v. Swartwout*, 1 J. C. 136. *S. C. C. C. 76.*

44. If bail to the action have been put in, but no notice given, until after the bail below have been served with process, and then the defendant gives notice, and offers to justify, the bail bond suit will be staid on payment of costs. *Masterton v. Benjamin*, 2 C. R. 98.

45. It is not a loss of trial alone which will prevent the Court from interfering to relieve the bail, but that loss must be without neglect on the part of the plaintiff, and must be occasioned by the delay of the defendant, after bail is called for, by proceeding on the bail bond, &c. *Ellis v. Berry*, C. C. 57.

46. The original suit was settled, and the costs were agreed to be paid by the defendant, which he neglected to do; the plaintiff instituted a suit on the bail bond, in order to obtain his costs; the Court refused to set aside the proceedings. *Campbell v. Grove*, 2 J. C. 105. *S. C. C. C. 113.*

47. On staying proceedings, the defendant must plead in the original action, and tender the costs of the bail bond suit. *Huguet v. Hallet*, 1 C. R. 55.

48. In moving to set aside the proceedings, in a bail bond suit, the papers must be entitled in that suit. *Pell v. Jachin*, 3 J. R. 448. *Ex ecutors of Phelps v. Hall*, 5 J. R. 367.

V. Proceedings against the sheriff.

49. Where the defendant has put in bail to the action, although the bail may be insufficient, the plaintiff cannot proceed against the sheriff. *The People v. Stevens*, 9 J. R. 72.

50. It seems, that if the plaintiff delays, for a length of time, to call on the sheriff for bail, it will discharge him. *Ibid*.

51. Where the rule for bringing in the body had expired, but no trial had been lost, as the cause, being a junior one, could not have been tried at the last circuit, and the defendant had sworn to merits, and tendered the full amount in money, as security, which was refused, and the bail had since justified, the Court denied a motion for an attachment against the sheriff, on payment by him of the costs of the rule to show cause, and of the plaintiff's application. *Post v. Van Dine*, 1 J. C. 412. S. C. C. C. 106.

52. The sheriff must have twenty days' notice of the rule to bring in the body, before a motion for an attachment against him. *Stewart v. Williams*, 2 J. C. 71. S. P. M'Gourch v. Armstrong, C. C. 50. *Franklin v. Lamb*, 1 J. R. 508.

53. If the sheriff does not return the writ within twenty days after notice of the rule for that purpose, an attachment may issue against him immediately; but it is otherwise in the case of a rule to bring in the body. *Franklin v. Lamb*, 1 J. R. 508.

*54. The rule on the sheriff to [*101] bring in the body of the defendant cannot be served until twenty days after the time in which the writ is returnable have expired; and, it seems, that the rule ought not to be entered before that time. *Coons v. M'Manus*, 15 J. R. 181.

55. Where a sheriff returned *cepi corpus*, &c., to a *capias ad respondendum*, and the deputy sheriff who served the writ became special bail, of which notice was sent by mail, but not received by the plaintiff's attorney, who, eighteen months afterwards, ruled the sheriff to bring in the body of the defendant, and, on affidavit of service, &c., moved for an attachment against him, the deputy and his sureties having, in the mean time, become insolvent; the Court refused to grant the attachment, considering it unjust and unreasonable, that the sheriff should be liable to an attachment, after the plaintiff had lain by for so long a time. *Jourden v. Hawkins*, 17 J. R. 35.

56. All the proceedings, until the attachment, including the rule for the attachment, must be entitled in the original cause. *The People v. Ferris*, 9 J. R. 160.

Proceedings on an attachment. See ATTACHMENT II.

VI. Bail to the action; (a) Filing and giving notice of bail; (b) Exception, justification, and waiver of bail; (c) Filing common bail.

(a) Filing and giving notice of bail.

57. The defendant has twenty days from Saturday in the second week of term, within which to put in special bail. *Lane v. Cook*, 8 J. R. 359.

58. Notice of bail should not be given before

the bail-piece is actually filed. *Britt v. Van Norden*, 1 J. C. 390. S. C. C. C. 96.

59. And in such case the Court will direct the bail-piece to be considered as filed of the time when the notice was given, and will order the defendant's attorney to pay costs. *Ibid*.

60. A bail-piece in a cause, after an attempt by the bail to surrender, was not allowed to be amended, at the instance of the plaintiff, by striking out the words, "trespass on the case," and inserting the word *debt*, so as to make it conform to the action in which the principal was arrested; the plaintiff's attorney not having discovered the mistake, until after a suit against the bail. *Morrell v. Pixley*, 12 J. R. 256.

61. A bail-piece, although taken before a single judge, is, in legal contemplation, taken in Court; it is a mere memorandum of the recognizance authorizing the making up of the record; and when that is filed, it becomes a record of the Court, on which *scire facias*, or debt will lie. *Green v. Orington*, 16 J. R. 55.

(b) Exception, justification, and waiver of bail.

62. After bail has been put in, the plaintiff cannot take an assignment of the bail bond, but must except to the bail. *Ferris v. Phelps*, 1 J. C. 249. S. C. C. C. 95. S. P. *Caines v. Hunt*, 8 J. R. 358.

*63. The plaintiff, if he requires [*102] it, is entitled to two real persons as bail. *Wendover v. Ball*, C. C. 44. S. P. *Caines v. Hunt*, 8 J. R. 358.

64. If one real and one fictitious person be given as bail, the plaintiff cannot treat the bail-piece as a nullity, but must except to the sufficiency of the bail. *Caines v. Hunt*, 8 J. R. 358.

65. Where the defendant is taken in custody, in vacation, and bail are excepted to, they may justify before a judge at his chambers, in vacation. *Fenn v. Smith*, 6 J. R. 124.

66. Bail may justify before officers authorized to take recognizances, on due notice. Reg. Gen. August 22, 1816. 13 J. R. 422.

67. But a judge of the S. Court, before justification, may order it to be made in open Court. *Ibid*.

68. When justification is not in open Court, either party may appeal to the Court. *Ibid*.

69. An attorney of the Court is not good bail. *Coster v. Watson*, 15 J. R. 535.

70. A sheriff cannot be bail in this Court. *Bailey v. Warden*, 20 J. R. 129.

71. Where a declaration is filed in chief, after receiving notice of special bail, it is a waiver of any exception to the sufficiency of the bail, though the bail-piece was not actually filed in the clerk's office, at the time the notice was given; and the plaintiff cannot, on the ground of the insufficiency of the bail, proceed against the sheriff. *The People v. Stevens*, 9 J. R. 72.

72. Where bail is put in, and the plaintiff entered an exception on the bail-piece, and afterwards proceeded in the cause, without any justification of bail, or new bail, and obtained a judgment, it was held to amount to a waiver of bail, and that he could not proceed against the bail to whom he had excepted. *Flack v. Eager*, 4 J. R. 185.

73. No formal notice of a waiver of bail is necessary. *Ibid.*

(c) *Filing common bail.*

74. If the plaintiff chooses to file common bail, it may be done after forty days from the second week of term. *Lane v. Cook*, 8 J. R. 359.

75. Where the plaintiff's attorney was induced to direct the sheriff to take a particular person as bail for the defendant, on his promise to put in sufficient bail the next day, which he did not perform, and the bail already taken afterwards became insolvent, the plaintiff's attorney, after having filed common bail, was allowed, there being no opposition, to file special bail for the defendant, in order to surrender his body for his own protection. *Gilchrist v. Van Wageningen*, 1 C. R. 499.

[*103] *VIL Proceedings against bail on their recognizance; (a) Execution against the principal, and action against the bail; (b) When bail are fixed; (c) Surrender of principal, in discharge of his bail; (d) Bail relieved, on their principal being discharged as an insolvent or bankrupt; (e) Other grounds for relief or discharge.

(a) *Execution against the principal, and action against the bail.*

76. A *ca. sa.* against the principal must not only be sued out, but must be actually returned, *non est inventus*, and filed, before the plaintiff can proceed to charge the bail. *Pearsall v. Lawrence*, 3 J. R. 514.

77. It is not necessary that there should be eight days between the *teste* and return of the *ca. sa.* against the principal, where the proceedings are by bill. *Cook v. Campbell*, 3 C. R. 322. *S. P. Carmer v. Weeks*, 3 J. R. 246.

78. Where the original action is in the Common Pleas, if the bail remove out of the county, the action on the recognizance may be brought in the Supreme Court. *Davis v. Gillet*, 7 J. R. 318. See ante pl. 30, 31, 32, 33.

79. Taking the principal on a *ca. sa.* is a discharge of the bail, and no *exoneretur* need be entered. *Milner v. Green*, 2 J. C. 283.

80. After judgment against the bail, if the principal has been taken in execution, the plaintiff cannot issue a *ca. sa.* against the bail, or, if the bail have been taken in execution, he cannot proceed against the body of the principal. *Smith v. Rosecrantz*, 6 J. R. 97.

81. The bail are not discharged by the plaintiff's electing to sue out a *fi. fa.* in the first instance; and if part of the debt be levied on the *fi. fa.* he may, notwithstanding, resort to the bail for the residue. *Olcott v. Lilly*, 4 J. R. 407.

82. The statute requiring a *fi. fa.* to be first issued, where the defendant puts in special bail, (Sec. 36, c. 50. s. 7.) is for the benefit of the principal himself, not of his bail, who cannot plead that no *fi. fa.* had been issued prior to the issuing of the *ca. sa.* *Gillespie v. White*, 16 J. R. 117.

83. It is not necessary for the plaintiff, in declaring on a recognizance, to allege that a *fi. fa.* was previously issued. *Ibid.*

84. Where a *ca. sa.* is issued after a year and a day, without a previous *scire facias* to revive the judgment, the bail cannot take advantage of the objection. *Ibid.*

85. The rule of the Mayor's Court of the city of New-York, requiring a *ca. sa.* issued against the principal, for the purpose of charging his bail, to lie four days, exclusive, in the sheriff's office, means, that the return day only is to be exclusive, and not that the day on which it is delivered to the sheriff should be also excluded. *Ibid.*

86. Therefore, the rule of that Court is satisfied by delivering a writ to the sheriff on the 15th, returnable on the 19th of the month. *Ibid.*

87. Whether the bail, in an action on their recognizance, can plead that the *ca. sa.* against the principal did not lie four days in the sheriff's office. *Quare. Ibid.*

*(b) *When bail are fixed.* [*104]

88. After the return of *non est inventus* to the *ca. sa.* against their principal, the bail are fixed in law. *Rathbone v. Blackford*, 1 C. R. 588.

89. Where the bail are once fixed by the return and filing of the *ca. sa.* they take the risk of the death of their principal, and are not entitled to relief, on that ground. *Olcott v. Lilly*, 4 J. R. 407.

(c) *Surrender of principal in discharge of his bail.*

90. Bail are not fixed till the expiration of eight days, in full term, after the return of process against them, until the expiration of which time they may surrender their principal. *Kane v. Ingraham*, 2 J. C. 403. *Strang v. Barber*, 1 J. C. 329. *Ellis v. Hay*, id. 334. *Brown v. Smith*, 9 J. R. 84. *Broumelow v. Forbes*, 2 J. R. 101.

91. And the surrender may be made without application to the Court. *Ellis v. Hay*, 1 J. C. 334.

92. Permitting the bail to exonerate themselves, by a surrender of their principal, within eight days after the return of the process against them, is, technically speaking, *ex gratia*; but is, notwithstanding, in effect, no further *ex gratia* than that the costs in the suit on the recognizance are always required to be paid. *Broumelow v. Forbes*, 2 J. R. 101.

93. The bail are relieved after surrender of their principal, on motion, and not by plea. *Ibid.*

94. The time allowed the bail is *ex gratia*, and they must, at their peril, surrender at that time. *Olcott v. Lilly*, 4 J. R. 407.

95. Where the defendant is in prison on a charge of felony, he may, at the instance of his bail, be brought up on a *habeas corpus*, that he may be surrendered. *Biggnell v. Forrest*, 2 J. R. 482.

96. The *exoneretur* will be allowed, although the bail have been indemnified by their principal. *Broumelow v. Forbes*, 2 J. R. 101.

97. The principal was sued in 1800, and made no defence, but judgment was not docketed until 1808; in the mean time, the defendant had been in gaol, and was reputed insolvent, and some time after removed into another

state; the bail were arrested on a writ, returnable in May term, 1809; on the ground of surprise, on the part of the plaintiff, the Court, in August term, 1809, permitted the bail to surrender their principal, on payment of costs of the suit on recognizance. *Livingston v. Barlles*, 4 J. R. 478.

96. If a plaintiff elect to sue special bail jointly, he who is first taken shall have time to surrender, till the last is taken also, and till the time allowed the last for surrendering is expired. *Ballard v. Kibbe*, C. C. 51.

99. If he sues them separately, then each may be separately fixed; or one may be fixed, and the other may afterwards surrender the principal, and be discharged; so that, in fact, the plaintiff may have the body in custody, and, at the same time, go on with a suit against the other bail, who has been fixed; but he can have but one satisfaction. *Ibid*.

100. The time for surrendering the principal was enlarged on an affidavit, [*105] *stating the service of the *capias* to have been made but a few days before its return, and the residence of the defendant and his bail at a great distance from the place of holding the Court. *Van Rensselaer v. Hopkins*, 3 C. R. 136.

101. The Court refused to enlarge the time for surrendering, on an affidavit, stating, that the bail had mistaken the time of the return of the *capias* against him, and the absence of the principal from the state. *Rathbone v. Warren*, 4 J. R. 310.

102. Bail may depute another to take and surrender their principal. *Nicolls v. Ingersoll*, 7 J. R. 145.

103. The right to surrender results from the relation between the bail and principal, is to be effected as circumstances shall require, and is not a personal power or authority, to be executed by the bail only. Per *Thompson, J.* *Ibid*. That bail may depute *ex necessitate*. [See *Boardman v. Fowler*, 1 J. C. 413.]

104. The bail may take their principal out of the jurisdiction of the Court in which they entered into their recognizance, and that even in a different state. *Nicolls v. Ingersoll*, 7 J. R. 145.

105. So, bail to an action, in *Connecticut*, were allowed to take their principal here. *Ibid*.

106. After demand, they may break open an outer door. *Ibid*.

107. And may take their principal on a Sunday, and confine him till the next day, and then surrender him. Per *Thompson, J.* *Ibid*.

108. Sunday is to be reckoned one of the eight days. *Brown v. Smith*, 9 J. R. 84.

109. The sickness of the bail is an excuse for not surrendering the principal within the eight days. *Boardman v. Fowler*, 1 J. C. 413. S. C. C. C. 108.

110. The *exoneretur* will be permitted to be entered where the surrender has been duly made, after the expiration of the eight days. *Strang v. Barber*, 1 J. C. 329.

111. Where a suit is brought on the recognizance, and the principal is surrendered within the time allowed, the costs must be paid before an *exoneretur* can be entered. *Parker v.*

Tomlinson, 2 J. C. 220. S. P. *Brownlow v. Forbes*, 2 J. R. 101.

112. When exonerated on payment of costs the bail must seek the plaintiff, and pay them without waiting for a demand, or tender of a bill. *Cathcart v. Cannon*, 1 J. C. 220. S. C. C. C. 80.

113. Where, on a surrender and *committitur* of the defendant, by his bail, the plaintiff consented to an *exoneretur*, this was deemed a sufficient discharge, as it regarded the plaintiff; as the *exoneretur* might be entered by the bail, at any time, and pleaded. *Kellogg v. Manro*, 9 J. R. 300.

(d) *Bail relieved on their principal being discharged as insolvent or bankrupt.*

114. The discharge of the defendant, under an insolvent or bankrupt law, before the bail are fixed, entitles them to an *exoneretur*, without a surrender of their principal. *Kane v. Ingraham*, 2 J. C. 403. *Seaman v. Drake*, 1 C. R. 9

*115. And the *exoneretur* may be entered, although the application be [*106] made after the expiration of the eight days. *Seaman v. Drake*, 1 C. R. 9.

116. So, proceedings against the bail will be staid, after declaration, plea and demurrer, in the suit against them. *Riddles v. Mitchell*, 1 C. R. 11. note.

117. The discharge of the principal, under a bankrupt or insolvent law, is equivalent to a surrender, so that if obtained at any time before the period allowed the bail *ex gratia* has expired, they may avail themselves of it; but this is the only instance in which the bail will be relieved, where the event, on which the application is grounded, took place after they were legally fixed. *Olcott v. Lily*, 4 J. R. 407.

118. A person was arrested on *mesne* process, and continued in prison 60 days; in the mean while, he was fixed as bail; he afterwards was declared bankrupt, under the law of the United States, and received his discharge; held, that the act of bankruptcy was not consummate until the last of the 60 days, and that the recognizance of bail was a debt provable under the commission, and that an execution, issued on the judgment on the recognizance, should be set aside, with costs. *Rathbone v. Blackford*, 1 C. R. 588.

119. Where the defendant neglected to avail himself of his discharge under the insolvent act, but allowed judgment to be perfected against him, the Court would not, on motion of his bail, order an *exoneretur* on the bail-piece. *Mechanics' Bank v. Hazard*, 9 J. R. 392. S. P. *Post v. Riley*, 18 J. R. 54.

(e) *Other grounds for relief or discharge.*

120. The Court may, in their discretion, order a *vacatur* of the bail, when it appears they have been *personated*; but if the personating was felonious, they will stay it, until the party personated has prosecuted the felon to effect. *Renoard v. Noble*, 2 J. C. 293.

121. In *scire facias* against bail, the defendant pleaded that another person of the same name and description became bail, and *traversed* that he was the person named in the bail-piece.

The name of *Elnathan Noble* was inserted in the bail-piece, but it was proved that *Stephen Norton* was the person who intended to be bail, and who, in fact, appeared before the judge who took and signed the acknowledgment of the bail-piece. *Held*, that the plea was good; and that the evidence was admissible and sufficient, on the issue joined between the parties, as to the identity of the person. *Ibid*.

122. Bail are entitled to an *exoneretur*, where their principal is committed to prison for life. *Cathcart v. Cannon*, 1 J. C. 28. S. C. C. C. 60.

123. So, where their principal has been convicted of felony, and sentenced to imprisonment in the state prison of another state, for a term of years. *Loflin v. Fowler*, 18 J. R. 335.

124. Where there was an irregularity in the proceedings against the bail, and they suffered two terms to elapse without taking notice of it, they were not allowed afterwards to avail themselves of the objection. *Jones v. Dunning*, 2 J. C. 74.

*125. If the debt in the suit against [*107] the principal has been paid, that is matter to be pleaded by the bail, and not ground for their relief on motion. *Mechanics' Bank v. Hazard*, 9 J. R. 392.

126. Where the bail are fixed, they cannot plead to a suit on their recognizance, that the principal debt had been recovered in another suit, (as, where the defendant was bail for the endorser, and the debt had been recovered against the maker of a promissory note,) such recovery not being a discharge of the defendant or his principal, until the costs of the suit against the principal are also paid. *Wattles v. Laird*, 9 J. R. 327.

127. But when damages are assessed on the recognizance, the bail may give the recovery of the debt in evidence, in mitigation, and the assessment will only be for the costs of the suit against the principal, which, (the plaintiff having entered judgment *pro forma* for the whole penalty,) together with the costs of the suit against the bail, the plaintiff may levy on his execution. *Ibid*.

128. Where a plaintiff made a written agreement with a defendant, against whom he had obtained judgment, and who was about going to sea, that he would not issue out execution against him, for the purpose of fixing the bail, until after a certain day, and the defendant paid the plaintiff a sum of money, in consideration of this indulgence, and this arrangement was made without the knowledge and consent of the bail, it was *held* to discharge them. *Rathbone v. Warren*, in error, 10 J. R. 587.

129. And, the bail being fixed at law, and prosecuted on the recognizance, *held*, that a Court of equity might afford relief, and grant a perpetual injunction, the remedy at law being doubtful. *Ibid*.

130. Though nothing passes between the bail and the plaintiff in a cause, yet bail are considered, by act and operation of law, as *sureties*, and are entitled to the benefit of the general principles relative to sureties, as applicable to them. *Ibid*.

131. After the return of *non est inventus* to a *ca. sa.* against the defendant, his bail gave their

note to the plaintiff for the amount of the judgment. The judgment having been reversed in error, the payee cannot recover against the makers of the note; the consideration, that is, the judgment against their principal, having failed. *Tappen v. Van Wagenen*, 3 J. R. 465.

Proceedings in *scire facias*. See *SCIRE FACIAS*.

VIII. Bail in criminal cases.

132. Bail is not required, where the defendant removes the proceedings under an indictment for a forcible entry and detainer. *Case v. Shepherd*, 2 J. C. 27.

133. Where a defendant, convicted of a conspiracy, was brought up for judgment, which the Court did not pronounce, the record of conviction *not being [*108] before them, he was admitted to bail. *M'Neill's case*, 1 C. R. 72.

See *tit. CHANCERY, Bail*.

BAIL IN ERROR. See *ERROR*.

BAILMENT.

1. A mere naked bailee of goods is not liable to an action for them, at the suit of the bailor, until after a demand and refusal of them. *Brown v. Cook*, 9 J. R. 361.

2. A. received of B. a bill of exchange, drawn by C., and which he promised to return to B. on demand, or pay the amount thereof: though the bill was received by A. as a matter of courtesy, and was to be used for the benefit of B., yet as A. did not return the bill on demand, nor in due season, *held*, that, under the circumstances of the case, he was liable to B. for the amount. *Rutgers v. Lucet*, 2 J. C. 92.

3. Where a slave is delivered to a person to be kept, or, upon trial, until the bailee should determine whether he would buy him or not, the bailee is not bound to keep him constantly under his eye; and if he permits him to go a short distance from his house, and the slave runs away, he will not be liable to the bailor. *De Foncleur v. Shottenkirk*, 3 J. R. 170.

4. Where no time has been fixed for the redemption of a pledge, the pawnor may, at any time, redeem, and the right of redemption does not terminate by his death, but survives to his personal representatives, against the pawnee and his representatives. Per *Kent*, J. *Cortchou v. Lansing*, 2 C. C. E. 200.

5. But the pawnee may, by calling upon the pawnor to redeem, and his refusal, vest in himself the absolute property of the pledge. *Ibid*.

6. Where the pawnee has incapacitated himself from performing the contract on his part, as by selling the pledge, the pawnor need not tender the sum borrowed, in order to entitle himself to an action. *Ibid*.

7. A pledge differs from a mortgage; the legal property continues with the pawnor, and the pawnee has only a special property; but in a mortgage the legal property is in the mortgagee; and a mortgage of goods is, in some cases, valid without delivery; but not so a pledge. *Ibid*. But see *Barrow v. Paxton*, 5

J. R. 258. where *Kent*, Ch. J., says, that there was no decision of the Court in the case of *Cortelyou v. Lansing*, and that the opinion reported as his, was merely one which he had prepared; the cause having been settled by the parties, before judgment. The points stated in that opinion are, however, no where denied to be good law, and are sanctioned by the Court, in *M'Lean v. Walker*, 10 J. R. 471.

8. If A. deliver cattle to B., who [*109] promises to redeliver them in *one year, with the natural increase, and to pay for such as should be lost or destroyed, and not returned, it is a letting to him of the chattels for one year, for a valuable consideration, and not a mere naked bailment. *Pulnam v. Wyley*, 8 J. R. 432.

9. Where the promissory note of a third person is deposited by a debtor with his creditor, as collateral security for a debt, such note is a pledge, in which the pawnee has merely a special property, the general ownership remaining in the pawnor. *Garlick v. James*, 12 J. R. 146.

10. The pawnee's authority extends no further than to receive the amount of the note from the maker, and not to compromise with him for a less sum than appears on the face of the note, or to dispose of it in any other manner, until after the pawnor's default in redeeming. *Ibid*.

11. Where the pledge is for an indefinite period, the pawnor should be called on to redeem, before the pawnee can dispose of the property; or, if he is absent, or cannot be found, judicial proceedings should be had, to bar his right of redemption. *Ibid*.

12. Any damage happening to a chattel, while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was hired, must be sustained by the bailor. *Millen v. Salisbury*, 13 J. R. 211.

13. So, if a horse is hired to go a journey, and during the due prosecution of the journey it becomes lame, without any ill treatment by the hirer, he is not answerable for the damage. *Ibid*.

14. Where a written agreement, dated 2d September, 1808, between A. and B., stated, that A. thereby delivered to B. a certain promissory note of C., for 200 bushels of wheat, valued at 200 dollars, payable in February, 1811, and engaged, in case the wheat did not sell for 200 dollars, to make up the deficiency; and B. thereby gave to A. the power of redeeming the note, by paying 186 dollars, with 3 $\frac{1}{4}$ per cent. interest, any time within six months of the time the note was payable; *held*, that the note was deposited as a pledge, and not as a mortgage, and that a tender by A. of the 200 dollars, on or before the day the note fell due, was sufficient to entitle him to a return of the note; and on such tender and refusal by B., A. might maintain trover for the note. *M'Lean v. Walker*, 10 J. R. 471.

15. The plaintiff sent to the defendant, a miller, a quantity of wheat, to be exchanged for flour, at the rate of a barrel of flour for every five bushels of wheat. The defendant mixed the plaintiff's wheat with the mass of wheat,

of the same quality, belonging to himself and others; but, before the flour was delivered to the plaintiff, the defendant's mill was entirely destroyed by fire, without any fault or negligence of the defendant; *held*, that the defendant was not responsible for the loss of the plaintiff's wheat, there being no contract of sale by which it was transferred to the defendant. *Seymour v. Brown*, 19 J. R. 44.

Further, as to the distinction between a pledge and a mortgage. See MORTGAGE.

See TROVER. COMMON CARRIERS. TV. CHANCERY, Bailment. Pledge.

*BANKS AND BANKING. [*110]

1. A clerk in the bank, who acted as a book-keeper, and whose particular duty it was to keep the ledger, into which the entries are copied from the teller's cash-book, received money from A., who was a dealer with the bank, for the purpose of having the same deposited in the bank, and which he entered in the ledger, and afterwards into the dealer's bank-book, but which was not received by the teller, nor entered in his cash-book, and was supposed to be embezzled, with other moneys, by the clerk, who absconded; *held*, that the clerk, in making the deposit, was the agent of A., and not of the bank; and that A. must be answerable for the deficit in the deposit. *Mahhattan Company v. Lydig*, 4 J. R. 377.

2. Whether due diligence was used by the bank to detect the fraud of the clerk, is a question of law: if the bank take the usual and customary mode to detect the frauds or mistakes of its clerks, it will be sufficient evidence of due diligence. *Ibid*.

3. If a dealer with the bank send his bank-book with money to be deposited, and the clerk enters the amount to his credit, in the bank-book, at the time the deposit is made, it is conclusive on the bank; *aliter*, if the deposit is first made, and the entry is afterwards copied from the ledger into the dealer's bank-book. *Ibid*.

4. An entry by a teller, or clerk, of a bank, of the amount of a deposit, in the bank-book of a dealer with the bank, being the act of the agent of the bank only, and not of both parties, is not conclusive. *Mechanics' Bank v. Smith*, 19 J. R. 115.

5. If, therefore, the dealer can afterwards prove that there was a mistake in the entry, he may recover, in an action for money had and received, the sum not credited to him. *Ibid*.

6. Though an incorporated bank may be authorized to make by-laws, rules, and regulations, &c., such by-laws and rules cannot affect the rights or interests of third persons. *Ibid*.

7. A by-law, or rule, therefore, of a bank, that all moneys made and received must be examined at the time, does not preclude a party dealing with the bank, from showing, afterwards, that there was a mistake in his account of deposits and receipts. *Ibid*.

8. The act to restrain banking associations

(2 N. R. L. 234.) extends only to associations or companies formed for banking purposes, and not to an individual who carries on banking operations alone, and on his own credit and account. *Bristol v. Barker*, 14 J. R. 205.

9. The act of April 17, 1816, "further to suspend, for the period therein mentioned, the restriction on banks issuing bills less than the amount of one dollar, and for other purposes," (Sess. 39. c. 222.) is a remedial law, and is to be liberally construed. *Thorp v. Chesebman*, 16 J. R. 264.

10. A bill, or note, in the form and similitude of bank bills and notes, payable on demand, in notes current at the Bank of Albany, or in current bank bills, is a bill payable in the bills or current notes of an incorporated company,

within the meaning of the third [*111] section of the statute, (Sess. 39. c. 222.) in which the bearer, after demand of payment, may maintain an action, in his own name, against the maker, and may give such bills, or notes, in evidence, under the money counts, in *assumpsit*. *Ibid*.

11. The remedy given by this statute to the holder of such notes, against the maker, extends as well to notes issued, and bearing date before, as to those dated after the passing of the act. *Ibid*.

12. The refusal of a bank to pay specie, and the consequent stoppage of its bills, is not sufficient evidence of its insolvency, to prevent, on that ground, a bona fide purchaser or holder of its bills, after that time, from setting off such bills, in a suit brought against him by such bank. *Jefferson County Bank v. Chapman*, 19 J. R. 322.

13. Whether a previous demand of payment of a bank note, at the bank, is requisite to enable the holder to maintain a suit thereon, or to set off the note in a suit brought by the bank against him? *Quære. Ibid*.

Bond of indemnity by a clerk in a bank. See BOND.

See UTICA BANK CORPORATION.

CHENANGO BANK. TV. CHANCERY, Banking.

BANKRUPT.

See Act Cong. 6. sess. 1. c. 19. April 4, 1800. (Expired in 1806.)

(a) Construction and effect of the bankrupt law of the United States, and what debts are provable under the commission; (b) Frauds in relation to the bankrupt law; (c) Actions by and against the assignees.

(a) Construction and effect of the bankrupt law of the United States, and what debts are provable under the commission.

1. The bankrupt law of the United States did not affect any preceding judgment, or other lien, on the property of the bankrupt. *Livingston v. Livingston*, 2 C. R. 300.

2. If the commissioners specify a day on which a man became bankrupt, it is not conclusive, but the party may show it to have

happened on another day. *Rathbone v. Blackford*, 1 C. R. 588.

3. A person committed to prison on *meane* process, where he remained for sixty days, was, in the mean while, fixed as bail; after the expiration of that time, he was declared bankrupt, and obtained a discharge; *held*, that the act of bankruptcy was not consummate until the last of the sixty days, and that he was discharged from the recognizance, which was a debt provable under the commission. *Ibid*.

4. If a bankrupt, before his bankruptcy, received money on a promise to put it out on bond and mortgage, which he neglected to do, *he is not liable in a [*112] special action on the case, the demand being provable under the commission. *Hatten v. Speyer*, 1 J. R. 37.

5. If a demand be provable under the commission, the plaintiff cannot, by varying the form of his action, preclude the defendant from taking advantage of his certificate. *Ibid*.

6. A person hiring a house for a year, during which time he becomes bankrupt, and is discharged, and occupying it after his discharge, will be liable for the use and occupation since his bankruptcy. *Hendricks v. Judah*, 2 C. R. 25.

(b) Frauds in relation to the bankrupt law.

7. If a person, when in contemplation of bankruptcy, pay money, or give security to a creditor, it will be valid, if the effect of measures taken by the creditor. *Ogden v. Jackson*, 1 J. R. 370.

8. But if done without compulsion, and with a view to prefer one creditor to another, it will be fraudulent and void. *Ibid*.

9. M. and S., being in embarrassed circumstances, on the 15th April, 1800, executed a conveyance of certain lands, which, by a declaration in writing executed by them, on the 31st May, 1800, they declared to be in trust to pay particular creditors, in preference. On the 13th June, 1800, they drew an order on one F., their agent, directing him to pay to R. such moneys of theirs as should come to his hands from certain persons, which order was accepted by F. on the same day. On the 11th July, 1800, M. and S. committed an act of bankruptcy, and on the 18th July, 1800, were duly declared bankrupts, under the law of the United States, which took effect on the 1st June, 1800. In an action brought by the assignees of M. and S. against F., it was *held*, that the order and acceptance amounted to an assignment, and fixed the fund irrevocably, and that the order was not given in contemplation of bankruptcy, so as to make it fraudulent under the bankrupt law. *McMonney v. Ferrers*, 3 J. R. 71.

See further tit. CHANCERY, Bankrupt, D.

(c) Actions by and against the assignees.

10. A suit may be brought in this state in the name of a foreign bankrupt, and he may be joined with the assignees of a copartner, who is bankrupt in this country. *Bird et al. v. Carlat*, 2 J. R. 342. *Dubitator, Bird et al. v. Pierpont*, 1 J. R. 118, in which the Court were equally divided. [See *Murray v. Murray*, 5 J. C. R. 60.]

11. A suit cannot be brought at common

law here, in the name of the foreign assignees, but it must be in the name of the bankrupt. *Ibid.*

12. In an action brought by the assignees, the defendant cannot set off a check issued by a bankrupt, payable to bearer, bearing date before the bankruptcy, unless he proves further, that the check came to his hands prior to the bankruptcy. *Ogden v. Conley*, 2 J. R. 274.

See *tit. CHANCERY, Bankrupt, C.*

[*113] *BARGAIN AND SALE.

1. A bargain and sale of land to A., to hold the same to A., in trust for B. and C., their respective heirs and assigns, forever, in fee simple, creates only a life-estate in A., and, at his death, the legal estate reverts to the heirs of the grantor; and B. and C. can only resort to a Court of equity to enforce the trust. *Jackson*, ex dem. *Ludlow*, v. *Myers*, 3 J. R. 388.

2. A deed of bargain and sale, without any pecuniary consideration, is void. *Jackson*, ex dem. *Houseman*, v. *Sebring*, 16 J. R. 515.

3. In a deed of bargain and sale, the use can be limited to no other person than the bargainee, in whom alone the legal estate can be executed. *Jackson*, ex dem. *White*, v. *Cary*, 16 J. R. 302. *S. P. Jackson*, ex dem. *Ludlow*, v. *Myers*, 3 J. R. 388.

4. Therefore, if A. bargain and sell to B., and C., his wife, in fee, in trust for the heirs of B., on the body of C. begotten, the legal estate vests in the bargainee, and passes, after the death of B., to C., his wife, and not to the heirs of B., begotten on the body of C., whose interest is of a kind which can be enforced only in equity; and as, in ejectment, the legal title only is regarded, a grantee of one of the heirs cannot recover against the wife, or the survivor. *Jackson*, ex dem. *White*, v. *Cary*, 16 J. R. 302.

5. The words for value received are sufficient to raise a use. *Jackson*, ex dem. *Hudson*, v. *Alexander*, 3 J. R. 484. *S. P. Jackson*, ex dem. *Bond*, v. *Root*, 18 J. R. 60.

6. The words make over and grant are sufficient to pass lands by way of bargain and sale. *Ibid.*

7. So, the words remise, release, and forever quitclaim, or the words release and assign, will raise a use by way of bargain and sale. *Jackson*, ex dem. *Salisbury*, v. *Fish*, 10 J. R. 456.

8. No precise form of words is required to raise a use; and if the words amount to a present contract of sale or bargain, a use is raised, which the statute will execute. *Ibid.*

9. If a valuable consideration be proved, it is sufficient, though no consideration is expressed in the deed. *Ibid.*

See USE. See also DEED.

As to a bargain and sale of goods. See SALE OF CHATTELS.

BASTARD.

1. Although the mother have no settlement in the town where the child is born, yet the
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overseers of that town may apply for, and the justices may make, an order of filiation. *Wyntkoop v. Overseers of New York*, 3 J. R. 15.

*2. Where the mother has no [*114] settlement within the state, the child must be adjudged to be settled where it was born. Per *Kent*, Ch. J. *Ibid.*

3. The law declaring that every bastard child follows the settlement of the mother, applies only to cases where the mother has a legal settlement within the state. Per *Kent*, Ch. J. *Ibid.*

4. By the statute, *Sess. 36. c. 78. s. 3* (1 N. R. L. 279.) which altered the common law, in this respect, every bastard child is to be deemed and adjudged settled in the city or town of the last legal settlement of the mother. *Overseers of the Poor of Canajoharie v. Overseers of Johnstown*, 17 J. R. 41. *Contra, Delavergne v. Naxon*, 14 J. R. 333. in which the attention of the Court was not called to the third section of the act relative to the poor.

5. It makes no difference whether the settlement of the mother of such child is acquired by birth from her father, or derived to her, through him, by reason of his acquiring a new settlement, she being, at the time of such change of settlement of her father, in his family and under age. *Overseers of the Poor of Canajoharie v. Overseers of Johnstown*, 17 J. R. 41.

6. A warrant against the putative father, can only be issued on the application of the overseers of the poor. *Wallsworth v. McCullough*, 10 J. R. 93.

7. An action lies by the overseers of the poor, on an order of bastardy, to recover of the putative father the weekly sum directed by such order to be paid, for the maintenance of the child. *Wallsworth v. Mead*, 9 J. R. 367.

8. Such order, unless appealed from, is conclusive on the defendant. *Ibid.* *S. P. The People v. Relyea*, 16 J. R. 155.

9. And it is *prima facie* evidence of the plaintiff's demand; and it lies on the defendant to show its reversal or modification, by the Sessions, or other matter of discharge. *Ibid.*

10. A previous order of a justice of the peace is not necessary, where security is given by a bond, for the maintenance of a bastard child or helpless pauper; but only in case of the voluntary application of the pauper himself for relief. *Falls v. Belknap*, 1 J. R. 486.

11. A party, who has given a bond for indemnifying the town against the maintenance of a bastard child, and who has already made a payment in pursuance of such bond, is concluded from alleging that the child's settlement was elsewhere. *Ibid.*

12. The surety of such indemnity bond, given to save harmless the town, from time to time, and at all times hereafter, is holden after the child has arrived at the age of 21 years, and as long as he shall continue chargeable. *Ibid.*

13. Such surety is not entitled to the custody of the child, for he is no more than a stranger. *Ibid.*

14. The mother of a bastard child, four years old, is entitled to its custody, and the putative father, and his surety, on a bond given for the maintenance of the child, cannot exonerate themselves from liability by demanding the child. *Carpenter and another, Overseers of Stephenstown, v. Whitman*, 15 J. R. 208. *S. P. The People v. Landt*, 2 J. R. 375.

*15. But if it appear that the [*115] child is abused, the Court will interfere in behalf of the child, on *habeas corpus*, and direct it to be placed elsewhere. *The People v. Landt*, 2 J. R. 375.

16. The recognizance given by the putative father of a bastard child, under the act, (Sess. 36. c. 12. s. 4.) is not within the seventh section of the act for the amendment of the laws; (1 N. R. L. 518.) and, therefore, in an action upon such recognizance, the damages are not assessed, but the verdict must be for the amount of the penalty, the whole of which is to be recovered, and is not merely to stand as security for future breaches. *Ibid.*

17. If an order of filiation is made, and is afterwards quashed, by consent of parties, that a second order might be made, a second order of two justices, out of Sessions, is valid, and cannot be impeached collaterally. *Ibid.* *The People v. Relyea*, 16 J. C. 155.

18. Where an order of filiation and maintenance has been made by two justices of the peace, against the putative father of a bastard child, and the child has been supported and maintained by the mother, an action of *assumpsit* will not lie by the mother against the overseers of the poor, for the maintenance and support of the child, without showing an express promise to pay for the support, or that the overseers had received money under the order. *Overseers of Dover v. Howard*, 12 J. R. 195.

19. And in such an action, it is competent for the overseers to show that the child had not a settlement in the town, notwithstanding the order of the justices. *Ibid.*

20. On an appeal to the Sessions, from an order of bastardy, the order is considered as *prima facie* evidence of the truth of the facts stated in it, and the onus of impeaching it is thrown on the appellant. *Sweet v. Overseers of Clinton*, 3 J. R. 23. [But now, by the statute passed February 14, 1813, (Sess. 36. c. 12. s. 12.) the sessions must begin *de novo*, and require the party in whose favor the order was made, to substantiate the same by evidence, except in case of the death of the mother of the child. 1 N. R. L. 310.]

21. On appeals, in cases of bastardy, the sessions have no power to award costs, unless authorized by statute; and no such authority existed under the act of the 6th March, 1801. The act of the 30th March, 1810, (Sess. 33. c. 109.) does not apply to appeals brought before the passing of the act. *Washburn v. Overseers of Hebron*, 9 J. R. 119.

22. The Court of General Sessions of the Peace have no authority to make an original order of filiation and maintenance in a case of bastardy. *Van Wageningen v. Overseers of Kingston*, 10 J. R. 56.

*BILL OF EXCEPTIONS. [*116]

1. A bill of exceptions ought to be on some point of law, arising upon a fact not denied, in which either party is overruled by the Court. *Graham v. Cammann*, 2 C. R. 168.

2. It does not lie to the charge of a judge for misdirection, as to a matter of fact; the proper course is to apply for a new trial. *Ibid.*

3. It does not draw the whole matter into examination, but only the points to which it is taken, and the party must lay his finger on the points which arise, either in admitting or refusing evidence, or in a matter of law, arising from a fact not denied, in which he is overruled by the Court. *Frier v. Jackson*, 8 J. R. 495.

4. The facts, on which a bill of exceptions is taken, must be reduced to writing at the time and presented distinctly to the Court, if the trial were in the Common Pleas, during the continuance of the term. *Midberry v. Collins*, 9 J. R. 345.

5. In the case of an appeal to the sessions from an order of two justices, no bill of exceptions lies. *Sweet v. Overseers of Clinton*, 3 J. R. 23.

6. A *mandamus* lies to the Common Pleas, to compel them to seal a bill of exceptions. *The People v. The Judges of Westchester*, 2 J. C. 118. *The People v. The Judges of Washington*, 1 C. R. 511. *Sikes v. Ransom*, 6 J. R. 279. *Pomroy v. Preston*, 2 C. R. 373.

7. So, to amend a bill of exceptions, according to the truth of the case. *Sikes v. Ransom*, 6 J. R. 279.

8. But it will not be granted, if it appears from the affidavits that the bill of exceptions was untrue; and the relator shall, in such case, pay costs to the defendants. *The People v. The Judges of Westchester*, 2 J. C. 118.

9. Regularly, a bill of exceptions ought to be tendered at the trial, and the Court is not bound to seal it at the subsequent term. *Sikes v. Ransom*, 6 J. R. 279.

10. Where a bill of exceptions was tendered to the Court of Common Pleas in *January* term, and application was made in *June* term, to amend it, which the Court refused, the Supreme Court denied a motion for a *mandamus*. *Ibid.*

11. A bill of exceptions, tendered after the jury have returned into Court with their verdict, but before it was delivered, is in season, as to any exception to the charge of the judge, but not as to any question of evidence arising at the trial. *Lanuse v. Barker*, 10 J. R. 312.

12. Where, on the return to a *mandamus*, it appeared that the bill of exceptions was not tendered to the judges of the Common Pleas until after the Court had adjourned for the term, and was then presented to them individually, at different times, the Supreme Court refused to grant a peremptory *mandamus*. *Midberry v. Collins*, 9 J. R. 345.

13. It must be presented to the judges of the Common Pleas, and be signed and sealed by them, while they are sitting together as a Court. If presented [*117] to, and signed by them, separately,

out of Court, it is irregular. *Clark v. Dutcher*, 19 J. R. 246

14. When the judge of the inferior Court comes into the Supreme Court to confess or deny his seal, the only question that can be asked him is, *Is this your seal, or not, put to this bill of exceptions?* Any question, as to the proceedings below, are inadmissible. *Croswell v. Byrnes*, 9 J. R. 288. n. (a.)

15. A bill of exceptions, signed by two judges only of the Court of Common Pleas, is not such a bill of exceptions as the Supreme Court will judicially take notice of, or grant a writ requiring the justices to come in and confess or deny their seals. *Pratt v. Malcolm*, 13 J. R. 320.

16. The decision complained of should appear to have been made by three judges at least, being the smallest number that can constitute a Court of Common Pleas. *Ibid.*

17. A bill of exceptions does not lie in a criminal case. *The People v. Holbrook*, 13 J. R. 90.

18. Where the record is made up, a general assignment of errors to a bill of exceptions is sufficient. *Shepard v. Merrill*, 13 J. R. 475.

19. Whether a verdict is against evidence or not, is a point which cannot be raised on a bill of exceptions. *Foot & Reynolds v. Wiswall*, 14 J. R. 304.

20. The rule of practice as to cases reserved, does not apply to bills of exceptions; and an order to stay proceedings is unnecessary, as it may be granted of course. *Hasbrouck v. Tappan*, 15 J. R. 182.

21. Where the sole question, on a bill of exceptions from an inferior Court, turns on the competency of a witness produced to testify to a fact, which was fully proved by other witnesses on the trial, the Court cannot reject the evidence as unnecessary; although the party might have waived the testimony of the witness who was objected to, and then the Court below would have been justified in refusing to seal the bill of exceptions. *Marquand v. Webb*, 16 J. R. 89.

[*118] *BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Form and requisites*; (a) *What notes are within the statute*, Sess. 24. c. 44.; (b) *Inland bills, bills or notes payable to bearer, and bank checks*; (c) *Consideration and construction of a bill or note.*

II. *Transfer and endorsement.*

III. *When a bill or note is void*; (a) *Want of consideration, illegal consideration, and fraud*; (b) *When the consideration may be inquired to, and effect of the want or illegality of the consideration, or of fraud as between the immediate parties to the bill or note, or to the transfer*; (c) *As between parties not immediate; and herein, of the consequences of the transfer of a bill or note, after it has become due; and when it will be intended to have been so transferred.*

IV. *Acceptance and non-acceptance.*

V. *Payment and non-payment*; (a) *When and how payment is to be made*; (b) *When and how demand of payment is to be made*; (c) *When it will be excused.*

VI. *Notice of non-acceptance and non-payment*; (a) *When and how to be given*; (b) *When want of notice, or irregular notice, will be excused.*

VII. *Liability of the parties, and how discharged.*

VIII. *Action on a bill or note*; (a) *When and by whom the action may be brought*; (b) *Declaration*; (c) *Action on a lost note, and when a bill or note may be given in evidence under the money counts.*

IX. *Damages and interest.*

I. *Form and requisites*; (a) *What notes are within the statute*, Sess. 24. c. 44.; (b) *Inland bills, bills or notes payable to bearer, and bank checks*; (c) *Consideration and construction of a bill or note.*

(a) *What notes are within the statute*, Sess. 24. c. 44.

1. A note, payable in *York state bills*, or specie, is negotiable within the statute; *York state bills* meaning bank paper, which is commonly regarded as cash. *Keith v. Jones*, 9 J. R. 120.

2. A promissory note, payable "*in bank notes current in the city of New-York*," is a negotiable note within the statute. *Judah v. Harris*, 19 J. R. 144.

3. A note may be a good promissory note within the statute, without the words *bearer or order*. *Ibid.* *S. P. Downing v. Backenstoes*, 3 C. R. 137.

4. A note, by which A. promised to pay the president, directors, and company, of a turnpike road, 125 dollars, for five shares of the capital stock of the corporation, in such manner and proportion, and ^{at} [*119] such time and place, as the president, directors, and company, should require, is within the statute. *Goshen Turnpike Company v. Hurin*, 9 J. R. 217. See *Union Turnpike Company v. Jenkins*, 1 C. R. 381.

5. An agreement, by which the subscribers to the stock of an incorporated manufacturing company promise to pay to the company 100 dollars, for every share set opposite to their names, in such manner and proportion, and at such time and place, as shall be determined by the trustees of the said company, though without the words *bearer or order*, is a promissory note within the statute, and no consideration need be averred. *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 238.

6. Where A. gave to B. a promissory note, payable to B., or order, and at the same time made an endorsement on the note, that it was to be delivered to B., in consideration of a judgment against C., to be assigned to A. by B.; held, that the note was a promissory note, within the statute, and might be declared on as such, notwithstanding the endorsement, which was merely to show the consideration, and to

operate as a notice to whoever might purchase the note; and that the delivery of the note was *prima facie* evidence of an assignment of the judgment. *Sanders v. Bacon*, 8 J. R. 485.

7. A promissory note has no legal inception, until it is delivered to some person as evidence of a subsisting debt. *Marvin v. M'Cullum*, 20 J. R. 268.

(b) *Inland bills, bills or notes payable to bearer, and bank checks.*

8. A bill drawn in the *United States*, on any part of the *United States*, is an inland bill. *Miller v. Hackley*, 5 J. R. 375.

9. *Due to the bearer hereof, 3l. 18s. 10d., which I promise to pay to A. B., or order, on demand*, is not a note payable to bearer, but must be transferred by endorsement. *Cock v. Fellows*, 1 J. R. 143.

10. A bank check is substantially the same as an inland bill of exchange, and the rules which are applicable to the one are generally applicable to the other. *Cruger v. Armstrong*, 3 J. C. 5.

(c) *Consideration and construction of a bill or note.*

11. Every note within the statute imports a consideration, unless the contrary appear in the note itself. *Goshen Turnpike Company v. Hurting*, 9 J. R. 217.

12. In an action on a note not within the statute, a consideration must be stated and shown, either by showing the acknowledgment of one on the face of the note, or by particularly averring it. *Jerome v. Whitney*, 7 J. R. 321. *S. P. Saxton v. Johnson*, 10 J. R. 418.

13. The words *value received*, in such a note, are *prima facie* evidence of a consideration, and sufficient to cast on the defendant the burden of proving that there was no consideration. *Jerome v. Whitney*, 7 J. R. 321. *Contra, Lansing v. M'Killop*, 3 C. R. 286.

14. But if the plaintiff, in his declaration on such note, instead of stating generally that it was given for value received, sets [*120] forth specially *in what the value received consisted, he is bound to prove the particular value according to the averment; and the general acknowledgment of value in the note is not sufficient to support the declaration. *Ibid.*

15. The word "*month*," when used in bills of exchange and promissory notes, is construed to mean a *calendar*, not a *lunar*, month. *Loring v. Halling*, 15 J. R. 119. *S. P. Leflingwell v. White*, 1 J. C. 99.

16. The holder of a bill, note, or check, is *prima facie* to be deemed the rightful owner of it; and he need not prove a consideration, except where circumstances of suspicion appear. *Cruger v. Armstrong*, 3 J. C. 5. *Conroy v. Warren*, id. 259.

17. Notes delivered after the time they bear date, are valid only from the day of delivery, and are to be considered as drawn on that day. *Lanning v. Gaine & Ten Eyck*, 2 J. R. 300.

18. The whole of a set of exchange constitutes but one bill. *Durkin & Henderson v. Crandon*, 7 J. R. 442.

As to the time and place of payment. See post V.

II. *Transfer and endorsement.*

19. If the payee of a note endorse it to a trustee for the benefit of some relation of his own, the note will be considered in the same light, in an action by the trustees, as if the original parties were before the Court. *Payne v. Eden*, 3 C. R. 213.

20. If the payee of a note, payable to him or bearer, endorse it, he will be liable as endorser. *Brush v. Administrator of Reeves*, 3 J. R. 439.

21. And if such note be declared upon as payable to order, it will be good, at least upon general demurrer. *Ibid.*

22. The endorsee cannot, in general, be affected by any dealings between the original parties. *Prior v. Jacobs*, 1 J. C. 169. (As to the exceptions to this rule, see post III.)

23. So, in an action by the endorsee against the maker, the latter cannot set off a demand against the payee. *Ibid.*

24. Where a promissory note payable to order is endorsed in blank, the holder has a right to fill it up with any name he pleases, and the person whose name is inserted will be deemed the legal owner. *Lovell v. Everett*, 11 J. R. 52.

25. And if, in fact, the endorsement in blank was intended as a transfer, for the benefit of other persons, yet he will be considered as a trustee suing for the benefit of the persons having the legal interest. *Ibid.*

26. Where a bill is first endorsed in blank, and afterwards specially endorsed, whether the subsequent holder can strike out the special endorsement, and bring his action as a first endorsee? *Quare. Thompson v. Robertson*, 4 J. R. 27.

27. Where a negotiable note is paid before it becomes due, and is, afterwards, endorsed by the payee, with notice to the endorsee of such *payment, he takes [*121] it subject thereto. *White v. Kibling*, 11 J. R. 128.

28. Where a note is endorsed in blank, and the holder fills up the blank, directing payment to be made to a particular person, for the purpose merely of collection, and the agent returns the note with the protest for non-payment to such holder, he may strike out the special endorsement, and make it payable to himself, so as to bring an action, in his own name, against the endorser. *Bank of Utica v. Smith*, 18 J. R. 230.

29. The endorsement of a promissory note to A. B. or order, for value received, transfers the legal title in the note to the endorsee, which cannot be divested, except by cancelling the endorsement, or endorsing it again. *Burdick v. Green*, 15 J. R. 247.

30. Where the defendant, being the payee of a negotiable promissory note, endorsed it, in these words, "For value received, I sell, assign, and guaranty the payment of the within note to J. A. or bearer;" held, that this was an absolute engagement, that the maker should pay the note, when due, or that the defendant would pay it himself; and that the plaintiff was not, therefore, bound to prove a

demand of payment, and notice of non-payment, as in ordinary cases. *Allen v. Rightmire*, 20 J. R. 365.

31. There is an implied warranty on the transfer of every negotiable instrument, that it is not forged. *Herrick v. Whitney*, 15 J. R. 240.

32. A promissory note, made, and endorsed for the accommodation of the maker, was dated at *Albany*, where the parties resided. After endorsing the note in blank, the endorser returned it to the maker, who, without the knowledge or consent of the endorser, wrote in the margin of the note, "payable at the Bank of America. J. R.," and presented the note at that bank, in the city of *New-York*, for discount, (in renewal of a former note, drawn and endorsed by the same parties, and discounted for the benefit of the maker,) where it was accordingly discounted. When the note became due, payment was demanded at the Bank of America, and notice of non-payment was regularly given to the endorser at *Albany*; held, that the memorandum made in the margin of the note by the maker, was a material alteration of the contract, which discharged the endorser from his liability; and that, if it were otherwise, the demand of payment, and notice of non-payment, were not sufficient to charge him. *Woodworth v. Bank of America*, in error, 19 J. R. 391. *Contra*, 8 C. 18 J. R. 315.

See tit. CHANCERY, Promissory notes.

[*123] *III. When a bill or note is void; (a) Want of consideration, illegal consideration, and fraud; (b) When the consideration may be inquired into; and effect of the want or illegality of the consideration, or of fraud, as between the immediate parties to the bill or note, or to the transfer; (c) As between parties not immediate; and herein, of the consequences of the transfer of a bill or note after it has become due; and when it will be intended to have been so transferred.

a) Want of consideration, illegal consideration, and fraud.

33. If a sheriff, on arresting a defendant, take from him the promissory note of A., endorsed by the defendant in blank, as security, the assignment or transfer is illegal and void, being contrary to the statute concerning sheriffs; and, in an action by the sheriff, as endorsee, against the maker, the latter may avail himself of the fact to defeat the action. *Strong v. Tompkins*, 8 J. R. 98.

34. A note made by an administrator, as administrator, by which he promises to pay, &c. for value received by the intestate and his heirs, is void, for want of consideration. *Ten Eyck v. Vanderpool*, 8 J. R. 120.

35. If a note is given for a particular purpose, and the object for which it was given should fail, the payee ought to return the note; and if he should bring an action upon it, the note would be taken in connection with the agreement, so as to prevent his recovery. *Danston v. Bacon*, 10 J. R. 198.

36. As, where a note was given to be offered by the payee for discount, on certain terms, not appearing on the face of the note, of extended credit and payment by instalments, and the proceeds to be applied in a particular manner, the payee, on failing to obtain the discount, transferred the note, with notice of the agreement; held, that the endorsee could not maintain an action. *Ibid*.

37. C. gave his bond to B. for a certain sum of money, on the payment of which B. agreed to convey a certain quantity of land to C.; B. delivered the bond to F., with an authority to receive the money; and C., with G., as his surety, gave a joint and several note to F., for the amount of the bond which was given up to C. In an action on the note against G., held, that he could not set up, as a defence, an agreement by F., that in case B. should refuse to consider the note as a payment on the bond, it should be returned; nor a want of consideration, by reason of the failure of B. to convey the land to C. *Parsons v. Administrators of Gaylord*, 3 J. R. 463.

38. After the return of *non est inventus*, to a *ca. sa.* against the defendant, his bail gave their note to the plaintiff for the amount of the judgment. The judgment having been reversed in error, the payee cannot recover against the makers of the note, since the consideration, that is, the judgment against their principal, had failed. *Tappen v. Van Wageningen*, 3 J. R. 465.

39. It seems, that a note given for a pretended title is not void, in the hands of an endorsee. *Baker v. Arnold*, 3 C. R. 279.

*40. A note executed by a debtor [*123] to a creditor, to induce him to withdraw his opposition to the debtor's obtaining his discharge under the insolvent law, is void. *Wiggins v. Bush*, 12 J. R. 306.

41. A bill or note drawn for the purpose of being discounted at an usurious rate of interest, and endorsed, for the accommodation of the drawer or maker, is void, in its original formation. *Munn v. The Commission Company*, 15 J. R. 44. *S. P. Bennet v. Smith*, 15 J. R. 355.

42. Where the question as to the possession of a farm, and some other matters in controversy, were submitted by the parties to arbitrators, who awarded the possession and a sum of money to the defendant, who brought an action to recover the possession; and it was then agreed that the plaintiff should give up the possession to the defendant, who should relinquish his claim under the award, and pay the plaintiff 150 dollars. In an action, on a note given for that sum, held, that it was given for a good consideration, and valid. *Hall v. Brown*, 15 J. R. 194.

43. A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when, in fact, it was of no value, is without consideration, and void. *Sill v. Rood*, 15 J. R. 230.

44. Where a bill of exchange, drawn here, upon a person in *Great Britain*, during war between that country and the *United States*, for supplies furnished by the payee to a *Brit-*

Let vessel, authorized by an act of Congress to sail from New-York to a British port, was sold by the payee to the plaintiff, who remitted it to Great Britain for collection; held, that the remittance of the bill was within the protection afforded to the original transaction, and was not illegal. *Suckley v. Furse*, 15 J. R. 338.

45. Where the owner of a slave told him, that if he could procure good notes for 200 dollars, &c. he would immediately manumit and set him free; and the slave procured the notes, and delivered them to his master, who made out a deed of manumission, and procured a regular certificate from the overseers of the poor, according to the statute, but refused to deliver the deed to the slave, and kept it two years, during which time he held him as a slave. In an action brought on one of the notes against the maker, held, that there was a failure of the consideration, and the plaintiff could not recover. *Petry v. Christy*, 19 J. R. 53.

46. The defendant gave to the plaintiff a promissory note, as the price or consideration for the assignment of an apprentice to E., at his request. In an action on the note, held, that the defendant could not set up, as a defence, that the assignment was void; but the validity of it could only be questioned, in a suit by E., to recover back the price, on a failure of consideration, or in a suit or proceeding in behalf of the apprentice. *Nickerson v. Howard*, 19 J. R. 113.

[*124] **(b) When the consideration may be enquired into; and effect of the want or illegality of the consideration, or of fraud, as to the immediate parties to the bill or note, or to the transfer.*

47. In an action between the original parties to a negotiable instrument, the consideration may be inquired into. Per Kent, Ch. J. *The People v. Howell*, 4 J. R. 296. *S. P. Pearson v. Pearson*, 7 J. R. 26. *Schoonmaker v. Roosa*, 17 J. R. 301.

48. An endorser of a note, for the accommodation of the maker, and without consideration, that fact being known to the endorsee when he took the bill, is, notwithstanding, liable to the endorsee. *Brown v. Mott*, 7 J. R. 361.

49. And that, too, even if the endorsee took the bill after it was due. *Ibid.*

50. But where there has been fraud, or if the endorsee has not made any advance, the taking it under knowledge of the want of consideration will let in a defence. *Ibid.*

51. And where, on the endorsement of a note, the consideration passing between the endorsee and endorser is less than the amount of the note, the endorsee, in an action against the endorser, can recover no more than the consideration he has actually paid. *Braman v. Hess*, 13 J. R. 52. *S. P. Brown v. Mott*, 7 J. R. 361. *S. P. Munn v. Commission Company*, 15 J. R. 44.

52. But where a bill or note is valid between the drawer or maker and the payee, so that the latter can maintain an action on it against the former it is valid in the hands of

the endorsee, who has discounted it at usurious interest, and he may recover the full amount of the note from the maker or acceptor. *Munn v. The Commission Company*, 15 J. R. 44. And see *Powell v. Waters*, 17 J. R. 176.

53. A note, void *ab initio*, is not valid in the hands of an endorsee, without notice. *Wiggins v. Bush*, 12 J. R. 306.

54. Where it appears from a memorandum on the back of the note, that it was dated after it was obtained, this is implied notice to an endorsee of fraud in the manner of obtaining the note. *Ibid.*

55. Where a note is given to secure the payment of the purchase money of a piece of land, conveyed to the maker of the note by deed with warranty, which land was, previous to the conveyance, bound by a judgment against the grantor, in an action by the grantor on such note, it is a good defence that the land had been sold under the judgment, and that thereby there had been a total failure of consideration, although the defendant had not yet been evicted by the purchaser; for he is still liable to be so, and will be responsible for the *mesne profits*. *Frisbee v. Haffnagle*, 11 J. R. 50.

56. In an action by the second endorsee of a promissory note, against his immediate endorser, it is competent to the defendant to prove, that the plaintiff had given no consideration for the note, but held it as the agent merely of the payee, or first endorser, to collect the amount for them, and therefore had no right to bring the suit. *Herrick v. Carman*, 10 J. R. 224.

**(c) As between parties not immediate; and herein of the consequences of the transfer of a bill or note after it has become due; and when it will be intended to have been so transferred.* [*125]

57. In an action by the endorsee of a note, not void in its creation, and endorsed before it became due, against the maker, the consideration cannot be inquired into. *Baker v. Arnold*, 3 C. R. 279. *S. P. Braman v. Hess*, 13 J. R. 52.

A. gave his promissory note to B., (the agent of C.,) or bearer, for a demand of C. against A., who, at the same time, stated to B. that there was not so much due, but he had mislaid his papers, and would let the note lie until he could find them; to which no objection was made by B. In an action brought by B., as holder of the note, against A.; held, that the defendant might show what was really due to C., and thus reduce the amount of the note; as B. was not to be considered as an innocent holder taking the note before it was due, in the regular course of business, but as receiving it subject to the examination to be made into the state of the account between A. and C. *Olmead v. Stewart*, 13 J. R. 238.

58. If the payee transfer the note by a special endorsement, by which he declares that he will not be made liable to pay the note, and at the time of endorsing it, expresses his ignorance of the consideration for which it was given; in an action by the endorsee

against the maker, such special endorsement will not render it necessary for the plaintiff to show that he gave a consideration, nor will it authorize the defendant to impeach the note for want of consideration, or for fraud. *Russell v. Ball*, 2 J. R. 50.

59. Where A., the debtor of B., gave a note to C. for the amount of the debt, in order to prevent its being attached by a creditor of B., and before any attachment had issued, and C. endorsed the note to D., who had advanced money for A.; held, that D., not being privy to any fraud in A., could not be affected by it, and might recover on the note as a *bona fide* endorsee, with consideration. *Warren v. Lynch*, 5 J. R. 239.

60. If it be shown, that, after a note was made and endorsed, a third person fraudulently obtained the possession, and passed it, the holder is bound to show himself a *bona fide* possessor; and in an action by the endorsee against the maker, the endorser is a competent witness to prove the fraud in obtaining the note. *Woodhull v. Holmes*, 10 J. R. 231.

61. Where a note is negotiated after it becomes due, the endorsee takes it, subject to every defence that existed in favor of the maker of the note, before it was endorsed. *Johnson v. Bloodgood*, 1 J. C. 51. S. C. C. C. E. 302. *S. P. Sebring v. Rathbun*, 1 J. C. 331. *Jones v. Caswell*, 3 J. C. 29. *Hendricks v. Judah*, 1 J. R. 319. *O'Callaghan v. Sawyer*, 5 J. R. 118. *Lansing v. Gaine & Ten Eyck*, 2 J. R. 300. *Lansing v. Lansing*, 8 J. R. 454.

62. But if the maker has confessed judgment on the note, the Court will not set aside the judgment, in order to let in such equitable defence, especially where the original parties are *in pari delicto*. *Sebring v. Rathbun*, 1 J. C. 331.

63. So, a note endorsed after it has become due, cannot be set off in an action brought against the endorsee, by the assignee of the maker. *Anderson v. Van Allen*, 12 J. R. 343.

64. So, if the maker of a note becomes insolvent, and his property is assigned to trustees, in an action by the assignees against the purchaser of such note, after it became due, for a debt due to the insolvent, he cannot set off the note; for it will be presumed to have been purchased after the assignment. *Johnson v. Bloodgood*, 1 J. C. 51. S. C. 2 C. C. E. 303.

65. In an action, by an endorser of a promissory note, against the maker, the latter will not be allowed to prove a set-off [*126] against the *original payee, unless he previously show that the note was transferred after it became due, or for the purpose of defrauding the maker of his set-off. *Hendricks v. Judah*, 1 J. R. 319.

66. A note payable on demand must be presented for payment in a reasonable time, or it will be considered as out of time, and dishonored; and if it be afterwards negotiated, it will, in the hands of the endorsee, be subject to all the equity which existed between the original parties. *Furman v. Haskin*, 2 C. R. 383.

67. What is a reasonable time, is a question

of law; and a note payable on demand, negotiated 18 months after its date, was considered as being out of time. *Ibid*.

68. So, a note negotiated two years after date. *Loomis v. Pulver*, 9 J. R. 244.

69. Where a note was drawn in England, payable on demand, and sued upon here within a year after its date, by the endorsee, the Court intended, no evidence to the contrary being shown, that it was endorsed soon after its date, and a set-off by the maker against the payee was rejected. *Hendricks v. Judah*, 1 J. R. 319.

70. Where a note, payable on demand, was negotiated five months after it was due, and there were several payments endorsed on it prior to its transfer, in an action by the endorsee, the maker was not allowed to set up any defence, as against the payee, or to show that sums had been paid on account of the note, which were not endorsed upon it, but the amount due on the face of the note was to be considered the true balance. *Sanford v. Mickles*, 4 J. R. 224.

71. There is no precise time in which a note, payable on demand, is to be deemed dishonored; but it must depend on the circumstances of the case, and the situation of the parties. *Loose v. Dunkin*, 7 J. R. 70.

72. In an action on such a note, where no particular circumstances were disclosed by the case, the transfer having been made two months and a half after the date, the maker was allowed to show payment, or part payment, to the payee, before the endorsement. *Ibid*.

When void, by reason of its being fraudulent, under the insolvent law. See AGREEMENT III. pl. 48, 49, 52, 53, 54, 55.

When void for usury. See USURY.

IV. Acceptance and non-acceptance.

73. An acceptance, by a collateral paper, is good. *M'Evers v. Mason*, 10 J. R. 207.

74. It seems, that promise to accept a bill already drawn, may, under circumstances, amount to an acceptance. *Ibid*.

75. But it seems, that a promise to accept a bill, not *in esse*, will not amount to a legal acceptance; or that, if it will, it is not so far assignable that an endorsee can avail himself of the promise, as amounting to an acceptance, and maintain an action against the drawee. *Ibid*.

*76. Where the drawee had engaged to the drawer to accept bills drawn under certain circumstances, and the drawer made a bill, which, by endorsement came into the hands of the plaintiff, who, however, did not take it on the credit of the drawee's promise, the plaintiff, even admitting that an endorsee might avail himself of a previous promise to accept, cannot, under these circumstances, maintain an action on such implied acceptance. *Goodrich v. Gordon*, 15 J. R. 6.

77. But where a person, by writing, authorizes another to draw a bill of exchange, and expressly stipulates to honor the bill, and a bill is afterwards drawn, which is taken by a

third party on the faith of such a written stipulation, it is tantamount to an acceptance of the bill. *Ibid.*

78. On the non-acceptance of a bill of exchange, a cause of action arises to the holder, and he is not bound to wait until the bill is protested for non-payment, before he can commence his suit. *Weldon v. Buck*, 4 J. R. 144.

V. *Payment and non-payment*; (a) *When and how payment is to be made*; (b) *When and how demand of payment is to be made*; (c) *When it will be excused.*

(a) *When and how payment is to be made.*

79. If a bill of exchange or promissory note, be payable so many months after date, calendar, and not lunar months are intended. *Leftingwell v. White*, 1 J. C. 99. *S. P. Loring v. Halling*, 15 J. R. 119.

80. Where a note, dated the 15th of July, is payable immediately, with interest from the 1st day of June, the preceding 1st of June is meant. *Whitney v. Crosby*, 3 C. R. 89.

81. A note in which no time of payment is expressed, is payable immediately. *Thompson v. Ketcham*, 8 J. R. 189. *S. P. Herrick v. Bennet*, id. 374.

82. A note falling due on the 4th of July, must be paid on the 3d. *Lewis v. Burr*, 2 C. E. 195.

83. Where no place of payment is mentioned in a note, it seems, that parol evidence is admissible, to show where it was agreed that payment should be made. *Thompson v. Ketcham*, 4 J. R. 285.

84. The whole of a set of exchange constitute but one bill, and a payment to the holder is good, whichever of the set he may happen to have in his possession. *Durkin & Henderson v. Cranston*, 7 J. R. 442.

85. Payment to the general endorsee of a bill is good, and cannot be affected by any transactions between him and the person by whom it was remitted; and if the bill has been protested for non-payment, he may waive the default, and accept payment. *Ibid.*

86. So, when a bill of exchange was drawn by A., on B., in London, which came by endorsement to D., who remitted it to E., in payment of a debt, and, having been protested for non-payment, the protest, with the first of the set, was returned to D., and the amount of the bill, with damages, was paid to D., by

[*128] the maker, who was ignorant that the drawee had, a few days after the protest, paid the amount of the bill, with all charges on the second of the set of exchange, to E.; held, that, the payment to E. being valid, and D. having been paid under a mistake of the fact, A., the drawer, might recover back from D. the money which he had paid him. *Ibid.*

(b) *When and how demand of payment is to be made.*

87. The drawer of a bill is only responsible after a default on the part of the acceptor; and the holder must first demand payment, or use due diligence to demand it, of the acceptor, before he can resort to the drawer, or endorser.

Munroe v. Easton, 2 J. C. 75. *S. P. Griffin v. Goff*, 12 J. R. 423.

88. If the endorser of a bill of exchange, on its becoming due, pay the amount of it to the endorsee, the latter having never demanded payment of the acceptor, he pays it in his own wrong, and cannot charge the drawer, in an action for money paid, &c. *Ibid.*

89. A creditor, having received from his debtor an order on a third person, for the amount of his debt, dated in December, and which the drawee agreed to pay in ten or fifteen days, did not present it until the next March; held, that he had not used due diligence, and in case of the drawee's insolvency, must bear the loss. *Brower v. Jones*, 3 J. R. 230.

90. A demand of payment cannot be made until the third day of grace, unless the third day be Sunday, in which case the demand must be made on the second day, or Saturday. *Jackson v. Richards*, 2 C. R. 343. *S. P. Griffin v. Goff*, 12 J. R. 423. *Johnson v. Haigh*, 13 J. R. 470.

91. When payment of a note, drawn payable at a particular place, is demanded personally of the maker elsewhere, and no objection made at the time, it will be sufficient. *Herring v. Sanger*, 3 J. C. 71.

92. In an action by the payee of a bill of exchange, against the acceptor, where the bill is drawn payable at a particular place, and accepted, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed; but the defendant, if he means to avail himself of a want of demand, must plead that he was ready, at the time and place appointed, to pay, but that the plaintiff did not come there, &c.; which defence goes only to the damages and costs, and not to the cause of action. *Wolcott v. Van Santvoord*, 17 J. R. 248.

93. A note, made payable at the *Mechanics' Bank*, in the city of New-York, was presented to the first teller of the bank, by a notary, at fifteen minutes past three o'clock, P. M., of the day in which the note was payable, and payment demanded; held, that this was a sufficient presentment and demand, though the bank closes at three o'clock, P. M., it appearing to be the usual course of doing business at the bank, to allow that time, after banking hours, for the presentment and payment of notes; and if the defendant was at the bank at that day, and offered payment, it was for him to show the fact, but he is bound to wait the usual time. *Ibid.*

94. A demand of payment of a note by a notary, or a person having *a parol authority for that purpose, or the lawful possession of the note, is sufficient; and the notary, or person authorized, may give notice of non-payment to the endorser. *Bank of Utica v. Smith*, 18 J. R. 230.

95. If the notary go to the maker's house, and find it shut up, and that he is out of town, it will be a sufficient demand. *Ogden v. Cowley*, 2 J. R. 274.

96. Where a note is not payable at any par-

ticular place, and the maker has a known and permanent residence within the state, the holder is bound to make a demand of payment there, in order to charge the endorser. *Anderson v. Drake*, 14 J. R. 114.

97. As, where a note was dated at *New-York*, but the maker, before it was payable, removed to *Kingston*, in *Ulster* county, and this was known to the holder; a demand of payment, or inquiry made for the maker in the city of *New-York*, is not sufficient to charge the endorser. *Ibid.*

98. But, where a note was dated at *Albany*, and the maker had removed to *Canada*, without the state, a demand of payment at *Albany* is sufficient. *Ibid.*

99. Where a bill is drawn on persons residing in *A*, payable in *B*, without any particular spot in the latter place being designated, where payment is to be made, after the holder has protested the bill for non-acceptance, in the place on which it is drawn, he is not bound to make any inquiry after the drawee in *B*, where it is payable, but it will be sufficient if he cause it to be protested in that place. *Boot v. Franklin*, 3 J. R. 207.

100. Where a bill is drawn on a person residing in *A*, and the bill is payable in *B*, and on being presented to the drawers, at their place of residence in *A*, is refused acceptance, and protested; and, there being no spot designated for payment in *B*, the place where made payable, payment demanded at *A*, of the drawees, is sufficient. *Mason v. Franklin*, 3 J. R. 202.

101. And the holder has, in such a case, his election to cause the bill to be protested either in *A*. or *B*. *Ibid.*

102. Where no particular place of payment is designated in a promissory note, the holder is bound to demand payment of the maker, personally, or at his place of residence; and the endorser contracts only to be answerable, in default of the maker, after such demand, and due notice of the default. *Woodworth v. Bank of America*, in error, 19 J. R. 391.

103. Where the maker of a note, dated at *Albany*, where the parties resided, made and endorsed for his accommodation, without the knowledge or consent of the endorser, wrote in the margin of the note, "payable at the *Bank of America*, J. R.;" and the note was discounted in that bank, in the city of *New-York*, and payment was demanded there, and notice thereof regularly sent to the endorser, at *Albany*; in an action against the endorser, held, that the demand of payment and notice was not sufficient to charge the endorser, but that the demand should have been made on the maker, personally, or at his residence, in *Albany*. *Ibid. Contra*, S. C. 18 J. R. 315.

104. The holder of a check must present it to the bank for payment, [*130] *before he can charge the drawer. *Cruger v. Armstrong*, 3 J. C. 5.

105. Where a check was dated the 12th of *April*, 1796, which was never presented to the bank for payment, but a suit was brought about four years after, against the drawer; held, that the plaintiff was not entitled to recover. *Ibid.*

106. A check must be presented at the bank within a reasonable time. *Conroy v. Warren*, 3 J. C. 259. *Cruger v. Armstrong*, 3 J. C. 5.

107. But where the drawer sustains no injury by its not being presented, as, where he defeats the payment of the check, by withdrawing his funds from the bank, he cannot object to a delay in presenting it. *Ibid.*

108. A previous demand of payment of a bank note, not being payable at any particular place, is not requisite, before a suit, to entitle the holder to set it off against the bank. Per *Woodworth, J. Bank of Niagara v. McCracken*, 18 J. R. 493. But see his observation on this point, in *Jefferson County Bank v. Chapman*, 19 J. R. 322. 325.

109. Where a bill is drawn, payable at sight, or a certain number of days after sight, there is no fixed rule for its presentment; but the holder is bound to use due diligence to put the bill into circulation. *Robinson v. Ames*, 20 J. R. 146.

110. The protest of a notary deceased, and a register of protests kept by him in his lifetime, (in which were notes and memoranda, in his handwriting, proved by a witness,) stated, that the notary had made diligent search and inquiry after the maker of the note, in the city of *New-York*, (where the note was dated,) in order to demand payment, and that he could not be found, &c., and that notice of non-payment to the endorser was put in the post-office; held, that this was sufficient evidence of due diligence, as to a demand of the maker, but not as to notice to the endorser. *Halliday v. Martinet*, 20 J. R. 168.

111. A bill of exchange, drawn in *Antigua*, upon merchants in *London*, dated *July* 18, 1817 was not presented for acceptance until *January* 16, 1818; but it had been put into circulation, and had passed through several hands before it was endorsed to the plaintiffs; held, that, under the circumstances, there was no default in the presentment of the bill. *Gowan v. Jackson*, 20 J. R. 176.

(c) When it will be excused.

112. Want of demand on the acceptor or maker, will be excused when he cannot be found; and may be given in evidence under an averment that the note was presented, and payment refused. *Stewart v. Eden*, 2 C. R. 121.

113. In an action against the acceptor of a bill of exchange, the holder need not show a demand of payment; it is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money, and that he was always ready afterwards to pay. *Foden v. Sharp*, 4 J. R. 183.

114. That the drawer has no funds in the hands of the drawee, is *no excuse for not demanding pay- [*181] ment, though it may excuse a want of notice to the drawer. *Cruger v. Armstrong*, 3 J. C. 5.

Further, as to demanding payment of a note or bill payable on demand. See ante III.

And further, as to demand of payment, in order to charge the drawer or endorser. See post VI.

VI. Notice of non-acceptance and non-payment ; (a) When and how to be given ; (b) When want of notice, or irregular notice, will be excused.

(a) When and how to be given.

115. The holder is bound to use due diligence, to give notice of non-acceptance, as well as of non-payment, to the drawer or endorser whom he intends to charge. *Tunno v. Lague*, 2 J. C. 1. *S. P. Griffin v. Goff*, 12 J. R. 423.

116. He is not bound to give the earliest possible notice ; it is enough if he use ordinary and reasonable diligence. *Bank of Utica v. Smith*, 18 J. R. 230.

117. The agent of the holder is only bound to give notice to his principal, and transmit him the requisite protests, in order that the holder may give notice to the drawer. But when he undertakes to give notice, it will be good, if it be given as early as it could have been received from the holder. *Ibid.*

118. An endorser of a note for the credit of the drawer, and with a knowledge of his insolvency, is entitled to regular notice. *Jackson v. Richards*, 2 C. R. 343.

119. The second endorser of a promissory note, when called upon by the holder to pay, in default of the maker, is bound to take up the note and give notice immediately to the first endorser ; and if he fails to give such notice, as soon as he receives it from the holder, the preceding endorser is not liable to him. *Morgan v. Woodworth*, 3 J. C. 89.

120. A notice given by the holder to the several endorsers, enures to the benefit of the endorsees or preceding parties. *Stafford v. Yates*, 18 J. R. 327.

121. So that the first endorser of a note, who has received notice of its dishonor from the holder, though not from his endorsees or the second endorser, is liable to such second endorser, in the same manner as if notice had been received from him. *Ibid.*

122. Demand and notice, in every case where a drawer exists, are a condition precedent to the holder's right to recover against the endorser. *Berry v. Robinson*, 9 J. R. 121.

123. And where the note is endorsed at any length of time after it became due, the endorsee is, notwithstanding, bound to prove a demand and notice. *Ibid.*

124. The law does not prescribe any form of notice to an endorser ; all that is necessary is, that it should be sufficient to put [*132] him on inquiry, *and to prepare him to pay it or defend. *Reedy v. Seixas*, 2 J. C. 337.

125. The sufficiency of notice is a question of fact for the jury. *Ibid.*

126. The question of reasonable notice is a compound of law and fact, and to be submitted to a jury. *Taylor v. Bryden*, 8 J. R. 173. *S. P. Bruden v. Bryden*, 11 J. R. 187.

127. But when the facts are ascertained, it then becomes purely a question of law. 11 J. R. 187.

128. If the question of reasonable notice or due diligence has been submitted to a jury, and fairly decided upon, in an action brought in another state, it cannot be investigated in an action brought in this state on the judgment. *Taylor v. Bryden*, 8 J. R. 173.

129. Where one of a set of exchange has been accepted and protested for non-payment, presenting the protest of the accepted bill, together with one of the set, which has neither been accepted nor protested, to the endorser, and demand of payment, will be sufficient notice to charge him. *Kenworthy v. Hopkins*, 1 J. C. 107.

130. Where the maker of a note, on its becoming due, pays part of the amount to the holder, a general notice of non-payment to the endorser, without mentioning that circumstance, is sufficient to charge him with payment of the residue. *James v. Badger*, 1 J. C. 131.

131. Notice to the endorser, prior to a demand upon the maker, is a nullity. *Jackson v. Richards*, 2 C. R. 343. *S. P. Griffin v. Goff*, 12 J. R. 423.

132. A notary, on protesting a note for non-payment, is not bound to give notice to all the endorsers. *Morgan v. Van Ingen*, 2 J. R. 204.

133. Notice to the endorser on the third day of grace, after a demand of the maker, and his default, is good. *Carp v. M'Comb*, 1 J. C. 328.

134. If the third day of grace be Sunday, although demand must be made on the Saturday preceding, yet notice to the endorser may be given on the Monday following. *Jackson v. Richards*, 2 C. R. 343.

135. Where the party resides in the same city or town, the notice must be personal, or left at his dwelling-house. *Ireland v. Kip*, 10 J. R. 490. *S. P. S. C. 11 J. R. 231.*

136. Putting a notice of the non-payment of a note into the post-office in New-York, directed to the endorser there, whose place of residence was at Kip's Bay, three miles and a half from the post-office, and within the city, is not sufficient to charge the endorser, especially when the letter-carriers do not deliver letters at that distance, and the place of the endorser's residence was known to the holder. *Ibid.*

137. And the additional circumstance that the endorser had directed the letter-carriers to leave all letters received by them for him, at a house in Frankfort-street, at which house he himself called or sent every day for his letters, unaccompanied with proof that the notice was actually delivered there, was not held sufficient proof of notice. *S. C. 11 J. R. 231.*

*138. In case of a temporary removal of the endorser from the place where payment is to be made, notice left at his last place of residence there, will be sufficient. *Stewart v. Eden*, 2 C. R. 121.

139. If the notary calls at the endorser's house, and, finding it shut up, and that he had

gone out of town, puts a letter into the post-office addressed to him, and informing him of the non-payment, it will be sufficient. *Ogden v. Conley*, 2 J. R. 274.

140. Where A. makes a promissory note payable to B. or order, on demand, which B. endorses to C., and C., having ineffectually demanded payment of the maker, leaves it with B., who is an attorney, to collect, this is not sufficient notice to charge B. *Agan v. M. Manus*, 11 J. R. 180.

141. Where the holder and endorser of a bill of exchange both reside in the same place, proof of notice to the endorser, within three days after advice of the dishonor of the bill, is insufficient. *Bryden v. Bryden*, 11 J. R. 187.

142. If the party to be affected by a notice resides in a different city or place from the holder, the notice may be sent through the post-office to the post-office nearest to the party entitled to such notice. *Ireland v. Kip*, 11 J. R. 231.

143. Where the endorser of a note resides in a different place from that in which it is payable, notice of the non-payment must be sent to him in the place in which he is actually resident; and if directed to a wrong place, without showing due diligence to ascertain his actual residence, but without success, the endorser will be discharged. *Bank of Utica v. De Mott*, 13 J. R. 432.

144. A bill was drawn and dated at *New-York*, on persons residing there, who accepted it. The drawers, in fact, resided at *Petersburgh* in *Virginia*. The bill being protested for non-payment, on the same, or next day, two letters were put in the post-office, giving notice to the drawers, one directed to *New-York*, and the other to *Norfolk*, the supposed place of their residence. *Held*, that, as it did not appear that the holder knew where the drawers lived, he had used due diligence, and that the notice was sufficient. *Chapman v. Lipscombe*, 1 J. R. 294.

145. A bill of exchange, drawn at *New-York*, on persons in *Baltimore*, was protested for non-acceptance, and the notary testified, that it was usual with him, in all cases of a protest of bills, where the endorsers or drawers lived at a distance, to send a written notice of the dishonor of the bill, by post, on the evening of the same day, to the endorser or drawer, and that he believed that he had sent such notice, in that way, to the endorsers in the present case, who resided at *New-York*; *held*, that this was sufficient evidence, in the first instance, to support the averment of due notice to the endorser, of the dishonor of the bill. *Miller v. Hackley*, 5 J. R. 375.

146. Where notice of the non-payment of a note is sent to the endorser, residing in a different town from the maker, by post, it ought to be directed to him, at his place of residence. *Reid v. Payne*, 16 J. R. 218.

147. But if the notice be sent to the post-office, to which the endorser usually resorts for his letters, although in a different town from *that in which he resides, and where there is also a post-office, it seems, that the notice will be sufficient. *Ibid*.

148. The contents of a notice to the endorser of a note, of a demand upon, and refusal by, the maker, may be proved by parol, or by producing a copy made by the witness, at the time of making the original notice; and it is requisite, for that purpose, that notice should have been given to the party, to produce the original at the trial. *Johnson v. Haight*, 13 J. R. 470.

149. A notary, on making due inquiry for the residence of the endorser, in order to give him notice, was informed, that he lived at G., when, in fact, he lived in the adjoining town of S., and the notary put a notice directed to the endorser at G., into the post-office at S. It was proved, that the endorser, though there were two post-offices in S., usually received his letters through the post-office at G.; *held*, that the notice was sufficient. *Reid v. Payne*, 16 J. R. 218.

150. If the endorser of a note be dead at the time it becomes payable, and there are executors or administrators known to the holder, notice of the non-payment must be given to them, for they represent the testator or intestate. *Merchants' Bank v. Birch's Executors*, 17 J. R. 25.

151. But, where a note fell due on the 22d of *December*, and the endorser died at sea, on the 12th of *December*, but his death was not known to the holder until in *March* following, and the will was not proved, nor letters testamentary granted, until *April*; *held*, that a notice of non-payment, left at the time, at the dwelling-house of the endorser, being his last place of residence in the city of *New-York*, and, also, sent to his family, who had a short time before removed into the country, was sufficient to support an action against the executors of the endorser, without showing notice to them of the non-payment. *Ibid*.

152. Protest, in case of non-payment or non-acceptance, is unnecessary in the case of an inland bill of exchange. *Miller v. Hackley*, 5 J. R. 375.

153. A notary, or any person authorized for that purpose, may give notice of non-payment of a note. *Bank of Utica v. Smith*, 18 J. R. 230.

154. Any person who is party to the note or bill, may give notice of its dishonor to the other parties. *Stafford v. Yates*, 18 J. R. 327.

155. Where there are any funds of the drawer in the hands of the drawee, or if, at the time the bill is drawn, there are circumstances sufficient to induce a reasonable expectation, that the bill will be accepted or paid, the drawer is entitled to notice of its dishonor, and to due diligence in the presentment of it. *Robinson v. Ames*, 20 J. R. 146.

156. As, where there were mutual dealings, and an open account between the drawer and drawee, and the latter had received considerable shipments of cotton from the drawer, and accepted previous bills, but, on account of the fall of price of cotton, its value was not equal to the accepted bills, and the last bill was, therefore, protested *for [*135] want of funds; *held*, that the drawer was entitled to notice of the non-acceptance. *Ibid*.

157. Notice of non-acceptance sent by mail, the next day after protest, is sufficient. *Ibid.*

158. A note or memorandum made by a notary, since deceased, in his register, that notice of non-payment for the endorser had been put in the post-office, is not sufficient evidence of due diligence, as it did not state where the endorser resided, nor to what place the notice was directed; but if it had been stated, that, after diligent search and inquiry, the endorser could not be found, it would have been sufficient. *Halliday v. Martinet*, 20 J. R. 168.

159. Where the drawer of the bill is a partner of the house or firm on whom it is drawn, the holder need not prove, that notice of the dishonor of the bill was given to the drawer. *Gowan v. Jackson*, 20 J. R. 176.

160. An endorser is entitled to strict notice; and if he resides in the same place, the notice must be personal, or left at his dwelling-house or place of business. *Smedes v. Utica Bank*, 20 J. R. 372.

(b) *When want of notice, or irregular notice, will be excused.*

161. Where, before a note became due, the endorser informed the holder, that the maker had absconded, and requested a further time of payment; held, that demand of the maker, or notice to the endorser, was unnecessary. *Leffingwell v. White*, 1 J. C. 99.

162. Notice of non-payment to the drawer is unnecessary, where he has no effects in the hands of the drawee. *Hoffman v. Smith*, 1 C. R. 157. Per *Radcliff, J. Cruger v. Armstrong*, 3 J. C. 5.

163. Notwithstanding the drawee may have accepted the bill. *Ibid.*

164. If an endorser, who has not had regular notice of non-payment by the drawer, does, with a knowledge of its insufficiency, make a subsequent promise to pay, it is a waiver of the want of due notice, and *assumpsit* will lie. *Durree v. Dennison*, 5 J. R. 248. *S. P. Miller v. Hackley*, 5 J. R. 375.

165. But the promise must be explicit, and made out by clear and unequivocal evidence; so, where the endorser, speaking of several bills on different places, and under different circumstances, said, *he would take care of the bills, or see them paid*; held, that this was not sufficient evidence of a promise to pay one of the bills, on which no notice of non-acceptance had been given. *Miller v. Hackley*, 5 J. R. 375. And see *Griffin v. Goff*, 12 J. R. 423.

166. *It seems*, that a promise to pay, by the endorser of a bill or note, after it becomes due, is a waiver of the necessity of proving a demand on the drawee, or notice to the drawer. *Pierson v. Hooker*, 3 J. R. 68.

167. If the endorser of a note, who has not received regular notice of non-payment, does, with a knowledge of the fact, subsequently promise to pay, it is a waiver of notice, and he is liable. *Trimble v. Thorne*, 16 J. R. 152.

168. It is, however, incumbent on the plain-
show, affirmatively, that the endorser

knew of the defect of notice; for his knowledge *is not to be inferred [*136] from the mere fact of his subsequent promise to pay. *Ibid.*

169. A qualified or conditional promise of the endorser to pay, which is rejected by the holder, is not a waiver of notice. *Agan v. M'Manus*, 11 J. R. 180.

170. The doctrine as to waiver of notice of the dishonor of bills of exchange, does not apply to promissory notes. *Ibid.*

171. *It seems*, that if such notice, in the ordinary course of business, can be dispensed with in any case, it is only where the insolvency of the maker was known at the time of the endorsement. *Ibid.*

172. *It seems*, that, where a bill is discounted for the accommodation of the endorser, and he is the person who is ultimately to pay, notice of non-payment by the maker is unnecessary. *Ibid.*

173. The prevalence of a malignant fever in the place of residence of the parties, was admitted to be sufficient excuse for not giving notice, until *November*, of a protest for non-payment made in *September*. *Tunno v. Lague*, 2 J. C. 1.

174. After a bill has been protested for non-acceptance, and due notice given, protest and notice, in case of non-payment, are not necessary to charge the endorsers. *Miller v. Hackley*, 5 J. R. 375.

VII. *Liability of the parties, and how discharged.*

175. The maker is liable to the payee for the amount of the note only. *Simpson v. Griffin*, 9 J. R. 131.

176. The payee endorser, who has been sued by the endorsee, cannot, without a special promise to save harmless, compel the maker to pay the costs of such suit. *Ibid.*

177. A person receiving a note, drawn by one partner, in the name of the firm, but for his private debt, and without the knowledge or consent of his partners, and having notice of these circumstances, cannot recover against an endorser, who endorsed it merely as a surety of the firm, believing it to be good against all the partners, and unacquainted with the circumstances under which it was issued. *Livingston v. Hastie*, 2 C. R. 246.

178. If a holder receives part payment of a note from the maker after it is due, it does not discharge the endorser, provided the holder gives due notice to the endorser, that he looks to him for payment of the residue. *James v. Badger*, 1 J. C. 131.

179. But where the holder received part payment of the maker, without giving any notice of a demand and non-payment to the endorser, and suffered two months to elapse before he called on him; held, that the endorser was discharged. *Craig v. Caldwell*, 8 J. R. 384.

180. And a promise by the endorser to pay the note, made without knowledge of the want of demand and notice, is not binding. *Ibid.*

181. If the holder of a bill, or note, compound with, and discharge, the acceptor or

maker, he cannot, afterwards, resort to the other parties to the bill or note. *Lynch v. Reynolds*, 16 J. R. 41.

182. But, merely receiving part [*137] payment from the acceptor, or *maker, without releasing him, does not affect the liability of the other parties. *Ibid*.

183. The principle is, that an act beneficial to the other parties, may be done with the acceptor of a bill, or maker of a note, provided due notice thereof be given, without impairing the rights of the holder; but that no act can take place between the holder and maker, prejudicial to the rights of the other parties, without discharging them. *Ibid*.

184. If the beneficial holder of a note agrees, on receiving a premium for delay, to wait a stipulated time, without suing the maker, he thereby discharges the endorser. *Hubby v. Brown*, 16 J. R. 70.

185. If the holder of a promissory note be called upon by the endorser, after the note has become due, to prosecute the maker, of whom the amount might then be collected, but who, afterwards, becomes insolvent, and the holder neglected to sue him, the endorser is not, therefore, discharged; for, although he is in the nature of a surety, he is answerable on an independent contract, and it is his duty to take up the note when it is dishonored. *Trimble v. Thorne*, 16 J. R. 152.

186. The holder's proceeding under a commission of bankruptcy against the acceptor of a bill, will not discharge the responsibility of the antecedent parties. *Kenworthy v. Hopkins*, 1 J. C. 107.

187. If a holder of a note release one of several joint makers, excepting from such liability as he may be under to the endorsers, those endorsers cannot, in an action against them by such holder, set up such release in discharge. *Stewart v. Eden*, 2 C. R. 121.

188. Where a prior endorser cannot maintain an action against a subsequent endorser, no person deriving title under the prior endorser, with knowledge of all the facts, can recover against such subsequent endorser. *Herrick v. Carman*, 12 J. R. 159.

189. R., for value received, delivered to C. a note, made by R., payable to C., and endorsed by H., in blank, as security, and C. afterwards sold and endorsed the note to B. for a less sum, who took it at his own risk, and with knowledge of the manner of making and endorsing the note. In an action brought by B., as endorsee, against H., the endorser, *held*, that as C., the original payee, could not maintain an action, either directly or indirectly, against H., as endorser, neither could B. recover against him. *Ibid*.

190. The holder of a note, after the time of payment, and after a suit has been commenced against the endorser, cannot release the maker by a writing not under seal, and without consideration; and such a release is no defence in the action against the endorser. *Crauford v. Millespugh*, 13 J. R. 87.

191. Where suits are brought against the maker and endorser of a promissory note, and the endorser pays the amount; and it is agreed

between the holder and endorser, that the suit against the maker shall be prosecuted for the benefit of the endorser, the maker cannot avail himself of the payment by the endorser, as a defence in the suit against him. *Mechanics' Bank v. Hazard*, 13 J. R. 353.

192. And, where payment is made by the endorser after a judgment *against the maker of a note, his bail cannot [*138] avail themselves of it, as a defence in a suit on the recognisance. *Ibid*.

193. But it seems, that if the plaintiffs had continued to be the real parties, the bail might have availed themselves of the payment by the endorser, or principal. *Ibid*.

194. A bill was drawn by the defendant on A., in favor of B., who sold it to the plaintiff. A., who resided in England, accepted the bill, but did not pay it, and it was returned protested. The plaintiff then drew a bill upon A. and the defendant, jointly, for the amount of the former bill, with damages, which was accepted by A. only, but was not paid. In an action against the defendant, as drawer of the first bill, *held*, that he was not discharged by A.'s acceptance of the second bill. *Suckley v. Furse*, 15 J. R. 338.

195. Where a person, engaged to labor for another for a year, at a certain price, for the whole period, on leaving his service, before the expiration of the year, received from him a draft for the services actually performed, which draft was not accepted or paid by the drawee; *held*, in an action on the draft, by the payee against the drawer, that the latter could not set up the original contract of service to defeat the recovery. *Hoar v. Clute*, 15 J. R. 224.

196. Where a deed of composition was entered into between S. and B., debtors, and their creditors, by which the former assigned all their property to M., and others, in trust, for their creditors, who, by the same instrument, released S. and B. from all their debts, &c., which deed was executed by M., as a trustee and creditor, and who was endorser of a note drawn by S. and B., of which B. & Sons, partners, were holders, and described in a schedule of debts, annexed to the deed, as due to M., and which deed was also executed by G., one of the firm of B. & Sons; *held*, that the execution of the deed by the holders of the note, was not a release of M., the endorser; for, upon the true construction of the whole instrument, M., having signed as creditor as well as trustee, he had thereby released all right of action against the makers, and was to be deemed as assenting to a discharge of the makers by the holders also, with a full understanding, that his liability to them, as endorser, was not to be impaired. *Bruen v. Marquand*, 17 J. R. 58.

197. The plaintiff lent the defendant his promissory note, payable to the defendant, or order, who endorsed and procured it to be discounted at the Bank of New-York, and received the money. The note was protested for non-payment, and, the defendant being insolvent, the plaintiff signed a written agreement, discharging him from all debts and demands, &c. The bank, with other creditors, also executed

the agreement by its corporate seal. Afterwards, the plaintiff paid the bank, as holders, the amount of the note, and brought an action against the defendant for so much money paid to his use; *held*, that the release of the defendant by the bank did not discharge the plaintiff, as maker of the note, especially, as the bank did not know for whose accommodation it was discounted, and, therefore, the plaintiff did not pay the money in his own wrong; besides, the plaintiff having no debt, or existing demand, at the time he signed the agreement to discharge

the defendant, that agreement could [*139] not have the *effect to discharge the right of action, subsequently acquired by payment of the money to the holders of the note. *Seymour v. Minturn*, 17 J. R. 169.

198. Where A. made a promissory note payable to the defendant, or order, which was endorsed by the defendant, for the purpose of its being discounted at a bank, for the accommodation of A., who, on its being refused to be discounted at the bank, negotiated it to a third person, at a discount, with knowledge of the circumstances; *held*, that this did not amount to a fraud, which could affect the rights of the holder against the maker, or endorser. *Powell v. Waters*, 17 J. R. 176.

199. *It seems*, that if the holder of a note sues the maker, and issue is joined in the cause, and the plaintiff, afterwards, takes a *relicta* and *cognovit actionem*, and gives the defendant a stipulation not to take out execution on the judgment entered up on the *cognovit*, until a certain day thereafter, before which day, according to the course and practice of the Court, the cause could not have been brought to trial, and a judgment obtained, it is not such an indulgence, or giving time to the maker, as will discharge the endorser. *Hallett v. Holmes*, 18 J. R. 28.

200. Though the last endorser delays, for more than a year, to take up a note protested for non-payment, and bring his action against a prior endorser, who has received notice of non-payment from the holder, this delay does not affect or discharge his right of action against the first endorser. *Stafford v. Yates*, 18 J. R. 327.

201. Every alteration of a note by the maker, in respect to the place of payment, or any alteration of the contract of the endorser, in any part, which may, in any event, become material, without the approbation of the endorser, discharges his liability. *Woodworth v. Bank of America*, in error, 19 J. R. 391.

202. Therefore, where a note is made and endorsed, for the accommodation of the maker, at A., where the parties reside, and the maker, without the knowledge or consent of the endorser, writes in the margin of the note, "*payable at the Bank of America*," which is in N., it is a material alteration of the contract, which discharges the endorser. *Ibid.* S. C. *Contra*, 18 J. R. 315.

203. Where a promissory note is endorsed, and delivered to a bank for collection, there is an implied undertaking on the part of the bank, in case the note is not paid, to give notice of the default of the maker to all the en-

dorsers; and if the bank neglects to give such notice, the holder may maintain an action of *assumpsit* against them, for the nonfeasance; the deposit of the note, and the probable profit to arise from the money remaining in the bank, after it is paid, being a beneficial act, and affording a good consideration to support such promise. *Smides v. Bank of Utica*, 20 J. R. 372.

204. A bank, in such case, is bound to employ a competent and faithful person, to give the requisite notice to the endorsers; otherwise, it is answerable for his default. *Ibid.*

205. But if the note is delivered to a notary, who is a sworn public officer, to protest it for non-payment, and to give notice thereof to the *endorsers, *it seems*, [*140] that the bank will not be liable for his neglect or default. *Ibid.*

VIII. *Action on a bill or note; (a) When and by whom the action may be brought; (b) Declaration; (c) Action on a lost note, and when a bill or note may be given in evidence under the money counts.*

206. A cause of action arises against the drawer on the protest for non-acceptance, without waiting until the bill is protested for non-payment. *Mason v. Franklin*, 3 J. R. 262.

207. And if the subsequent demand of payment and protest are void, they may, on demurrer, be rejected from the declaration as surplusage. *Ibid.*

208. The endorsee of a promissory note given in *Connecticut*, where promissory notes are not negotiable, may, in this state, maintain an action, in his own name, against the maker. *Lodge v. Phelps*, 1 J. C. 139.

209. If a note be endorsed in blank, the Court, where there are no suspicious circumstances, never inquire into the right of the plaintiff; any person in possession of the note may sue, and may, in Court, if necessary, fill up the blank, and make it payable to himself. *Livingston v. Clinton*, cited 3 J. C. 264.

210. A note was endorsed by the defendant, for the accommodation of the makers, who were then in good credit. Before negotiating the note, they became insolvent, and the defendant directed them not to part with the note, which they promised. They, afterwards, passed it to the plaintiff, with full notice of all the circumstances, in satisfaction of a debt due from them to the plaintiffs, which covered part of the amount of the note, receiving from the plaintiffs the balance in cash. In an action by the plaintiffs against the endorser, *held*, that the plaintiffs were not *bona fide* holders of the note, and could not, under the circumstances, support the action; and that, as the defence rested on matters arising subsequent to the execution of the note, one of the makers was a competent witness to defeat the recovery, and that without a release, as he was indifferent between the parties. *Skilding v. Warren*, 15 J. R. 270.

211. The defendant, being the payee of a promissory note, for 1500 dollars, endorsed it to the plaintiff, who endorsed and delivered it to a bank. The note was protested by the bank for non-payment, and due notice thereof given

to the defendant, who paid to the bank 800 dollars in part, and promised to pay the residue. The bank sued the plaintiff, as endorser, and recovered a judgment against him for the balance due on the note, after deducting the 800 dollars paid by the defendant. The plaintiff paid to the bank 380 dollars, and they continued in possession of the note, which had not been fully paid. The plaintiff declared against the defendant, as endorser of the note, in the usual form; and, also, for money paid, &c. *Held*, that the plaintiff could not maintain an action on the note, as it had not been fully paid, and was the property of the bank; but that he might sustain the action to recover the 380 dollars paid by him, on the count [*141] for money paid, &c. for the defendant, at his request. *Buller v. Wright*, 20 J. R. 367.

(b) Declaration.

212. The plaintiff may declare upon a promissory note, not negotiable, in the same manner as upon a note within the statute. *Downing v. Backenstoes*, 3 C. R. 137.

213. If the endorser of a note die before it becomes due, in an action by the holder against the executor, the promise to pay must be alleged to have been made by the defendant; if by the testator, it will be fatal. *Stewart v. Eden*, 2 C. R. 121.

214. An averment, that A. B. & Co. made, or endorsed, a note, the proper name and firm of A. B. & Co. being thereunto subscribed, is sufficient, and will be supported by evidence, that the note was made or endorsed by one of the partners only. *Manhattan Company v. Ledyard*, 1 C. R. 192.

(c) Action on a lost note, and when a bill or note may be given in evidence under the money counts.

215. Where a plaintiff, in a Justice's Court, declared on a promissory note, payable on demand, and proved that the note had been lost or destroyed; and the existence and contents of the note being proved; and it not appearing that the note was negotiable, or, if negotiable, that it had been, in fact, negotiated; *held*, that he was entitled to recover on the note. *Pintard v. Tuckington*, 10 J. R. 104.

216. A recovery cannot be had upon a note merely lost, and not destroyed, if it had been endorsed before it was lost. *Ibid*.

217. A note not negotiable, expressed to be for value received, may, in connection with proof of a consideration, be given in evidence under the money counts. *Smith v. Smith*, 2 J. R. 235.

218. But a note not negotiable within the statute, and no consideration appearing on the face of it, cannot be given in evidence under the money counts. *Saxton v. Johnson*, 10 J. R. 418.

219. A bill of exchange may be given in evidence, in an action by the payee against the maker, under the money counts. *Cruger v.*

Armstrong, 2 J. C. 5. *S. P. Arnold v. Crane*, 8 J. R. 79.

220. A note to pay a certain sum of money in lands, may be given in evidence under the money counts; and the admission of the defendant that he could not convey the land, and his promise to pay the note, are sufficient evidence of a consideration. *Smith v. Smith*, 2 J. R. 235.

221. A note payable to A. B., or bearer, may be given in evidence under the money counts. *Pierce v. Crafts*, 12 J. R. 90.

222. So, in an action by the endorsee against the maker, a note may be given in evidence under the money counts. *Ibid*.

When the party may sue on the bill or note, or resort to the original action. See ACTIONS IN GENERAL I. 4, 5.

*IX. Damages and interest. [*142]

223. The holder of a bill of exchange, drawn in New-York, on England, returned protested for non-payment, is entitled to recover of the drawer or endorser here the contents of the bill, at the rate of exchange, or the price of bills on England, at the time of the notice of the dishonor of the bill, with 20 per cent. damages, and interest. *Graves v. Dash*, 12 J. R. 17, in error. *Contra, Hendricks v. Franklin*, 4 J. R. 119. *S. P. Denston v. Henderson*, 13 J. R. 322.

224. The right to recover twenty per cent. damages on the protest of a foreign bill of exchange, rests, with us, on immemorial commercial usage, sanctioned by a long course of judicial decisions. Per *Spencer, J. Hendricks v. Franklin*, 4 J. R. 119.

225. Where the holder commenced his action on the protest for non-acceptance, without waiting until the bill is protested for non-payment, he may recover, besides the amount of the bill, twenty per cent. damages, with the usual interest, and charges of protest. *Weldon v. Buck*, 4 J. R. 144.

226. Where a bill, remitted to pay an antecedent debt, is returned protested, the twenty per cent. damages are not recoverable from the remitter. *Kenuworthy v. Hopkins*, 1 J. C. 107.

227. So, where a bill is remitted by A. to B., in payment of a previous debt, with a special endorsement directing the mode of its application, and after non-payment and protest endorsed by B. to C., with notice of the circumstances, C., in an action against A., cannot recover the twenty per cent., for he can only stand in the place of B., who, after protest, was the mere agent of A. in regard to the bill, and ought to have returned it to him, and is entitled to the same rights, and no more. *Thompson v. Robertson*, 4 J. R. 27.

228. The remitter of the bill is the only person entitled to damages. *Ibid*.

229. On a bill of exchange drawn in a foreign country, and made payable there, when sued upon here, the plaintiff can recover interest only according to the legal rate of the country where the contract was made. *Foden v. Sharp*, 4 J. R. 183.

230. A bill of exchange was drawn in the

United States, upon A., in *London*, on which the defendants were endorsers. Before the bill became due, B., the agent of the defendants, offered C., the holder of the bill, to pay it, in case A. did not, for the honor of the defendants, and C. promised to let him have the bill for that purpose. The bill not having been paid by A., B., on being informed of the fact, requested C. to let him have the bill, and offered to pay it; but C. declined, saying, that the bill had been put into the post-office, to be returned to *America*; held, that B. ought to have been ready in *London*, to take up the bill when it became due, and his offer to pay, when the rights of the parties had become fixed, was of no avail; that the previous promise of C. to let him have the bill, was a *nudum pactum*; and that, under the circumstances of the case, the plaintiff was not precluded from recovering the *twenty per cent. damages* on the amount of the bill. *Denston v. Henderson*, 13 J. R. 322.

*231. Where a note, endorsed [*143] and discounted at a bank, at six per cent. is protested for non-payment, the bank, in an action against the endorser, are entitled to recover *seven per cent.*, or the legal interest. *Mechanics' Bank v. Minthorne*, 19 J. R. 244.

232. A promissory note was drawn at *Montreal*, in *Lower Canada*, payable to persons resident in *England*, "with interest until paid, in *England*;" held, that the plaintiffs, on a judgment obtained here against the maker, were entitled to interest only to the time of the judgment; and that according to the legal rate of interest in *England*. *Scotfield v. Day*, 20 J. R. 102.

233. But the plaintiffs, in such case, are not entitled to any allowance for the *current rate of exchange* between this country and *England*, at the time of the judgment, or for any difference of exchange. *Ibid.*

BLASPHEMY.

1. Blasphemy against *God*, and contumelious reproaches and profane ridicule of *Christ* or the *Holy Scriptures*, are offences punishable at the common law, whether uttered by words or writings. *The People v. Ruggles*, 8 J. R. 290.

2. Wantonly, wickedly and maliciously uttering the following words, *Jesus Christ was a bastard, and his mother must be a whore*, was held to be a public offence, and punishable by the common law of this state. *Ibid.*

BOND.

1. A judgment by default is within the condition of a bond to save the obligee harmless from what he might be obliged to pay, *after due proceedings at law had against him, and*

adjudged and decreed, &c.; and he may avail himself of the condition, unless the default be shown to have been suffered collusively. *Gives v. Driggs*, 1 C. R. 450.

2. The condition of a bond that A., a clerk in a bank, should *well and faithfully perform the duties assigned to, and trust reposed in him, as first teller*, applies to his honesty, and not to his ability, and the sureties in such bond are not responsible for a loss arising from the mistake of the clerk. *Union Bank v. Clossey*, 10 J. R. 271. S. C. 11 J. R. 182.

3. But if A. conceal deficiencies originally arising from mistake, and, for the purpose of concealment, make false entries in the books of the bank, it is fraudulent, and a breach of the condition of the bond, and A.'s sureties are liable for the losses which the obligees may sustain in consequence of such fraudulent conduct. [*144]

Union Bank v. Clossey, 11 J. R. 182. And, whether the losses alleged to have been sustained by the obligees arose from such fraud and concealment or not, is matter of fact for a jury. *Ibid.*

4. A note was lost or mislaid, and A., the maker, having paid the amount to B., the holder, took his bond of indemnity against the note, &c.; and, afterwards, A. having a demand against B. for money, B. refused to pay, without first deducting the amount of the note, to which A. consented, and took the balance and a receipt from B. for the amount of the note as due, and afterwards brought an action against B. on his bond of indemnity. Held, that the second payment being voluntary on the part of A., and no fraud alleged on the part of B., no action could be maintained against him on the bond. *Bazen v. Rogel*, 3 J. C. 87.

5. After 18 or 20 years, a bond will be presumed to have been paid. *Executors of Clark v. Hopkins*, 7 J. R. 556.

6. To rebut the presumption, the obligee ought to show a demand of payment, and an acknowledgment of the debt within that time. *Ibid.*

7. The assignee of a bond may maintain *trover* for it in his own name against the obligor, who has got it into his possession, and converted it. *Clowes v. Handley*, 12 J. R. 484.

8. On a judgment for the penalty of a bond, the plaintiff cannot, by his execution, collect more than the sum mentioned in the condition of the bond, with interest and costs. *Van Wyck v. Montrose*, 12 J. R. 350.

9. And where the interest of a second judgment creditor, who has issued and delivered to the sheriff a *fi. fa.*, would be affected, the plaintiff cannot collect more, even with the consent of the defendant. *Ibid.*

10. Where the condition of a bond recites another bond, by which the plaintiff, and one J. S., were bound to the *United States*, for certain duties from J. S.; and then the condition is, that if the defendant shall well and truly pay off and discharge the said bond, and hold the plaintiff harmless, and indemnified from the payment thereof, the obligation to be void;

this is not to be considered as an obligation or undertaking to pay off the recited bond, but merely as a bond of indemnity; and, therefore, a plea of *non damnificatus*, in an action upon such bond, is good. *Douglass v. Clark*, 14 J. R. 177.

11. One obligor cannot plead, that the bond was obtained from his co-obligor, by duress. *Thompson v. Lockwood*, 15 J. R. 256.

12. But this rule does not apply to a bond taken by a sheriff from a defendant, whom he has no right to detain in custody; and the co-obligor or surety may avail himself of the defence of duress, in a several action against him. *Ibid.*

13. An endorsement on a bond or note made by the obligee or promisee, without the privity of the obligor or promisor, is not admissible evidence of payment, in favor of a party making the endorsement, so as to repel the presumption of payment arising from the lapse of time, or to take the case out of the statute of limitations; unless it be first shown, that the endorsement was made [*145] at the time it bears date, or when its operation would be against the interest of the party making it; and then, on such proof being given, it is good evidence to go to a jury. *Roseboom v. Billington*, 17 J. R. 182.

14. Where the condition of a bond is for the payment of money at a fixed day, evidence contradicting or varying such express condition is inadmissible. *Wells v. Baldwin*, 18 J. R. 45.

15. But if the bond is without condition, and the plaintiff has executed a separate instrument of defeasance, such defeasance may be pleaded to an action on the bond. *Ibid.*

Bond to indemnify a town against the maintenance of a bastard child. See BASTARD.

Rail bond. See BAIL III. IV.

Bottomry bond. See BOTTOMRY.

Bond and warrant of attorney. See PRACTICE.

Bond *colore officii*, and for ease and favor. See SHERIFF.

Bond for the gaol liberties. See SHERIFF.

Condition of a bond. See CONDITION.

Action on a bond. See DEBT I. PLEADING.

Execution of a bond. See DEED VI.

Proof of a bond. See EVIDENCE.

Surety in a bond. See SURETY.

Release of the obligors, or of a joint obligor. See RELEASE.

BOTTOMRY.

1. The master of a ship may, in a case of necessity, *bona fide*, hypothecate the ship, at the port of destination, as well as any other foreign port. *Reade v. Commercial Insurance Company*, 3 J. R. 352.

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2. A clause of sale inserted in a bottomry bond, does not destroy its character or operation. *Robertson v. United Insurance Company*, 2 J. C. 250.

See INSURANCE. SHIPS AND SEAMEN.

BROOKLYN VILLAGE.

Kings County, of which *Brooklyn* is part, includes all the wharves, docks, and other artificial erections, in the *East River*, opposite to the city of *New-York*, though west of the natural low water mark, on the *Nassau* or *Long Island* shore; and the jurisdiction of *Brooklyn* village extends to the actual line of low water, whether formed by nature or artificial means. *Udal v. Trustees of Brooklyn*, 19 J. R. 175.

*BURGLARY. [*146]

The breaking open, in the night time, of a store, at the distance of 20 feet from a dwelling-house, but not connected with it by any fence or enclosure, and no person sleeping in the store, is not burglary. *The People v. Parker*, 4 J. R. 424.

CANADA GRANTS.

1. The Supreme Court will not take notice of claims to lands within this state, under grants made by the French government in *Canada*, prior to the treaty between *Great Britain* and *France*, in 1763; those claims being, at most, but equitable, and affording no evidence of a legal title, that can be recognised by a Court of law, which looks only to titles under patents from this state, or the former colonial government of the province of *New-York*. *Jackson*, ex dem. *Winthrop*, v. *Ingraham*, 4 J. R. 163.

2. It appears, that those *Canadian* claims were pronounced, by the Colonial Assembly, in 1773, to be wholly unfounded. *Ibid.*

CANALS AND CANAL COMMISSIONERS.

1. The acts of the 7th of *April*, 1816, (Sess. 39. c. 237.) and of the 16th of *April*, 1817, (Sess. 40. c. 262.) relative to canals, authorized the commissioners to enter upon and occupy any lands which might be necessary for canal improvements. If, therefore, it become necessary, for the prosecution of the canals, to occupy part of a turnpike road, the commissioners, or their agents, for that purpose, may

lawfully enter on the land of any person, for making a new road, in the place of such part of the turnpike road discontinued by them, and taken for the purposes of the canal. *Rogers v. Bradshaw*, 20 J. R. 735. in error. *Contra*, S. C. 20 J. R. 103.

2. The act of the 13th of April, 1820, (Sess. 40. c. 102. s. 21.) which authorizes the commissioners to discontinue or alter any part of a public road, or highway, when it interferes with the proper location or construction of the canal, applies to a turnpike road; it being, in the popular and ordinary sense, "a public road or highway." *Ibid.* *Contra*, S. C. 20 J. R. 103.

3. Though the party whose land is taken for the use of the public, is justly entitled to an adequate compensation, yet, it seems, the canal commissioners, or their agents, are not liable, as trespassers, for entering upon, and occupying land taken for the use of the [*147] canal, before *compensation is made to the owner, though the act of the 13th of April, 1820, under which they acted, contains no provision for making compensation; and, especially, they are not liable in trespass to the party, when the act of April, 1817, providing a compensation to individuals, caused by taking their lands for the purposes of the canal, extends to cases arising under the act of the 13th of April, 1820, as well as under the former acts on the same subject. *Ibid.*

CAPTURE.

1. A capture, and an immediate recapture, does not divest the property of the original owner. *Cook v. Howard*, 13 J. R. 276.

2. Property taken in battle on land, does not vest in the captor, at least, not until after the battle is over; and if it be retaken during the battle, the title of the original owner is not divested. *Ibid.*

3. Property taken from an enemy in a war upon land, belongs to the sovereign of the captor. *Ibid.*

CERTIORARI.

1. Proceedings under the absent and absconding debtor act are removable by certiorari. *Learned v. Duval*, 3 J. C. 141.

2. A certiorari, to remove an indictment, for a forcible entry and detainer, into the Supreme Court, is grantable of course. *The People v. Runkel*, 6 J. R. 334.

3. A certiorari lies to the judges of the Common Pleas, to remove proceedings on an appeal to them from commissioners of highways. *Lawton v. Commissioners of Cambridge*, 2 C. R. 179.

4. The Court will not intend that proceedings, which are not returned, are irregular. *Ibid.*

5. A circumstance not stated in the return as a fact, is to be disregarded. *Ibid.*

6. A circumstance, stated in the return, which was not ordered to be returned, is to be disregarded. *Ibid.*

7. A certiorari, in a civil suit, removes the proceedings in the same state in which they were in the Court below, and the Supreme Court must continue the proceedings from the point at which the Court below left off. *Wolfe v. Horton*, 3 C. R. 86.

8. On a certiorari, the record itself is sent up, and, though stated in the return to be only a copy, it will still be regarded as the record. *Ibid.*

9. The delivery of a certiorari to a justice, supersedes his powers, *and [*148] renders all subsequent proceeding *coram non iudice*, and void. *Case v. Shepherd*, 2 J. C. 27.

10. On an appeal from the decision of commissioners of highways, to three of the judges of the Court of Common Pleas, under the 36th section of the act to regulate highways. (Sess. 36. c. 33. 2 N. R. L. 282.) if the decision of the commissioners is reversed, a certiorari will lie, on behalf of the commissioners, to remove the proceedings into the Supreme Court; the right to bring a certiorari being reciprocal, and belonging as much to the commissioners as to the appellants. *Commissioners of Kinderhook v. Claw and others*, 15 J. R. 537.

11. Wherever magistrates proceed judicially, both parties to the proceedings are entitled to be heard, and notice to both is indispensably requisite, notwithstanding there is no direction in the act by which the tribunal is constituted, that notice shall be given. *Ibid.* And, if notice is not given, a writ of certiorari lies to reverse the proceedings. *Ibid.*

12. Wherever the rights of an individual are infringed by the acts of persons, clothed with an authority to act, and who exercise that authority illegally, and to the injury of an individual, the party injured may have redress by certiorari. Per *Spencer J.* *Wildy v. Washburn*, 16 J. R. 49.

13. A certiorari, to remove into the Supreme Court the proceedings of three justices of the peace appointing a town officer, on the neglect of the town to make an appointment, must be prosecuted in the name of the people; and, if it be brought in the name of the party aggrieved, the Supreme Court will make no order on the subject. *Ibid.*

14. A certiorari will not lie, to remove into the Supreme Court proceedings commenced before a judge of the Court of Common Pleas, under the act of the 13th of April, 1820, (Sess. 43. c. 194.) to amend the act concerning distresses, &c. until the case has been finally tried, and judgment given thereon before the judge of the Court of Common Pleas. *Lynde v. Noble*, 20 J. R. 80.

15. Nor will a writ of certiorari, though issued after judgment, stay the writ of restitution in such case. *Ibid.*

See CERTIORARI TO A JUSTICE'S COURT

[*149] *CERTIORARI TO A JUSTICE'S COURT.

- I. On what a certiorari may be brought.
- II. Certiorari and return; (a) How a certiorari may be obtained, and the effect of it; (b) What the justice may be required to return, and how the return must be made.
- III. Joinder in error, and subsequent proceedings.
- IV. Amendment; (a) Of the certiorari; (b) Of the return.
- V. (a) When the judgment below will be reversed; (b) What may be intended from the return in support of the judgment; (c) What parts of a return may be disregarded by the Court.
- VI. Costs.

I. On what a certiorari may be brought.

1. A judgment of nonsuit, without awarding costs, is incomplete, and can neither be affirmed nor reversed. *Monnell v. Weller*, 2 J. R. 8.
2. But a certiorari will lie to reverse a judgment of nonsuit, when costs are awarded. *Smith v. Suttis*, 2 J. R. 9.
3. A plaintiff obtaining judgment may have a certiorari, if, by the error of the justice, the amount which he was entitled to recover has been diminished. *Bissell v. Marshall*, 6 J. R. 100.

II. Certiorari and return; (a) How a certiorari may be obtained, and the effect of it; (b) What the justice may be required to return, and how the return must be made.

(a) How a certiorari may be obtained, and the effect of it.

4. An affidavit, on which to obtain a certiorari, may be made by the party's attorney, if there appear a sufficient reason for its not having been made by the party himself. *Dickson v. Seelye*, 6 J. R. 327.

5. Every thing relating to the merits, or to the errors in the Court below, must be contained in the original affidavit, which is required to be made within thirty days after judgment; yet a supplementary affidavit, which is merely explanatory of a collateral fact, may be made after the 30 days. *Ibid.*

6. The justice must obey the certiorari at his peril. *Van Patten v. Ouderkerk*, 2 J. C. 108.

7. He cannot move to quash a certiorari directed to him. *Ibid.*

8. A certiorari allowed after execution, begun to be executed by the constable, is no *superveneas* to the execution. *Blanchard v. Myers*, 9 J. R. 66.

9. If, after making the levy, the constable take security that the goods shall be forthcoming at a certain day, and in the

[*150] mean time a certiorari be regularly issued and served on the justice, it is no defence for not having delivered the goods at the time. *Ibid.*

10. If a justice return that there was no such cause before him as the one entitled in the certiorari, but goes on to state the proceedings in a cause before him, according to its true title, and on the return, there is an assignment of errors and joinder, it is too late to object to the cause being wrong entitled in the certiorari. *Drake v. Drake*, 11 J. R. 531.

11. On the return to a certiorari, it is too late to object that the affidavit on which it was allowed was made after the time limited by the statute. *Lovet v. Green*, 12 J. R. 204.

12. The irregularity should be taken advantage of, by motion to quash the certiorari, before its return. *Ibid.*

13. A return to a certiorari to a Justice's Court, is conclusive as to the facts stated. *Rawson v. Adams*, 17 J. R. 130.

(b) What the justice may be required to return, and how the return must be made.

14. A justice is not bound to return any thing but what can legally be required of him, notwithstanding a command in the writ. *Van Patten v. Ouderkerk*, 2 J. C. 108. S. S. C. C. 118.

15. The justice may be required to return the evidence. *Dodge v. Coddington*, 3 J. R. 146.

16. The justice must return all the proceedings in the suit. *Van Doren v. Walker*, 2 C. R. 373.

17. The Court will not order the justice to return the conduct of the jury. *Anonymous*, 3 C. R. 106.

18. A notice of special matter, which might be given in evidence under the general issue, need not be returned. *Keeler v. Adams*, 3 C. R. 84.

19. A return of a notice, which, if returned, would not vary the determination of the Supreme Court, will not be ordered. *Ibid.*

20. The justice is not bound to state the evidence in his return, unless called upon to do so. *Wilson v. Fenner*, 3 J. R. 439.

21. Where a justice, having signed a return to a certiorari, made a supplementary return, and then made another return, stating, that the supplementary return was incorrect, the Court refused to receive the supplementary returns, and expressed their strong disapprobation of the practice of preparing returns to certioraris for justices, without their request, especially by the party, or his attorney, who sues out the certiorari. *Rudd v. Baker*, 7 J. R. 548.

III. Joinder in error, and subsequent proceedings.

22. Where no attorney is employed, the notice to join in error must be served personally upon the defendant, and not be put up in the clerk's office. *Hardenbergh v. Thompson*, 1 J. R. 61.

23. But, in such case, the assignment of errors need not be served on the party; only the notice to join in error. *Verney v. Benedict*, 8 J. R. 360.

*24. Where the plaintiff in error [*151]

has entered a rule for the defendant to join in error in twenty days, &c. he must apply at the next term for the effect of his rule; a longer delay will be considered as a waiver of it. *Sealy v. Shattuck*, 2 J. C. 69. S. C. C. C. 126. But the practice now is to enter a default, after the expiration of the twenty days, on filing affidavit of the service of the notice, &c. and to take judgment, of course, at any term thereafter.

25. Error-books are unnecessary, and if the plaintiff will deliver them, he will not be allowed for them, on taxation of costs. *Ehel v. Smith*, 3 C. R. 187.

26. If, after joinder in error, it be discovered that the justice has neglected to make a return, and has quitted the state, the Court will not *non pros.* the writ, but will give the defendant in error leave to take out execution in the Court below, and the plaintiff to discontinue without costs. *Ronney v. Crary*, 3 C. R. 126.

27. On a *certiorari* to a Justice's Court, the plaintiff in error may assign as error in fact, such matters as could not come under the observation of the justice, and, therefore, could not be returned by him as the misconduct of the jury, after they had retired to make up their verdict. *Harvey v. Rickell*, 15 J. R. 87.

See *tit.* ERROR.

IV. Amendment; (a) *Of the certiorari*; (b) *Of the return.*

(a) *Of the certiorari.*

28. A *certiorari* may be amended, so as to agree with the affidavit on which it was obtained. *Knapp v. Palmer*, 1 C. R. 486.

(b) *Of the return.*

29. An affidavit to amend a return, must state wherein the errors consist, that the Court may see whether they are material or not. *Leonard v. Sunderlin*, 3 C. R. 136.

30. A return was, on affidavit that the error arose from a clerical mistake, after assignment of errors and judgment thereon, allowed to be amended. *Day v. Wilber*, 2 C. R. 134.

31. But the Court will not grant an order to amend, until the opposite party has been notified of the application; and where an order was granted, *ex parte*, to amend, the Court altered it, and gave the plaintiff time to show cause against the amendment. *Day v. Wilber*, 2 C. R. 258.

32. After notice of argument, the justice, on affidavit of imposition on him by the attorney, was allowed to apply for leave to amend his return, on giving notice of the application, &c., to the attorney of the plaintiff in error. *Simpson v. Carter*, 5 J. R. 350.

33. If there has been a former trial for the same cause of action, the justice will be ordered to amend his return, by setting forth the testimony in it. *Fetter v. Mulliner*, 2 C. R. 364.

*34. If a justice has given a cer-

cause before him, and afterwards, in an affidavit, states the facts differently, and explains the reason of the mistake in his certificate, he will not be ordered to amend the return to a *certiorari* in conformity to it, and contrary to his affidavit. *Keeler v. Adams*, 3 C. R. 84.

35. Where a justice has returned precisely and specifically as to all the facts stated in the affidavit, the Court will not direct him to amend his return on supplementary affidavits. *Butler v. McIntyre*, 2 J. R. 182.

36. The justice may be required to explain the evidence given in the cause. *Wilson v. Fenner*, 3 J. R. 439. *Durkee v. Brackett*, 1 C. R. 501.

37. After joinder in error, the defendant will be allowed to amend a clerical mistake, the joinder appearing to have been served in order to prevent a default being entered against him for want of having served the plaintiff with an order to stay proceedings. *Moore v. Bacon*, 3 C. R. 83.

38. Amending a return after the Court have given their opinion against it, must be on payment of costs by the defendant; that is, of the costs on the general assignment of errors, and of the subsequent costs down to the giving of the opinion. *Wilber v. Day*, 2 C. R. 375.

39. But the plaintiff cannot move for the justice to amend his return, after he has noticed the cause for argument. *Knapp v. Onderdonk*, 2 C. R. 383.

40. And, after an assignment of errors, it is too late for the plaintiff to move to amend the return; he ought to have applied to a judge for an enlargement of the rule. *Rue v. Sprague*, 1 J. R. 493.

V. (a) *When the judgment below will be reversed*; (b) *What may be intended from the return in support of the judgment*; (c) *What parts of a return may be disregarded by the Court.*

(a) *When the judgment below will be reversed.*

41. The verdict of a jury in the Court below, does not conclude the Supreme Court as to the facts. *Nicoll v. Dunlap*, 2 J. R. 195.

42. So, if it clearly appear, from the evidence returned to the *certiorari*, that the plaintiff's demand was illegal, or that he had no right to recover, the judgment will be set aside, notwithstanding a verdict for the plaintiff. *Nicoll v. Dunlap*, 2 J. R. 195. S. P. *Kidder v. Townsend*, 3 J. R. 435.

43. So, if part of the plaintiff's demand, by his own showing, is illegal, and he has recovered for the whole; for the Supreme Court cannot intend that the legal charges were rejected. *Ehel v. Smith*, 3 C. R. 187.

44. But if the evidence below be not stated in the return, the Court above will intend that it was sufficient to support the declaration. *Kidder v. Townsend*, 3 J. R. 435.

45. If the declaration states one cause of

[*152.] tificate of certain proceedings in a

[*153] action, and the plaintiff's evidence relates to a totally different cause, a judgment rendered for the plaintiff will be reversed. *Delamater v. Borland*, 1 C. R. 593.

46. Where some evidence has been offered to the justice, the Court will not reverse his judgment, merely because it was too light or insufficient to support a judgment. *Fisher v. Chandler*, 1 J. R. 505.

47. If, on the return of the *certiorari*, the evidence does not appear sufficient to support the action, the judgment will be reversed. *Dodge v. Coddington*, 3 J. R. 146.

48. In an action for a penalty before a justice, where a verdict is found, and judgment given for the defendant, the Court will not reverse the judgment, because the verdict was clearly against evidence, there being no irregularity alleged. *Comfort v. Thompson*, 10 J. R. 101.

49. On the return to a *certiorari*, the Court will not admit the objection that the justice was a priest or minister of the gospel, and that the proceedings were, therefore, *coram non jure*, but will presume that the justice acted under a regular commission. *M'Intyre v. Tanner*, 9 J. R. 135.

50. If the justice, after a suit is commenced, move into a part of a house in which a tavern is kept, and there try the cause, while the tavern is kept in the other part of the house, (See *sec.* 36. c. 53. a. 19. 1 N. R. L. 397.) his judgment will be reversed. *Low v. Rice*, 8 J. R. 409.

51. The judgment of a justice will not be reversed, because the justice had previously expressed an opinion in the cause. *McDowell v. Van Deusen*, 12 J. R. 356.

52. If a justice mislead a defendant, by informing him that the cause was discontinued, and, afterwards, gives judgment against him, in his absence, the judgment will be reversed. *Tyler v. Olney*, 12 J. R. 378.

53. If an improper question has been put to a witness, and answered, but which is immediately corrected by the justice, the judgment will not be reversed on that account. *Brown v. Cowell*, 12 J. R. 384.

54. A justice's refusal to endorse the defendant's exemption from imprisonment, upon an execution, is no ground for reversing the judgment. *Spafford v. Griffen*, 13 J. R. 328.

55. Where it is stated in a return, that the cause was tried under an act relative to Justices' Courts, which had been repealed; the mistake in wrong entitling the act or proceedings, does not affect the jurisdiction of the justice. *Chapman v. Smith*, 13 J. R. 80. Per *Spencer, J.*

56. A judgment of a Justice's Court will not be reversed, where it appears that the *certiorari* was brought merely for the purpose of throwing costs on the defendant in error. *Potter v. Smith*, 14 J. R. 444.

57. As where, to an assignment of errors on a *certiorari*, the defendant pleaded an award, subsequent to the rendition of judgment, with satisfaction of the damages and costs, to which

the plaintiff in error demurred; *held*, that the defendant in error was entitled to judgment on the demurrer; for, if the judgment below should be reversed, he could not recover back what he had paid in satisfaction, and, therefore, *the only object [*154] could be to subject the defendant in error to costs. *Ibid.*

58. In matters of *tort*, the Court does not interfere to reverse a judgment, on the ground of excessive damages. *Harvey v. Rickett*, 15 J. R. 87.

59. In reviewing the proceedings of justices' Courts, the Supreme Court is not regulated by the rules applicable to writs of error. *Ibid.*

60. A judgment of a justice will not be reversed, merely on the ground, that the process was in one form of action, and the declaration in another, though the objection was made to the variance at the time, and overruled by the justice. *Bowen v. Ferne*, 16 J. R. 161.

61. In an action of trespass in a Justice's Court, where there is a verdict and judgment for the defendant, the Supreme Court will not reverse the judgment on a *certiorari*, brought merely because the verdict was against evidence, if it appears that the injury was trivial, and the plaintiff entitled to nominal damages only, and the suit is merely for costs. *Cady v. Fuirchild*, 18 J. R. 129.

See further, COURTS OF JUSTICES OF THE PEACE.

(b) *What may be intended from the return in support of the judgment.*

62. On a plea of payment, the jury found a verdict of eight cents for the defendant; and the Supreme Court, to support the verdict, intended a set-off. *Carna v. Penfield*, cited 2 C. R. 138.

63. If necessary to support the judgment, the Court will intend that the promise, on which the suit below was brought, was an express promise in writing, no fact appearing to the contrary. *Holly v. Rathbone*, 8 J. R. 148.

64. Where the testimony is submitted to the jury without objection, every inference that could be drawn from the evidence, will be presumed to have been drawn; and every reasonable intendment will be made in support of the verdict. *Menderback v. Hopkins*, 8 J. R. 436.

65. So, a previous request, by the defendant, may be intended in support of the verdict. *Ibid.*

66. Where a justice returned to a *certiorari*, that, being convinced by the evidence adduced, he gave judgment, the Court intended that it was on legal evidence. *Wilson v. Fenner*, 3 J. R. 439.

67. Where it does not appear, from the return, that the whole merits of the cause were not before the jury, the Court will, after verdict for the plaintiff, intend that the defendant below had failed in supporting his plea. *Kline v. Husted*, 3 C. R. 275.

68. Where it is not stated in the justice's re-

turn, that the witnesses were sworn, but, both parties being present, it does not appear that any objection was made, the Court will intend that they were sworn, or that their testimony was admitted by consent, without oath. *House v. Lou*, 2 J. R. 378.

69. If it appears from the return, that the jury retired, and nothing is said about a constable being sworn to attend them, the omission is fatal, and cannot be supplied by intendment. *Van Doren v. Walker*,

[*155] *2 C. R. 373. *Day v. Wilber*, 2 C. R. 134. *S. P. Beekman v. Wright*, 11 J. R. 442. *Coughnet v. Eastenbrook*, 11 J. R. 532.

70. Joining issue, or awarding a venire, cannot be intended. *Van Doren v. Walker*, 2 C. R. 373. But see *Wright v. Anthony*, cited 2 C. R. 138.

71. Where the whole evidence is not returned by the justice, before whom a judgment had been obtained, on a promissory note, which the defendant alleged was not for a good consideration, and the cause was fairly submitted to the jury, who found for the plaintiff, the Court will not reverse the judgment, though, from the evidence returned, there is some reason to believe that a larger sum was included in the note, which was given for fees and services of a deputy sheriff, than was warranted by law. *Woodin v. Hoofut*, 12 J. R. 286.

72. On the return of a *certiorari*, the error complained of ought to appear affirmatively, otherwise the judgment of the justice will be presumed to be correct. *Clements v. Benjamin*, 12 J. R. 299.

73. If the return be imperfect, or defective, the plaintiff in error ought to procure a further return. *Ibid*.

74. Where improper evidence has been admitted in a Justice's Court, without being excepted to at the time, it cannot, afterwards, on the return to the *certiorari*, be made the ground of objection or reversal. *Van Sickler v. Jacobs*, 14 J. R. 434.

75. If the parties in a Justice's Court agree to try the cause on its merits, this does not preclude the defendant, who was sued for a debt contracted by his wife before marriage, from objecting, on the return to a *certiorari*, to the non-joinder of his wife, though he did not make the objection in the Court below, nor did he waive it; such agreement applies to technical and formal objections. *Gage v. Reed*, 15 J. R. 403.

(n) *What parts of a return may be disregarded by the Court.*

76. The Court, on the return to a *certiorari*, will take notice of such facts only as the justice certifies from his own knowledge, not such as he derives from the information of others. *Mosely v. Landon*, 2 J. R. 193.

77. If the justice, in his return, go out of the case, as by stating matters which arose in some other cause, the Court will disregard them, and take notice only of what he was re-

quired, by the *certiorari*, to return. *Allen v. Horton*, 7 J. R. 23.

78. The misrecital, in the return to a *certiorari*, of the title of the act for the recovery of debts to the value of 25 dollars, will be disregarded. *Farrington v. Payne*, 15 J. R. 431.

Further, and more particularly, as to the errors for which a judgment will be reversed. See COURTS OF JUSTICES OF THE PEACE.

*VI. Costs.

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79. Costs are to be taxed for a general assignment of errors only. *Wilber v. Day*, 2 C. R. 375. Reg. Gen. Feb. 1805. 2 C. R. 387.

80. The costs on a *certiorari* refer back to the original judgment. *Reynolds v. Lammond*, 3 J. R. 540.

81. So, where a person, in the Court below, obtained a judgment for 11 dollars, and enlisted in the army of the United States, and the judgment was afterwards reversed, with costs, amounting to more than 20 dollars, the Court refused to discharge the defendant in error from an execution, issued on the judgment of reversal. *Ibid*.

82. When, on a *certiorari*, the judgment is affirmed in part, and reversed in part, costs in error will not be allowed on either side. *Williams v. Sherman*, 15 J. R. 195.

See COURTS OF JUSTICES OF THE PEACE.

CHAMPERTY AND MAINTENANCE.

- I. *Champerty*.
- II. *Maintenance*.
- III. *Buying a pretended title*.

I. *Champerty*.

1. The purchase of land during the pendency of a suit concerning it, if made with a knowledge of the suit, and not in consummation of a previous bargain, is champerty, (*See* 24. c. 87. s. 1. 1 N. R. L. 172.) and the purchase is void. *Jackson, ex dem. Bryant, v. Ketchum*, 8 J. R. 479.

2. And, it seems, that it would be void, even if the purchaser were ignorant of the *lis pendens*. *Ibid*.

3. H. T., who claimed land as heir at law of his father, and who was about to commence suits to recover the possession of it, entered into an agreement with the plaintiff, his brother-in-law, by which he covenanted, in consideration of the premises, &c. to convey to the plaintiff the one fourth part of the property which should be recovered; and the plaintiff, in consideration of such covenant, &c. promised H. T. to pay, bear, and sustain, one half of all the expenses which might oc-

cur in the prosecution of the intended suits, &c.; held, that this agreement was illegal and void, under the first section of the statute to punish champerty and maintenance. *Thalimer v. Brinkerhoff*, 20 J. R. 386.

4. And the illegality of this agreement is a good defence for the defendant, who, as the attorney of H. T., had received a [*157] large sum of money, on a compromise of the suits brought by H. T., in an action of *assumpsit* against the defendant, to recover one fourth of the money. *Ibid.*

5. To make such an agreement illegal and void for *champerty*, it is not necessary that the land should be held adversely. *Ibid.*

II. Maintenance.

6. An action for maintenance will not lie against a person for carrying on a suit in the name of another, or assisting in the prosecution of it, if he has any legal or equitable interest in the land, or subject of controversy. *Hickham v. Conklin*, 8 J. R. 220.

7. Purchasing a pretended title, and prosecuting a suit in the name of another, but for the party's own benefit, is not an offence within the 8th section of the act to prevent and punish champerty and maintenance. *Ibid.*

8. Where a person having conveyed land, when an infant, and after arriving at full age conveys it to another, it is not an act of maintenance, if the prior grantee was never in possession. *Jackson, ex dem. Brayton, v. Burchin*, 14 J. R. 124.

III. Buying a pretended title.

9. Buying and selling lands out of the possession of the vendor, and held adversely at the time, is buying and selling a pretended title, and is not a valid consideration for a promise. *Whitaker v. Come*, 2 J. C. 58.

10. So, where notes were given for the purchase money, on a contract for the purchase and sale of *Susquehanna* lands, within the jurisdiction of *Pennsylvania*, under the *Conventient* claim to those lands; held, that the sale was illegal, and the consideration void. *Ibid.*

11. In the case of a sale of lands, held adversely, equity will not interfere, either to compel the vendor to refund the purchase money, nor enjoin him from prosecuting his action for it against the vendee; but will leave the parties to pursue their remedies, if any they have, at law. *Woodworth v. Jones*, 2 J. C. 417.

12. Where the deed of a grantor describes, generally, all the right and title to the land in a particular patent, without specifying the precise quantity or bounds, and the grantor has a legal title to, and possession of a part, and a part is unoccupied, though another part of the same patent be in the actual occupation of one who

claims and holds adversely to the grantor; yet, taking such a deed is not maintenance, especially where the purchase was made by the *bona fide* advice of counsel; and there are other circumstances to show that there was no intention to purchase a pretended title. *Van Dyck v. Van Beuren*, 1 J. R. 345.

13. The possession of *Indians*, existing as an independent nation, is not such an adverse possession as will render alienations by patentees, to whom their lands [*158] were granted by the state, void for maintenance. *Jackson, ex dem. Klock, v. Hudson*, 3 J. R. 375.

14. Where a person purchases land, knowing, at the time, that the same is held adversely to the person of whom he purchases, by persons claiming by deed, he is liable to an action for the value of the land held adversely, and the improvements thereon. *Teale v. Fonda*, 7 J. R. 251.

15. In an action under the 8th section of the act, the plaintiff, in his declaration, need not negative the *proviso* in favor of persons in possession buying in pretended titles. *Teale v. Fonda*, 4 J. R. 304.

16. Where a person undertakes to sell land which is held adversely to him, it is immaterial whether his title or claim were good or bad; and the parties to such sale will be equally within the statute against champerty and maintenance. *Tomb v. Sherwood*, 13 J. R. 289.

17. So, where a person obtained a certificate from the surveyor general of the state, that he purchased a lot of land, and the land was then sold under an execution against him, and he, afterwards, assigned the certificate; held, that the assignee was liable to the penalty of the statute. *Ibid.*

18. The value to be recovered in such case is not only that of the land actually occupied and cultivated, but of the whole lot or parcel which is claimed in connection with it. *Ibid.*

19. A person who sells and conveys land, without knowing that there is a subsisting adverse possession, is not liable to the penalty for selling a pretended title, under the 8th section of the act to prevent champerty and maintenance. *Hausenfrats v. Kelly*, 13 J. R. 466.

20. The seller of land is, however, in the first instance, to be presumed conversant of the situation of it. *Ibid.*

21. Where a person enters upon new lands, without claim, or color of title, and conveys them, by deed, to a third person, and the lawful owner of the land, not having notice of these facts, afterwards sells and conveys the same land, he is not liable to the penalty for selling a pretended title. *Ibid.*

See further, *tit. CHANCERY, Champerty and Maintenance.*

[*159] *CHANCERY.

I. Account.	Length of Time, and Possession.
II. Action.	
III. Agreement.	XXXIX. Lease.
IV. Alien.	XL. Legacy.
V. Appeals.	XLI. Limitations.
VI. Assignment.	XLII. Loan Officers.
VII. Award.	XLIII. Lunatics and Idiots.
VIII. Bailment.	XLIV. Mortgage.
IX. Banking.	XLV. <i>Ne Exeat</i> .
X. Bankrupt.	XLVI. New Trial.
XI. Champerty and Maintenance.	XLVII. Nuisance.
XII. Civil Death.	XLVIII. Parent and Child.
XIII. Constitution and Government of the United States.	XLIX. Partition.
XIV. Contribution.	L. Partnership.
XV. Corporation.	LI. Pleadings.
XVI. Costs.	LII. Pledge.
XVII. Debtor and Creditor.	LIII. Power.
XVIII. Deed.	LIV. Practice.
XIX. Descent.	LV. Principal and Agent.
XX. Devise.	LVI. Principal and Surety.
XXI. Escheat.	LVII. Promissory Note.
XXII. Evidence.	LVIII. Quo Warranto.
XXIII. Execution.	LIX. Receiver.
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XXVII. Fugitives from Justice.	LXIII. Sheriff.
XXVIII. Guardian and Ward.	LXIV. Ships, and Ship Owners.
XXIX. Habeas Corpus.	LXV. Statutes.
XXX. Heir.	LXVI. Steam Boats.
XXXI. Husband and Wife.	LXVII. Substitution.
XXXII. Infant.	LXVIII. Surrogates.
XXXIII. Injunction.	LXIX. Tenant in Common.
XXXIV. Interest.	LXX. Tenant by the Curtesy.
XXXV. Judgment.	LXXI. Towns.
XXXVI. Jurisdiction of the State.	LXXII. Trust.
XXXVII. Jurisdiction of Chancery.	LXXIII. Turnpike Companies.
XXXVIII. Laches.	LXXIV. Vendor and Purchaser.
	LXXV. Will.

[*160] *I. ACCOUNT.

- A. In what cases, and against whom, account lies.
 B. (a) When an account is conclusive; (b) and when it will be opened.
 C. What is a good bar to an account; length of time.
 D. Manner of accounting; how charged and discharged; and what allowances shall be made to the party.

(A) In what cases, and against whom, account lies.

1. Chancery exercises a concurrent jurisdiction with Courts of common law, in all mat-

ters of account. *Ludlow v. Simond*, 2 C. C. E. 1. 38. 52. *Post v. Kimberly*, 9 J. R. 470. 493. *Duncan v. Lyon*, 3 J. C. R. 351. 361.

2. The ground on which this jurisdiction was originally assumed, was, that though the party had a legal title, yet the remedy at law was doubtful or incomplete. *Ludlow v. Simond*, 2 C. C. E. 1. 39. 53. *Rathbone v. Warren*, 10 J. R. 587. 595, 596.

3. The remedy at law by an action of account, which gave the party the same relief, by a judgment to account before auditors, seems to have fallen into disuse, without any good reason. *Duncan v. Lyon*, 3 J. C. R. 351. 361.

4. Chancery, having acquired cognizance of a suit, for the purpose of discovery or injunction, will, in most cases of account, whenever it is in full possession of the merits, and has sufficient materials before it, retain the suit, in order to do complete justice between the parties. *Armstrong v. Glickrist*, 2 J. C. 424. 431. *Rathbone v. Warren*, 10 J. R. 587. 596.

5. The plaintiff may come into Chancery, not only to compel the defendant to account, but to have his account allowed. *Ludlow v. Simond*, 2 C. C. E. 1. 39. 52. 53.

6. To sustain a bill for an account, there must be mutual demands, not a single matter; a series of transactions on one side, and of payments on the other, not a single payment or matter that can be set off at law. *Porter v. Spencer*, 2 J. C. R. 169.

7. A. and B. carried on trade as partners, with the funds of A., in the name of B., who, without any dissolution of the co-partnership, or rendering any account to A., afterwards, without the consent of A., entered into partnership with C., and carried into the new concern all the funds of the former partnership. A., on the death of B., filed a bill against B.'s administrators, and C., his surviving partner, for discovery and account; held, that A. was entitled to an account from C. of the transactions and profits of the partnership between him and B., and of the personal estate of the intestate in his hands. *Long v. Majestre*, 1 J. C. R. 305.

8. Rent may be recovered in equity, where the remedy has become difficult or doubtful at law, or where there is a perplexity or uncertainty as to the title, or [*161] the extent of the tenant's responsibility. *Livingston v. Livingston*, 4 J. C. R. 287.

9. But it seems, that if the defendant, the bill being for a discovery, and an account of rents, &c., had demurred to that part of the bill which sought relief, the plaintiff, after obtaining the discovery sought for, would have been sent to law for his remedy. *Ibid*.

10. An assignee of an executor, or of the administrator of an executor, cannot be called to an account by legatees, where there is no fraud or collusion, even though the assets could be traced and identified. *Rayner v. Pearson*, 3 J. C. R. 578.

11. The assignees of a bankrupt partner, under a separate commission, are tenants in common with the solvent partner; and, having got possession of the partnership funds, the solvent partner cannot call them out of their hands, or compel them, or the partnership

debtors who have settled with them, to account. *Murray v. Murray*, 5 J. C. R. 60. [See *BANKRUPT. PARTNERSHIP.*]

12. Where an agent has duly and fairly accounted with his immediate and authorized principal, he is not bound to account over again to a person beneficially interested or standing in the relation of *cestui que trust* to the principal. *Tripler v. Olcott*, 3 J. C. R. 473.

13. As, where F. made a bill of sale of a ship then on her voyage, and of freight earned, to L., which was absolute on the face of it; and L. sent to O., the master of the ship, a copy of the bill of sale, with a power of attorney, and instructions as to the disposition of the property, and O., considering L. as the owner from that time, acted as his agent, and afterwards accounted to him for the proceeds of the freight, &c.; *held*, that O. was not accountable to F., as having a resulting trust, though some of the letters from L. to O. incidentally mentioned that the bill of sale was intended to secure O. for certain advances and responsibilities; there being no fraud or collusion between L. and O. *Ibid.*

14. Where the supercargo and agent of a merchant here, delivers goods to a merchant abroad for sale, and the agent settles with the merchant abroad, according to the account stated by him, with full knowledge of all the facts, without any fraud or imposition, the principal here is bound by the act of his agent, and is concluded from any further claims against the merchant abroad, especially after having kept the account for several years, without making any objections to it. *Murray v. Tolland*, 3 J. R. 569.

B. (a) *When an account is held conclusive; and,*
(b) *When it will be opened.*

(a) *When an account is held conclusive.*

15. After judgment and execution, and sale under a mortgage, the account will not be opened, though there appear to have been some irregularity in it. *Bloodgood v. Zeily*, 2 C. C. E. 124.

16. A defendant is not entitled to open an account, unless a sufficient *foundation has been laid in the answer for that purpose. *Slee v. Bloom*, on appeal, 20 J. R. 669. S. C. 5 J. C. R. 366.

(b) *When an account will be opened.*

17. Where a merchant, in embarrassed circumstances, borrowed money, at different times, of his confidential clerk, who took various bonds and securities for such loans, and for which, by agreement, he was to be allowed usurious interest, including a period of ten years, and the parties from time to time came to a settlement of their accounts, and the merchant gave his bond, and further securities, for the balance of the principal and interest due on such settlement, the Court ordered all the bonds, obligations, and settlements, to be set aside, and the accounts at large to be opened between the parties from the commencement of their transactions; there being not only evidence of mistakes and omissions in their ac-

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counts, but of oppression, imposition, and undue advantage taken of the necessities of the principal. *Barrow v. Rhineland*, 1 J. C. R. 550.

18. Where the administrator of an executor, in his answer to a bill, filed by the representatives and legatees of the testator, for an account, &c., sets forth an account, and avers that he has fully administered, &c., and has distributed the surplus, being a trifling sum, the Court will not order a reference to a master for a further account, especially after a lapse of twelve years. *Rayner v. Pearsall*, 3 J. C. R. 578.

19. Where the charges in the bill are specific, setting forth the items of the account, with their dates, on an order of reference for an account, the inquiry is not to be opened beyond the special matter charged; although the bill may contain a general charge, at the conclusion, and a prayer for a full account concerning the premises. *Consequa v. Fanning*, 3 J. C. R. 587. S. C. on appeal, 17 J. R. 511.

20. If a merchant abroad sends goods to a merchant here, by his order, or by that of his agent, which are received with the invoice, and accepted without objection, he cannot, afterwards, object that the goods were overcharged in price. *Ibid.*

21. Where a consignee of goods sells some of them on credit, and settles with the consignor, and pays him the full amount, he cannot afterwards claim to be reimbursed for any part, on the ground of a bad debt in the sale, there being no fraud or mistake in the settlement. *Ibid.*

22. Where a balance of an account is paid without any charge of interest, interest cannot be afterwards demanded. *Ibid.*

[See Interest. Foreign Laws.]

C. *What is a good bar to an account; length of time.*

23. The Court is unwilling to decree an account, when the transactions *have become obscure and entangled by [*163] delay and time. *Rayner v. Pearsall*, 3 J. C. R. 578.

24. There is, however, no precise and definite rule on this subject, but each case must depend on the exercise of a sound discretion upon the circumstances. *Ibid.*

25. Where, on a bill filed against the administrator of an executor for an account, it appeared that he had fully administered all the assets which had come to his hands, and distributed the surplus, and twelve years had elapsed, the Court refused an order of reference for an account. *Ibid.*

26. Length of time is a good bar to an account between the representatives of deceased partners. *Ray v. Bogart*, on appeal, 2 J. C. 432.

27. A bill, filed in 1809, for an account, as to transactions before, and at the commencement of the revolutionary war, was dismissed, on the ground of the staleness of the demand; twenty-six years having elapsed from the end of the war before the bill was filed, and no cause shown for the delay, and especially

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against executors, who had no knowledge of the original transactions. *Ellison v. Moffat*, 1 J. C. R. 46.

28. If a merchant receives a *stated account* from abroad, and keeps it by him for any length of time, *e. g.* for *two years*, without objection, he is bound by it, and equity will not decree an account to be taken afterwards. *Murray v. Toland*, 3 J. C. R. 569. 575.

29. Where an agent has suffered *thirty years*, after his agency had ceased, (though he had subsequent transactions with his principal,) and sixteen years before the death of his principal, to elapse, without rendering any account, or filing a bill; *held*, that the lapse of time was a bar to the admission of his demand. *Moore v. White*, 6 J. C. R. 360.

[See further, *Limitations. Laches, Length of Time and Possession.*]

D. *Of the manner of accounting; how charged and discharged; and what allowances will be made to the party.*

30. Where the defendant received from the plaintiff the note of L. to collect, and L. being reputed insolvent, and having absconded, and a person in his behalf offering to pay two thirds of the debt, which proposal was known to the plaintiff, who made no objection, and the defendant received the two thirds of the debt, and gave up the note; *held*, that the defendant was not responsible for more than he actually received; the silence of the plaintiff amounting to an assent to the settlement, and being equivalent to a ratification of it. *Armstrong v. Gilchrist*, on appeal, 2 J. C. 424.

31. Where an executor was robbed of the money of his testator, and, afterwards, died; his administrator was allowed to avail himself of the fact, in his discharge, on a bill filed against him by the heirs of the testator, for an account. *Furman v. Coe*, on appeal, 1 C. C. E. 96.

*32. Where an administrator employed the money belonging to the estate of the intestate, in trade, for his own benefit, and refused to render any account of the profits, he was charged *compound interest*, after a reasonable time for the settlement of the account, making annual rests in the account, for that purpose. *Schieffelin v. Stewart*, 1 J. C. R. 620.

33. Executors and other trustees, if they have made use of the trust money, or have been negligent in not paying it over, or in not loaning or investing it, so as to render it productive, are chargeable with interest. *Dunscomb v. Dunscomb*, 1 J. C. R. 508. *Schieffelin v. Stewart*, 1 J. C. R. 620. *Manning v. Manning*, 1 J. C. R. 527.

34. If one partner withdraws or uses the partnership funds in his own private trade and speculations, he must account not only for the *interest* on the moneys so withdrawn, but for the *profits* of the trade. *Lynch v. Sloughton*, 1 J. C. R. 467. But unless he uses the money in trade so as to make a profit, he is chargeable with *simple interest* only; otherwise, with *compound interest*. *Sloughton v. Lynch*, 2 J. C. R. 209.

35. In stating an account between partners, the true dates, as furnished by the books of account themselves, ought to be assumed. *Ibid.*

36. A party cannot surcharge and falsify an account, unless upon the ground of mistake or error distinctly charged. *Ibid.*

37. The period of the dissolution of the co-partnership, is the proper time to make a rest, and adjust the balance of the partnership account; and the partner against whom the balance is found, is chargeable with interest thereon. *Ibid.*

38. The correct and legal mode of computing interest on an account between debtor and creditor, where partial payments are made, is, first, to carry the payment to the extinguishment of the interest due, and if such payment exceeds the interest due at that time, to deduct the surplus only from the principal, and compute interest on the balance, to the next payment. *Connecticut v. Jackson*, 1 J. C. R. 13. *Sloughton v. Lynch*, 2 J. C. R. 209.

39. *Compound interest* is never allowed, except in special cases; as, where there is a settlement of the accounts between the parties, after interest has become due, or there has been an agreement for that purpose, subsequent to the original contract, or a master's report computing the amount of principal and interest, has been confirmed. *Connecticut v. Jackson*, 1 J. C. R. 13. *Barrow v. Rhinelanders*, 1 J. C. R. 550.

40. A., in 1789, advanced to B., a merchant, a sum of money, in consideration of which, B. engaged that A. should be interested in certain commercial adventures of B., in proportion to the sum advanced, and promised to render an account to A. of the proceeds, and pay him his proportion thereof. In *September*, 1794, B. rendered an account to A. of the adventures, and offered to come to a settlement, if A. would give up the written agreement, which A. refused. On a bill filed by the administrator of A., in 1799, against B., for an account; *held*, that the defendant was answerable not only for the principal of the balance due the intestate for his proportion of the proceeds *of the ad- [*165] ventures, but for *interest* from *September*, 1794, when he rendered the account. *Lynch v. De Vior*, on appeal, 3 J. C. 303.

41. The plaintiff and defendant were joint owners of a ship and cargo, on a voyage from *New-York* to *Batavia*, and back; and the defendant agreed to go out in the ship as *supercargo*, and the plaintiff agreed to pay him, as a compensation for the performance of the duties of a supercargo, the sum of 10,000 dollars, "out of the proceeds of any cargo the ship may bring from *Batavia*, or to deliver him part of such cargo to that amount, at the current market price, on its arrival at *New-York*." The ship, on her return voyage, put into *St. Kitts*, from necessity, and was there condemned as unseaworthy, and sold, with the cargo, and the proceeds remitted by the supercargo to *New-York*. On a bill filed against the defendant for an account, he claimed to retain a certain sum for commissions and services, in the sale and management of the prop-

erty; it was decreed, that the defendant was not entitled to any allowance, on a *quantum meruit*, for his services, merely on the ground that the contingency had never happened, on which his specific compensation for the same services was to depend; nor was he entitled to any compensation for his services at *St. Kitts*, as he still acted in the character of a supercargo, and the sales there were substituted for a sale in *New-York*, on which sale, by his special agreement, he was to receive no commission. *Franklin v. Robinson*, 1 J. C. R. 157.

42. Joint owners or partners are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose. *Ibid.* *S. P. Bradford v. Kimberly*, 3 J. C. R. 431.

43. G. was engaged by M. as supercargo of a ship, on a trading voyage from *New-York* to *Madeira*, the *Cape of Good Hope*, *Madras*, and *Calcutta*, and thence back to *New-York*. By the written instructions to G., which confided much to his discretion, he was to receive, as a compensation for transacting the business, *two and a half* per cent. of the value of the property brought home for the account of M., arising from the proceeds of the outward cargo, deducting duties, &c., and to have his reasonable expenses on the voyage paid out of the cargo, and to be allowed five per cent. of the clear profits on its termination. G. performed his duty from *New-York* to *Madeira*, and the *Cape of Good Hope*, but was taken sick at the latter place, and obliged to leave the ship, and died on his return home, in another vessel; having previously appointed, at the *Cape*, B. & B. his substitutes, as supercargoes, for the remainder of the voyage, agreeing to pay them for their services out of his commissions. The ship performed her voyage, and the homeward cargo was delivered to M., who cleared a considerable profit on the voyage. B. & B. having faithfully performed their duty as supercargoes, in the place of G.; held, that the legal representatives of G. were entitled to the full compensation stipulated, as for the completion of the voyage. *Gray v. Murray*, 3 J. C. R. 167.

44. Where several joint owners of a cargo appoint one of their number, as their agent, to receive and sell the cargo, and distribute the proceeds, he is entitled, under such [*166] special agency, to a commission *or compensation for his services, as a factor or agent, in the same manner as a stranger. *Bradford v. Kimberly*, 3 J. C. R. 431. [See further, as to the course and practice of the Court of Chancery in taking an account, *Practice, M. Reference to a Master*, and the case of *Remsen v. Remsen*, 2 J. C. R. 495.]

II. ACTION.

45. If one person makes a promise to another, for the benefit of a third person, that third person may maintain an action at law, on the promise. *Cumberland v. Codrington*, 3 J. C. R. 229. 254. 7 J. C. R. 57.

46. An action of account lies at law, by one partner against another; and there is no good reason why that action is not resorted to instead of a bill in equity. *Duncan v. Lyon*, 3 J. C. R. 351.

47. An action of covenant lies at law, by one partner against another, where, by the contract, there is a covenant to account. *Ibid.*

48. An action of *assumpsit* lies on a promise in writing by one partner, to take part of the goods bought, in which they were to be equally concerned, as to profit and loss. *Ibid.*

49. An action on the case for a deceit lies against a person selling land, knowing that he has no valid title, although the deed contains no covenant as to title. *Roberts v. Anderson*, 3 J. C. R. 371. 375.

50. Where a father conveyed land to his son, for a nominal sum, on his covenanting to pay an annuity to his mother, during her widowhood; held, after the husband's death, that the wife was entitled to an action on the covenant so made for her benefit; and that a release of the covenant to the son from the father, in his life-time, was fraudulent and void. *Shepard v. Shepard*, 7 J. C. R. 57.

*III. AGREEMENT. [*167]

A. What is a sufficient consideration to support an agreement; and of a failure of consideration.

B. What agreements will be enforced in equity: by whom to be performed; and when the person or the estate is liable.

C. Performance of an agreement; (a) What is a sufficient performance in whole or in part; (b) Where a specific performance will be decreed; (c) Where not.

D. (a) When an agreement may be rescinded; and for what cause; as (b) Mistake, or ignorance of the law; (c) Inadequacy of price; (d) Fraud.

E. Parol agreements, within the statute of frauds; without the statute; and of the effect of part performance, and other circumstances, to take the case out of the statute.

A. What is a sufficient consideration to support an agreement; and of a failure of consideration.

51. In regard to chattel interests, an agreement under seal imports a consideration at law. *Bunn v. Winthrop*, 1 J. C. R. 329.

52. A voluntary bond or deed of a chattel interest, as between the parties, will be supported without a consideration. *Ibid.*

53. Provision for the mother of a bastard, and for her infant, is a sufficient consideration to support a bond, or a deed of personal chattels, made by the father of the child, for that purpose. *Ibid.*

54. A *cestui que trust*, though a mere volunteer, and the limitation without consideration, is entitled to the aid of the Court. *Ibid.*

55. *Aliter*, where the party seeks to raise an interest by way of trust, on a covenant or executory agreement. *Ibid.*

56. Where A. conveyed land to B. by deed, with covenants of warranty, and B. executed to A. a bond and mortgage to secure the payment of part of the purchase money, B. cannot be relieved against the mortgage, on the ground of failure of consideration, for want of title in A., possession having been taken by B., under the deed, and there being no eviction at law, under a paramount title; and more especially, in this case, where the bond and mortgage having been assigned to C., B. in consideration of forbearance, had executed a new bond and mortgage to him, for the same premises, will relief be denied, as against an assignee, for a valuable consideration without notice of any fraud, or failure of consideration, in the creation of the original debt. *Bumpus v. Plainer*, 1 J. C. R. 213.

B. What agreements will be enforced in equity; by whom to be performed; and when the person or the estate is liable.

57. Equity will not enforce a mere voluntary defective agreement, *not [*168] valid at law, especially against a legal claim for a just debt, where there is no consideration, accident or fraud. *Minturn v. Seymour*, 4 J. C. R. 497.

58. Where the administrators of a vendee assigned the contract for the purchase of land to the defendants, who covenanted to take up and cancel the contract, and to indemnify and save them harmless from all damages, &c., by reason of the contract, &c.; held, that the administrators were entitled to a specific performance of the covenant, on the part of the defendants, who could not set up a want of personal assets as an objection, *in limine*, to the relief sought by the vendors. *Champion v. Brown*, 6 J. C. R. 398.

59. But the administrators of a vendee cannot assign a contract for the purchase of land, nor compel its performance, without the consent of the heirs. *Ibid.*

60. The heirs, therefore, of an intestate, who had made a contract for the purchase of land, which his administrators assigned to the defendants, are proper parties to a bill filed for the specific performance of the contract. *Ibid.*

61. Where the assignee of a vendee takes possession of the land, under the contract of sale, though the vendor cannot compel the assignee to pay the purchase money, yet he may, by virtue of his lien on the land, call on him to pay the money, or surrender the possession of it, or have it sold for the benefit of the vendor. *Ibid.*

62. Where there is a contract for the purchase of land, and the vendee dies, the land in equity descends to his heirs, as real estate; and they may call on the executors or administrators to discharge the contract out of the personal estate of the vendee, so as to enable the heirs to demand a conveyance from the vendor. *Ibid.*

C. Performance of an agreement; (a) What is a sufficient performance in whole or in part;

(b) *Where a specific performance will be decreed; (c) Where not.*

(a) *What is a sufficient performance in whole or in part.*

63. Where a vendor comes into a Court of Equity to compel a vendee to a performance, if the vendor is unable to make out a title as to part of the subject matter of the agreement, which was the principal object of the purchaser, equity will not compel the vendee to perform the contract *pro tanto*. *Waters v. Travis*, on appeal, 9 J. R. 450.

64. But where the vendee seeks relief, the Court will compel a vendor to a specific performance of an agreement for the sale of land, as to part, when he has incapacitated himself from performing the whole. *Ibid.*

65. Where land contracted to be sold, was held in common, and the vendor, after the contract, divided with the other tenants in common, and executed a deed of partition, the partition was held to be no obstacle to a decree of part performance, where the party was capable of performing the whole. *Ibid.*

*(b) *Where a specific performance will be decreed.* [*169]

66. A bill for the specific performance of an agreement, is addressed to the sound judicial discretion of the Court of Chancery, in the exercise of its extraordinary jurisdiction. *St. John v. Benedict*, 6 J. C. R. 111. *S. P. Seymour v. Delancey*, 6 J. C. R. 222.

67. Mere lapse of time is not, in all cases, an objection to decreeing a specific performance of an agreement. *Waters v. Travis*, on appeal, 9 J. R. 450.

68. As, where an agreement, for the sale of land, was suffered to remain unexecuted for fourteen years, the vendee having continued in possession, the Court, under the circumstances of the case, decreed a specific performance. *Ibid.*

69. The assignee of an agreement for the sale of land, without notice, is subject to all the equity which existed between the parties, and can require a specific performance on no other terms than could have been insisted on by his assignor, the original vendee. *Murray v. Gouverneur*, 2 J. C. 438.

70. Where a sale (at public auction) is *bona fide*, and the title good, and the quantity of land the same, and the description of it substantially true, though in a slight degree defective or variant, a specific performance of the contract will be decreed. *King v. Bardeau*, 6 J. C. R. 38.

71. As, where two adjoining lots of land were sold at auction together in one parcel, and for one price, and on one of the lots were buildings which projected two feet on the other lot; held, that this was not such a material defect in the subject, or variation from the terms of description at the sale, as would entitle the purchaser to abandon the contract. *Ibid.*

72. But the purchaser, under the circumstances, was held to be entitled to compensation for any diminution of value arising from the

projection of the building, to be deducted from the price. *Ibid.*

73. Equity may decree a specific performance of a general covenant of indemnity, though it sound only in damages. *Champion v. Brown*, 6 J. C. R. 398.

74. Where there was a contract for the conveyance of a farm, parcel of a tract of land, subject to a quit rent, which had not been demanded for above 60 years, the existence of such encumbrance, if any, was held to be no objection to a decree of specific performance. *Ten Broeck v. Livingston*, 1 J. C. R. 367.

(c) *Where not.*

75. A written agreement may be so waived by *parol*, that the Court will refuse to interfere to enforce it. *Botsford v. Burr*, 2 J. C. R. 405.

76. On a contract for the sale of land, the payment of the purchase money by the plaintiff was made a condition precedent to the conveyance; after a default, the defendant accepted part of the purchase money; but the plaintiff, though repeatedly called upon, refused to pay the residue. The defendant, after giving notice of his intention to do so, sold and conveyed the land to another; and [*170] the plaintiff, afterwards, *tendered the money due on the contract, and filed his bill for a specific performance; *held*, that a specific performance could not be decreed; nor could the bill be sustained for a compensation in damages, but the party was left to his remedy at law on the covenant. *Hatch v. Cobb*, 4 J. C. R. 559. *S. P. Kempshall v. Stone*, 5 J. C. R. 193.

77. Even if the defendant had not sold the land to another, before the plaintiff filed his bill, *it seems*, that he would not, after such default and delay, have been entitled to a specific performance, as no accident, mistake or fraud had intervened to prevent a performance of his part. *Ibid.*

78. But if the plaintiff tenders the purchase money at the day appointed, and demands a conveyance, which is refused, and the defendant afterwards sells to a third person, with notice of the equitable title of the plaintiff, a specific performance of the contract will be decreed against the subsequent purchaser, who is considered as purchasing subject to the equity title of the plaintiff under the agreement. *Wadsworth v. Wendall*, 5 J. C. R. 224.

79. And, *it seems*, that if the plaintiff had been in possession, under the agreement, that would have been constructive notice to the purchaser of his actual interest, or equitable title under this agreement. *Ibid.*

80. Where an agreement appears to have been made to defeat or defraud a creditor of the plaintiff, or an intervening purchaser at a sheriff's sale, under a judgment and execution, a specific performance of it will not be decreed. *Seymour v. Delancey*, 6 J. C. R. 222.

81. An agreement must be certain, fair and just, in all its parts; otherwise, a specific performance will not be decreed. *Ibid.*

82. Where the remedy is not mutual, or one party only is bound by the agreement, a spe-

cific performance will not be decreed. *Parkhurst v. Van Cortlandt*, 1 J. C. R. 273. *S. P. Benedict v. Lynch*, 1 J. C. R. 370.

83. Inadequacy of price, though not so gross as to amount to fraud, may be a sufficient ground for refusing to decree a specific performance of the contract. *Osgood v. Franklin*, 2 J. C. R. 1.

84. And though mere inadequacy of price, independent of other circumstances, is not of itself sufficient to set aside a transaction, yet it may be sufficient to induce the Court to stay the exercise of its discretionary power to enforce the specific performance of a private agreement for the sale of land, and to leave the party to seek his compensation in damages at law; especially, where the inadequacy of price (being half the value) is so great as to give the contract an appearance of unreasonableness, inequality and hardship. *Ibid.*

85. Where a bill, filed to compel the performance of a *parol* contract to compensate the plaintiff for the use of his land, could not be sustained, the contract not being valid, by the statute of frauds; yet the Court retained the bill, and awarded an issue of *quantum damnificatus*, to assess the damages sustained by the plaintiff, by the acts of the defendants, as the plaintiff had sustained an injury for which he ought to be compensated, and for which he had no remedy, or at best, a doubtful and inadequate one, at law. *Phillips v. Thompson*, 1 J. C. R. 131.

*86. So, where possession had [*171] been taken of land under an agreement void by the statute of frauds, and improvements made, though an execution of the agreement will not be decreed on the ground of part performance, yet the bill may be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements. *Parkhurst v. Van Cortlandt*, 1 J. C. R. 273. *But see S. C.* on appeal, 14 J. R. 15. *contra*, as to decreeing a specific performance. The appellants had entered upon the land, under an assignment of a license given by the respondent, to occupy and improve the land; and they, afterwards, surrendered the license to the respondent, and took a written memorandum, authorizing them to possess the land, and promising to give them the preference to purchase or lease it. It was proved, that at various times, the respondent had encouraged the appellants to build and make improvements on the land, by assurances that no advantage should be taken of their labor, and that, when his title was perfected by a partition of the tract, they should have a lease in fee, or a deed, at the rate at which wild lands were selling; *held*, that, the appellants having gone on the land and made improvements, that was a part performance of the agreement, which took it out of the statute; that, although the memorandum of the agreement was, in itself, uncertain, yet, as a part performance was made the basis of the claim to a specific performance of it, *parol* evidence might be connected with the memorandum, for the purpose of making out the contract; and, there being satisfactory evidence of an agreement, indepen-

dently of the memorandum, and the conduct of the respondent being a fraud on the appellants, a specific performance was decreed. *Ibid.*

87. In the sale of lands, time may make part of the essence of the contract; and on default at the day, without any just excuse, or any acquiescence or subsequent waiver by the other party, the Court will not help the party in default. *Benedict v. Lynch*, 1 J. C. R. 370.

88. As, where A., in March, 1810, agreed to purchase a farm of B., and to pay 250 dollars in one year; one third of the residue of the money in one year thereafter, and the other two thirds in the two successive years; and on the payment being made, B. agreed to give a deed; and if A. failed in the payments, or either of them, the agreement was to be void; and A. entered into possession of the land, under the agreement, and made improvements, but made no payments; and B., in 1813, about two years after the first default, supposing the agreement void or abandoned, sold the farm to a third person; and A., in 1814, tendered the whole of the purchase money, and filed a bill for the specific performance of the agreement; the bill was dismissed with costs. *Ibid.*

[*172] *D. (a) *When an agreement may be rescinded; and for what cause, as,*
(b) *Mistake or ignorance of the law; (c) Inadequacy of price; (d) Fraud.*

(a) *When an agreement may be rescinded.*

89. It seems, that one party alone cannot rescind a contract. *Skinner v. Dayton*, 2 J. C. R. 526.

90. Where one party intends to abandon or rescind a contract, on the ground of a violation of it by the other, he must do it promptly and decidedly, on the first information of such breach. *Lawrence and others v. Dale and others*, 3 J. C. R. 23. *S. P. McNeven v. Livingston*, on appeal, 17 J. R. 437.

91. If he negotiates with the party, after knowledge of a breach of it by him, and permits him to proceed in the work, it is a waiver of his right to rescind the contract. *Ibid.*

92. Where the defendants contracted with the plaintiffs, to be responsible for the perfect construction and performance of certain steam-boats, to be built on the river Ohio, so that they should carry one hundred tons burthen, and run four miles an hour, in still water, &c.; held, that the plaintiffs could not, after the boats were built, rescind the contract, on their part, and recover back the money advanced by them to the defendants, on the alleged ground that the boats drew too much water to navigate the river, without having first put the fitness of the boats to navigate the river, in the manner agreed on, to the test of experiment. *Ibid.*

93. Where copartners in trade engaged a clerk as book-keeper and cashier, at a fixed salary for two years, with an understanding that he should have a larger compensation as the business extended and his duties increased; and during the third year, it was discovered that the clerk had overdrawn money belonging to the firm, and applied the same to his own use, of which he afterwards rendered a statement; but a majority of the partners, after-

wards, continued him in the employment of the firm; held, that he was entitled to an increased compensation for his services after the second year, pursuant to the agreement; the fact of continuing in service, after a discovery of his improper conduct, being an admission that he had not forfeited his right to the increased allowance. *Kirk v. Hodgson and others*, 3 J. C. R. 400.

94. By an agreement made in April, 1815, A. covenanted with B. and C., (directors and agents of a manufacturing company,) to make certain machinery in one year, for a certain price, to be paid in instalments; on the 1st of August following, B. and C. gave notice to A. that the company could not go on, and that the contract was abandoned; and A. (the covenants being independent) brought an action at law against B. and C. to recover the instalments due before the 1st of August; held, that on B. confessing judgment in the suit at law, with leave to A. to enter it up, an injunction issued by the Court of Chancery (afterwards dissolved, but the order reversed on appeal) be continued until the hearing, and that proceedings be had in Chancery, *either by a reference to a master, [*173] or by an issue at law, to ascertain the damages sustained by A. by the non-execution or rescinding of the contract; the answer of A. to the bill of B. alleging that the instalments due on the 1st of August, and sued for at law, did not exceed a just compensation for their damages, &c., not being sufficient to rebut the equity on which B. relied for relief, by having a judicial inquiry into the facts, and the damages ascertained by a master, or on an issue of *quantum damnificatus*. *Skinner v. White and others*, on appeal, 17 J. R. 357. S. C. 2 J. C. R. 526. 5 J. C. R. 351. 13 J. R. 307. S. C. on appeal, 19 J. R. 513.

95. Where an executory contract has been entered into, so as to become binding on the parties, both parties have acquired such an interest in its execution, that neither of them can divest the other of his right to have the contract fulfilled; and if one of the parties refuse to proceed further, so that the other is disabled from performing his part of the contract, it is a violation of the contract, for which the party may have his action to recover damages against the one who has been the cause of the non-execution of the contract. *Skinner v. White and others*, on appeal, 17 J. R. 357.

96. S. and others formed an association for manufacturing cotton, &c., and executed articles of agreement, as to the organization of the company, and the mode of managing or conducting the business; the stock of the company was divided into twenty shares, and the subscribers to the stock elected a president, and two of their members as directors, and a treasurer, &c., who had power to appoint a general agent, to transact all business, &c., under the particular direction of the president and directors, &c. S. having been elected president, and R. and H. directors, they, on the 25th of April, 1815, entered into a contract with W., T. and W., who had subscribed for two shares of the stock, to make certain ma-

chinery, in one year, at a certain price, to be paid in instalments, which contract was signed and sealed by S. as "for the directors" of the company. On the 1st of August, following, R. and H., as directors, gave notice to W., T. and W., that the company could not go on, and that the contract was abandoned: and W., T. and W. thereupon (the covenants in the contract being independent) brought an action at law against S. on the covenant, to recover the instalment which became due on the 1st of August (though the machinery had not been completed or delivered.) S. pleaded in bar, that he executed the contract in behalf of the company, and in his capacity of director and agent of the company, and not otherwise; and, on demurrer, the Supreme Court gave judgment against S., on the ground of a want of an averment in the plea of an authority from the company to him, to execute the contract; *held*, that this decision at law was not conclusive, as to the question of the personal responsibility of S. on the contract; and, S. having obtained an injunction in Chancery, which was dissolved, on the coming in of the answers, on the ground that S. was individually responsible, which decree was afterwards reversed on appeal, and the Court of Chancery directed to ascertain, by a reference to a master, the damages, if any, which W., T. and W. had sustained by the non-execution or rescinding of the contract; and the damages so ascer-

tained to be levied on the execution at law; *held*, *that this decree of the Court of Errors did not conclude S., as to the fact of his individual and sole responsibility, nor as to his right to call on the other members of the company, for a ratable contribution towards satisfying what might be recovered against him on the contract: and, the cause having been, afterwards, put at issue, and proofs taken in the Court of Chancery, on appeal from the decree of that Court; *held*, that W., T. and W. were entitled to recover against S., individually, damages for the breach of the contract with them, to the amount of their actual expenditures and losses, as far as they had proceeded in the performance of the contract on the 1st of August, 1815: that S. was entitled to contribution from his associates, who had, by their assent or acts, ratified the contract; and that they could not, under any articles of the association, as to a forfeiture of their shares, avoid the responsibility; that the injunction against the suit at law should be continued, until the amount of such contribution was ascertained; and that the deficiency only, after what remained of the clear estate of the company had been applied towards the payment of W., T. and W., should be levied under the judgment and execution of S. *Skinner v. Dayton*, on appeal, 19 J. R. 513. S. C. 5 J. C. R. 351. 2 J. C. R. 528. 13 J. R. 307. 17 J. R. 357. *Contra*, S. C. 5 J. C. R. 351.; where it was decided that S. was not entitled to call on his associates for contribution; and if he were so entitled, the right of W., T. and W. to have their damages assessed and levied by judgment and execution, was not to be delayed until the

question of contribution between S. and his associates was settled.

(b) *Mistake or ignorance of the law.*

97. Every man is to be charged with a knowledge of the law. *Shotwell v. Murray*, 1 J. C. R. 512.

98. The Court does not undertake to relieve parties from their acts and deeds fairly done, with a full knowledge of facts, though under a mistake of the law; for every man is charged at his peril with a knowledge of the law. *Lyon v. Richmond*, 2 J. C. R. 51. 60.

99. Therefore, a subsequent decision of a higher Court, in a different case, giving a different exposition of a point of law from that declared and known to the parties, when a settlement took place between them, can have no effect on, or destroy, the settlement made by them. *Ibid*.

100. Ignorance of the law, with a full knowledge of the facts, cannot, generally, be set up as a defence; nor will it protect a party from the operation of a rule in equity, where the circumstances would create an equitable bar to a legal title. *Storrs v. Barker*, 6 J. C. R. 166.

(c) *Inadequacy of price.*

101. Mere inadequacy of price is not a sufficient ground for setting aside a contract of sale, unless it be so gross and palpable, as, of itself, to afford evidence of actual fraud. *Osgood v. Franklin*, 2 J. C. R. 1. S. C. on appeal, 14 J. R. 527.

*102. And, in judging of the in- [*175] adequacy of price, the condition and circumstances of the estate, at the time of sale, must be regarded. *Ibid*.

103. Accidental subsequent advantage made of the bargain, has no effect. *Ibid*.

104. If, however, an agreement has been consummated by a conveyance, it will stand, notwithstanding the inadequacy of the price. *Ibid*.

105. A sale at auction, under process of law, cannot be invalidated for the mere inadequacy of price. *Livingston v. Byrne*, on appeal, 11 J. R. 555.

(d) *Fraud.*

As to setting aside agreements for fraud. See *Fraud. Debtor and Creditor. Husband and Wife*.

E. (a) *Of parol agreements, within the statute of frauds; (b) Without the statute; and the effect of a part performance, and other circumstances, which take the case out of the statute.*

(a) *Parol agreements within the statute.*

106. An agreement made by an owner of land, with the commissioners, under the act relative to draining the drowned lands of Orange county, (sess. 30. c. 25.) by which they were allowed to use each bank of the river W., &c., which they might deem necessary in removing all obstructions, and deepening and widening the river, &c., and to use, occupy and enjoy the same, and for which they were to

pay a compensation to the owner, who agreed to allow them to cut a canal through his land, is a contract concerning an interest in land, within the purview of the statute. *Phillips v. Thompson*, 1 J. C. R. 131.

107. A memorandum in writing, of the sale of land, to be valid, must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty, that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof. *Parkhurst v. Van Cortlandt*, 1 J. C. R. 273. S. C. on appeal, 14 J. R. 15.

108. It seems, that there is no difference in the construction of the 11th and 15th sections of the statute of frauds, (sess. 10. c. 44. 1 N. R. L. 75.) or the 4th and 17th sections of the stat. (29 Car. II. c. 3.) as to what is a sufficient signing of a contract by the party to be charged. *M'Comb v. Wright*, 4 J. C. R. 659.

109. An auctioneer is an agent, lawfully authorized by the purchaser of lands or goods at auction, to sign the contract of sale for him, as the highest bidder. *Ibid.*

110. Writing the purchaser's name, as the highest bidder, on the memorandum of sale, by the auctioneer, immediately on receiving the bid, and knocking down the hammer, is a sufficient signing of the contract, within the statute of frauds, so as to bind the purchaser. *Ibid.*

[*176]. *(b) *Parol agreements without the statute of frauds; and the effect of a part performance to take a case out of the statute.*

111. Consideration money paid, possession taken, and valuable improvements made, under a parol contract for the conveyance of land, will, in equity, take the case out of the statute of frauds, and entitle the plaintiff to a decree for a specific performance. *Wetmore v. White*, 2 C. C. E. 87. [Contra, at law, per *Kent*, J. *Jackson*, ex dem. *Smith*, v. *Pierce*, 2 J. R. 221.]

112. To entitle a party to take a case out of the statute, on the ground of part performance of the contract, he must make out, by clear and satisfactory proof, the existence of the contract as laid in his bill. *Phillips v. Thompson*, 1 J. C. R. 131. S. P. *Parkhurst v. Van Cortlandt*, 1 J. C. R. 273.

113. And the act of part performance must be of the identical contract set up by him. *Phillips v. Thompson*, 1 J. C. R. 131.

114. It is not enough, that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the plaintiff's bill. *Ibid.*

115. A contract cannot rest partly in writing and partly in parol; for where an agreement is reduced to writing, all previous negotiations resting in parol are merged in it. *Parkhurst v. Van Cortlandt*, 1 J. C. R. 273. And per *Thompson*, Ch. J. S. C. on appeal, 14 J. R. 15.

116. But where the plaintiff had taken possession of land, and made improvements, by the written permission of the defendant, who

promised to give him a preference to purchase or lease, and it was proved by parol, that the defendant had encouraged the plaintiff to make improvements, assuring him that no advantage should be taken of his labor, and that he should have a lease or a deed, at the rate at which such lands were selling; held, that the plaintiff having taken possession of the land, it was a part performance of the parol agreement, which took the case out of the statute; that it did not rest on the written memorandum; the use of which was to show merely that the plaintiff took possession with the consent of the defendant, and was not an intruder; that the part performance was evidence of some agreement which might be made out by parol evidence, independently of the memorandum; and, the consent of the defendant being a fraud on the plaintiff, a specific performance was decreed. S. C. on appeal, 14 J. R. 15. Contra, S. C. 1 J. C. R. 273; where the chancellor refused to decree a specific performance, on the ground that the contract was not made out with sufficient clearness and certainty; yet he retained the bill, for the purpose of affording the party a reasonable compensation, for his improvements.

117. A promise, in consideration of marriage, not reduced to writing before marriage, cannot afterwards be made valid and effectual, so as to impair the rights of third persons. *Reade v. Livingston*, 3 J. C. R. 481.

118. So, a settlement after marriage, in pursuance of a parol agreement entered into before marriage, is not valid as against creditors. *Ibid.*

*119. Whether a post-nuptial settlement, reciting a parol ante-nuptial agreement, is, on that account, valid, as against creditors? *Quære. Ibid.*

[See *Sexton v. Wheaton*, 8 *Wheaton's Rep.* 229.; where the Supreme Court of the U. S. held, that a post-nuptial voluntary settlement, made by a husband, not indebted at the time, on his wife, without any evidence of fraud attending the transaction, was valid against subsequent creditors.]

120. But a settlement after marriage, in pursuance of a valid written agreement before marriage, is good. *Ibid.*

[See, as to settlements before marriage, and voluntary settlements, XXXI. *Husband and Wife.*]

IV. ALIENS.

121. An alien enemy may take personal property by succession, as next of kin, and is entitled to a distributive share under the act for the distribution of intestate estates; though he cannot recover it during war, but it remains in the hands of the administrator in trust for him, until the return of peace. *Bradwell v. Weeks*, 1 J. C. R. 206. See S. C. contra, in the Court of Errors, (13 J. R. 1.) where the decree, as above stated, was reversed on appeal. [But as all the judges of the Supreme Court, and other law members, were for affirming the de-

cree, and the members of the Court, including the senators, were equally divided, the president of the senate declaring his opinion for a reversal, it may be allowable to say, *magis Sevole assensior*. And see *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603. 619.]

122. An alien enemy, by the modern law of nations, does not forfeit his right of property; and if he is permitted to remain in the country, or is brought here a prisoner of war, or perhaps, when he is ordered out of the country, in consequence of war breaking out, he may sue for it. *Ibid.* (See 10 J. R. 69. 183.)

123. Alien enemies commorant abroad, cannot sue in civil Courts. *Ibid.*

124. It is no objection, after the war, that the suit was brought by the plaintiff as trustee for an alien enemy; as, the suit not having been abated, on that ground, during the war, the temporary disability created by the war ceased on the return of peace. *Hamersley v. Lambert*, 2 J. C. R. 506.

125. An alien cannot take land by descent, though he may by purchase or devise, and hold until office found. *Moore v. White*, 6 J. C. R. 360.

126. But, if he dies after the descent, the land will escheat to the people without office found. *Ibid.*

*[See 7 Cranch, 603. 3 *Wheaton*, 563. 594. 599. 4 *Wheaton*, 453. 460.]

127. Where land escheats by reason of the alienage of the devisee, that does not defeat the lien of creditors, existing at the death of the deviser, but the land remains chargeable with his debts. *Ibid.*

V. APPEAL TO THE COURT OF ERRORS.

A. When an appeal lies.

B. Of the effect of an appeal as to further proceedings in the Court of Chancery; petition and proceedings thereon; and the decree of the Court of Errors.

C. Change of parties pending an appeal.

D. Costs on appeal.

A. When an appeal lies.

128. An appeal lies from an order of the Court of Chancery, refusing to dissolve an injunction, and awarding costs against the defendant. *Nesbitt v. Willet*, 2 J. C. 413. *M'Vicker v. Wolcott*, 4 J. R. 510.

129. No appeal lies from a temporary order of that Court, awarding an injunction; and, the order having expired, the appeal was dismissed. *Trustees of Huntington v. Nicoll*, 3 J. R. 506.

130. No appeal lies from an order for the examination of witnesses; but if incompetent witnesses have, on the hearing, been admitted, the party may appeal. *Ibid.*

131. No appeal lies from an order for an attachment, to bring up a party to answer interrogatories for a contempt in disobeying a writ of injunction. *Buel v. Street*, 9 J. R. 443.

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132. It seems, that an appeal will not lie from an interlocutory order which does not involve a decision upon some matter touching the merits of a cause, and by which the party is aggrieved. *Ibid.*

133. No appeal lies from a decree in Chancery, pronounced on the default of the defendant in not appearing at the hearing, after the cause has been regularly set down for hearing, and regular notice thereof given. *Sands v. Hildreth*, 12 J. R. 493.

134. Whether an appeal will lie from a decree for costs only, in any case? *Quære*. *Travis v. Waters*, 19 J. R. 500. But where a plaintiff has been guilty of laches, or varied his claim for costs, by his neglect and inattention in obtaining the final decree, no appeal will lie from the order of the chancellor refusing his application for costs. *Ibid.* And it seems, it will not lie for costs merely. *Eastburn v. Kirk*, 2 J. C. R. 317.

*B. The effect of an appeal as to [*179] further proceedings in the Court of Chancery; petition and proceedings on appeal, and the decree of the Court of Errors.

135. The practice on an appeal is, to lodge the appeal with the register of the Court of Chancery; and the Court of Errors is not possessed of the jurisdiction of the cause, until the petition of appeal has been presented to them, which cannot be until that Court is in session. *Bradwell v. Weeks*, 1 J. C. R. 325.

136. An appeal from a final decree in a cause opens, for the consideration of the Court of Errors, all prior or interlocutory orders and decrees, in any way connected with the merits of the final decree. *Jaques v. Methodist Episcopal Church*, on appeal, 17 J. R. 548. [As to what is a final decree, see *Practice XIII.*]

137. An appeal to the Court of Errors stays, in the first instance, all proceedings in the Court of Chancery, on the matter appealed from; and if the defendant wishes to proceed, notwithstanding the appeal, he must apply to the Court of Chancery for leave; and unless the Court of Errors be at the same time in session, and have the cause before them, the Court will exercise its discretion, as to the propriety of allowing the defendant to proceed. *Green v. Winter*, 1 J. C. R. 77. *S. P. Messonier v. Kauman*, 3 J. C. R. 66.

138. But after an order, dissolving an injunction, staying an execution at law, the plaintiff may proceed at law with his execution, notwithstanding an appeal from the order; for an appeal cannot, of itself, affect the validity of an order, dissolving an injunction, or discharging a party from a writ of ne exeat, or revive the process. *Wood v. Dwight*, 7 J. C. R. 295.

139. Where an account was ordered to be taken before a master on the principles declared in the decree, the Court of Chancery refused to allow the account to be taken, pending the appeal from that decree; or to direct the appellant to deliver over deeds, &c. relative to his trust. *Green v. Winter*, 1 J. C. R. 77.

140. On motion to the Court of Chancery,

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after an appeal filed, for leave to proceed, notwithstanding the appeal, the Court ordered a reference to a master, to ascertain the precise sum due to the defendant, with interest, and that the defendant bring the amount into the Court, within thirty days after the confirmation of the report, or that he give security, to be approved of by a master, to perform the decree, or such decree as might be awarded against him on the appeal; or that execution issue, notwithstanding the appeal. *Messonier v. Kauman*, 3 J. C. R. 66.

141. A decretal order of reference to a master, to state an account between the parties, was made in September, 1815, and the parties appeared, from time to time, before the master, until the 16th of October, 1817, when they were nearly ready for a final hearing before him; and then the defendant presented an appeal from the decretal order, dated the 16th of October, 1817; on petition and motion of the plaintiff, the Court of Chancery ordered the master to proceed in taking [*180] the account, and to complete and file his report, notwithstanding the appeal. *Barrow v. Rhineland*, 3 J. C. R. 120.

142. The Court of Chancery, notwithstanding an appeal filed, may in its discretion award execution for the sum decreed to be paid by the defendant, unless he brings the amount, with the costs, into Court, within the time given for that purpose, to abide the event of the appeal, &c. or give security to the satisfaction of a master, to pay the principal, interest and costs on the affirmance of the decree, or such part thereof as may be payable on the decree of the Court of Errors, on the appeal. *Riggs v. Murray*, 3 J. C. R. 160.

143. If a petition of appeal be defective in form, the respondent must object to it at the time of filing; it is too late to make the objection after he has answered the appeal. *Rogers v. Cruger*, 3 J. R. 564.

144. On an appeal from an interlocutory order or decree, the Court of Errors will, if the merits of the cause be fully before it, take them into consideration, and make a final decree. *Le Guen v. Gouverneur & Kemble*, 1 J. C. 436. *Bush v. Livingston*, 2 C. C. E. 66. *Bebee v. Bank of New-York*, 1 J. R. 529.

145. A Court of review gives such a decree as the Court below ought to have given; and when the plaintiff below brings the appeal, the Court above not only reverses what is wrong, but decrees what is right, and models the relief according to its own view of the ends of justice, and the exigencies of the case. *Gelston v. Codwise*, 1 J. C. R. 189.

146. On appeal from Chancery, the decree and order of the Court of Errors becomes, to the Court below, the law of the case; and the party can have no further relief there, than what is administered by the decree of the Court above. *Ibid*.

147. If the parties in the Court of Chancery neglect to except to the master's report, in a cause, it seems, that the Court of Errors will not enter into an investigation of the calculations made by the master, but will consider

the exceptions as waived by the party. *Delabigarre v. Bush*, 2 J. R. 490.

148. On an appeal from an order of the Court of Chancery, postponing the hearing of a cause, until the assignees of two of the parties, who had become insolvent pending the suit, should be made parties, the Court of Errors will not decide on the merits of the cause. *Deas v. Thorne*, 3 J. R. 543.

149. On an appeal, the Court of Errors will not permit evidence to be read which was not read in the Court of Chancery, nor will it hear and decide on the merits, unless the merits have been heard and decided on in that Court. *Ibid*.

150. On an appeal from an order of the Court of Chancery, granting an injunction to stay proceedings at law, the Court of Errors will not hear and decide on the merits of the cause, if the Court below had not heard the cause on the merits, before granting the order. *Trustees of Huntington v. Nicoll*, 3 J. R. 566.

151. The Court of Errors, on appeal, will decide on those parts only of the decree of the Court of Chancery complained of in the petition of appeal. *Sands v. Codwise*, 4 J. R. 536.

*152. When an objection is made [*181] in the Court of Chancery, of a want of parties, it may be insisted on in the Court of Errors on appeal. *Grant v. Duane*, 9 J. R. 591.

153. When the defendant neglects to appeal from a decree, against an objection made as to the want of proper parties to the bill, but appeals from a final decree, which is reversed on that ground, the Court of Errors will order that the respondent have leave to dismiss his bill in the Court of Chancery, or amend it by adding proper parties; and if he elect the latter, that the present parties have leave to use all testimony already taken in the cause, subject to all just exceptions; that each party pay his own costs in the Court above, and that costs in the Court below abide the final event. *Hickcock v. Scribner*, 3 J. C. 311.

154. Where a bill was brought to obtain a sale of mortgaged premises, to which the mortgagee, who had delivered the mortgage without a written assignment, to the plaintiff below, was not made a party, the Court of Errors, on reversing the decree of sale, on the ground of a want of proper parties, gave leave to the respondent to have his bill dismissed, or to add proper parties, on payment of the costs in the Court below. *Johnson v. Hart*, J. C. 322.

155. Where a cause, on appeal, comes on to a hearing in the Court of Errors, if the transcript of the record, or certified copies of the pleadings, and evidence, and papers read in the Court of Chancery, are not filed in the Court of Errors, the counsel for the appellant will not be allowed to read the original papers produced by the register of Chancery; but the appeal will be dismissed with costs. *Winter v. Green*, 12 J. R. 497.

156. A respondent, in the Court of Errors, on an appeal, may set down a cause for hear-

ing, *ex parte*, and need not give notice of the order for that purpose to the appellant; and, if the appellant does not appear, at the day, or is not ready to proceed to the hearing, the appeal may be dismissed. *Bissell v. Dennison*, 14 J. R. 483.

157. A point not raised in the Court of Chancery, cannot be noticed in the Court of Errors, on an appeal. *Franklin v. Osgood*, 14 J. R. 527.

158. Although it is a rule, that an objection not taken in the Court below, cannot be taken in the Court of appellate jurisdiction; yet, that rule is intended to be applied only to objections which the party by his silence may be deemed to have waived, and which, when waived, will leave the merits of the cause to rest with the judgment. It does not apply to an objection which, if taken, would have destroyed the foundation of the action. *Palmer v. Lorillard*, 16 J. R. 348. *S. P. Beekman v. Frost*, 18 J. R. 544, in which the other cases were considered.

159. No point or question, which, had it been raised in the Court below, might have been met and obviated, can be raised in the Court of Errors, for the first time. *Ibid.*

160. *Aliter*, if the point raised in the Court of Errors could not, by amendment or proof, have been obviated in the Court below. *Ibid.*

161. A cause cannot be entered in the calendar of causes to be heard in the Court of Errors, until after the petition of appeal addressed to *that Court, and the answer of the defendant to such appeal, have both been regularly filed in that Court. *Woodcock v. Bennet*, 20 J. R. 501.

162. After a cause had been argued, on appeal, in the Court of Errors, and a decree of affirmance pronounced, on a point which, though stated in the printed case before the Court, was not much insisted upon by the one side, nor objected to by the other, on the argument, the Court of Errors, on motion of the appellants, refused to modify the decree, so as to allow the appellants to amend their answer, or to file a supplemental bill in the Court below, especially as it was to help the plea of the statute of limitations, and the answer accompanying the plea contained an admission of the debt. *Murray v. Coster*, 20 J. R. 576.

(c) *Change of parties pending an appeal.*

163. If any of the parties in interest in a cause become changed, by death or otherwise, pending an appeal to the Court of Errors, the cause will be remanded, without prejudice to either party, in order that the Court of Chancery may take the necessary steps to bring in the parties whose interest may have accrued since the appeal. *Wilson v. Hamilton*, 9 J. R. 442.

164. Where a decree had been pronounced in the Court of Chancery, in a suit brought by certain creditors of a bankrupt, and his assignee, and others, and afterwards the assignee was removed, and a new assignee appointed by a majority of the creditors of the bankrupt, and the cause having been brought by appeal to the Court of Errors, the appellant presented a petition, praying a stay of all the proceedings,

until the new assignee was made a party by the respondents, the Court of Errors refused to grant the application. *Sands v. Codwise*, 2 J. R. 487. On the motion, the counsel for the appellant was heard first, in support of the petition. *Ibid.*

(d) *Costs on appeal.*

165. On the reversal of a decree or order, the appellant is only entitled to costs in the Court below, up to the time that the decree or order was given; and cannot recover costs on the appeal. *Le Guen v. Gouverneur*, 1 J. C. 436. *Farquharson v. Mabee*, 3 J. R. 553.

166. Costs are not allowed in the Court of Errors, on reversing a decree of the Court of Chancery. *Evertson v. Booth*, 20 J. R. 499. And *Spencer*, Ch. J., said, that though the decree of reversal, in the case of *Parthugast v. Van Cortlandt*, as stated in the report of that case, (14 J. R. 15. 45.) directs the respondent to pay costs, the *remitter* was drawn up incorrectly, in that respect, and was corrected by the Court of Errors, during the session, and that part directing the payment of costs was struck out; and he added, that he recollected no instance in which costs on the reversal of a decree of the Court of *Chancery had been allowed in [*183] the Court of Errors. The costs mentioned in the report of *Simson v. Hart*, (14 J. R. 77.) and of *Anderson v. Roberts*, (18 J. R. 543.) must be understood to mean the costs of the appellants in the Court of Chancery.

167. Where several defendants in Chancery put in separate demurrers, on which separate decrees were given, on reversal of the decrees below, the Court of Errors ordered each respective respondent to pay the appellant the sum of thirty dollars, for his costs on the appeal, for each respective decree so reversed. *Le Roy v. Veeder and others*, 1 J. C. 417. *S. C. 2 C. C. E.*

175. The severance was considered unnecessary and vexatious; and the costs were intended to prevent abuse.

168. The 37th rule of the Court of Chancery, made June 7th, 1806, requiring the party appealing from a decree or order of the Court, to deposit 100 dollars with the register or assistant register, to answer for costs, &c., is an equitable and salutary rule, intended to prevent delay and abuse. *Bradwell v. Weeks*, 1 J. C. R. 325.

169. But it seems, that the Court of Errors does not award interest on the sum so deposited, on reversing the decree of the Court of Chancery. *Evertson v. Booth*, 20 J. R. 499.

VI. ASSIGNMENT.

170. The assignee of *those in action takes it subject to all the equity of the original debtor or obligor, at the time, but not to any latent equity residing in a third person, against the assignor or obligee. *Murray v. Lylburn*, 2 J. C. R. 441. *S. P. Livingston v. Dean*, 2 J. C. R. 479. *Clute v. Robinson*, 2 J. R. 505.

171. So, where A. gave a bond and mortgage to B. and took from him a *defeasance*, conditioned that the bond and mortgage should be given up and cancelled, if A., by a certain day, should execute a deed to B.; and B. afterwards assigned the bond and mortgage to C.; *held*, that C. took them, subject to all the equity existing between A. and B., and liable to be defeated by a performance of the condition of the *defeasance*, and that whether he had notice of the *defeasance*, or not. *Clute v. Robison*, 2 J. R. 595.

172. So, the assignee of an agreement for the sale and purchase of lands, without notice, is subject to all the equity which existed between the parties, and can require a specific performance on no other terms than could have been insisted on by his assignor, the original vendee. *Murray v. Gouverneur*, on appeal, 2 J. C. 438.

173. To subject the assignee to the equity of a third person, he must have express or constructive notice of it, at the time of the assignment. *Livingston v. Dean*, 2 J. C. R. 479.

174. Where B. obtained from L. a deed of land, by fraud, and in which H. was concerned; and B. afterwards confessed a judgment to H., who assigned it to R. for a valuable [*184] consideration, and without notice of the fraud; *held*, that the deed being null on account of the fraud, the judgment created no valid lien on the land; and that R. took the assignment at his peril, and subject to all the existing rights of the debtor; and the land was ordered to be reconveyed, and a perpetual injunction awarded. *Livingston v. Hubbs*, 2 J. C. R. 512.

175. Where A. assigned to S. a debt and demand against R., and also the proceeds of goods delivered by A. to R., to sell on account: *held*, that all the right of A., as creditor of R., passed by the assignment; and that a release of all demands, in law and equity, by S. to R. as assignee, given on a compromise with him, was valid and effectual. *Allen v. Randolph*, 4 J. C. R. 693.

176. An assignment void at law, and necessarily leading to fraud and corruption, will be set aside. *Arden v. Patterson*, 5 J. C. R. 44.

177. As, where D. assigned all his claim and right of action against A. for a certain quantity of wine, to S., in trust for the creditors of D., and P., an attorney, who had acquired a knowledge of the grounds of the claim from D. and S., purchased the right of action from S., who supposed it to be desperate, for a trifling consideration, and then prosecuted the suit for his own benefit, and obtained judgment for the whole amount; *held*, that the agreement and assignment were void, on the ground of champerty; and on S. refunding to P. the consideration money paid by him, a perpetual injunction was awarded. *Ibid*.

178. A. and B., being concerned together in commercial adventures to South America, A., unknown to B., who was abroad, assigned over the whole of the return cargo to C., to secure the individual debt of A., who was insolvent; and C. knew, at the time, there was an un-

settled account between A. and B., arising from their mercantile adventures, though he was ignorant of the nature and extent of the transactions between them, or of the amount of interest, if any, of B.; *held*, that C., having sufficient notice of the rights of B. to put him on inquiry as to the extent of his interest, took the assignment subject to all the rights and securities of B. *Rodriguez v. Heffernan*, 5 J. C. R. 417.

179. An assignee of one of two partners, is entitled only to the share of such partner after the settlement of the accounts of the partnership, and all the just claims of such partner are satisfied. *Ibid*.

180. In May, 1817, A. confessed a judgment in favor of M., S. & C., by way of security and indemnity. Afterwards, in June, 1817, A., being in failing circumstances, assigned certain real and personal estates specified in schedules, to M. & C. in trust, to convert the same into money, and, after deducting charges, &c., to pay, 1st, the debts and responsibilities specified in a schedule (and which included a large debt to M., S. & C.), either ratably, or in such order of preference and priority as they should deem best; 2d, to pay all the debts of A., and 3d, to account for the surplus to A., or his legal representatives; and the real estate was declared to be subject to the judgment confessed in favor of M., S. & C., and to another judgment in favor of Q.—M. & S. accepted the trust, and executed it by paying a great part of the debts, &c. In August, 1817, some of the creditors of A. recovered judgments against him, and issued executions, by virtue of which the sheriff sold a house and lot of A. which, having been previously conveyed in trust for his wife, was not included in the assignment; *and H. became the [*185] purchaser at the sheriff's sale, for the execution creditors, and the trust for the wife was adjudged void as against those creditors. On a bill filed by H., against M., S. & C., to prevent their selling the same property under an execution on their judgment, or on the judgment in favor of Q., which had been purchased by M. for a small sum; *held*, that M. & S., by accepting the trust under the assignment, had waived any remedy for their own demands, or those of M., S. & C., under their judgment, the lien of which was preserved merely for the sake of priority, and to guard against intervening liens; and, as to any direct remedy, that the judgment was extinguished by the operation of the deed of assignment; and that M. must be considered as purchasing the judgment of Q., in his character of trustee, and, therefore, could not make use of it for any purposes inconsistent with that character. *Hawley v. Mancius*, 7 J. C. R. 174.

181. An assignment of shares or stock in an incorporated company, passes all the growing profits on such shares, and an action at law to recover such profits, after they are ascertained and declared, lies at the suit of the assignee. *Kane v. Bloodgood*, 7 J. C. R. 90—108.

182. An assignment of a trust carries a fee to the assignee, though the deed contains no words of inheritance, if such appears to have

been the intent of the parties. *Fisher v. Fields*, 10 J. R. 495.

See further XVII. *Debtor and Creditor*.
Fraud.

VII. AWARD.

- A. *Of the arbitrators and umpire; their power and duty.*
B. *When the Court will interfere with an award, and confirm or set it aside.*

A. *Of the arbitrators and umpire; their power and duty.*

183. Where a lease contained a covenant, that the mills and other buildings erected on the premises by the lessee should, at the end of the term, "be appraised and valued by two persons indifferently chosen by the parties, and, in case of their disagreement, by a third person chosen by the two," a nomination by each party of one appraiser, with the assent of each to the nomination of the other, is binding on them, and a compliance with the covenant. *Underhill v. Van Cortlandt*, 2 J. C. R. 339. Appraisers so chosen are considered in the same light as arbitrators. S. C. 17 J. R. 405.

184. Arbitrators, in appraising property, are not bound to assess the value of each particular article separately. *Ibid*.

185. Where an umpire is chosen [*186] by two arbitrators, and they join *in the umpirage, it is good; for the umpire may take what advice or assessor he pleases. *Ibid*.

186. If, by the agreement of the parties to a submission, the arbitrators have power to nominate an umpire, in case of their disagreement, they may choose the umpire before they proceed to the consideration of the subject. S. C. 17 J. R. 405.

B. *When the Court will interfere with an award, and confirm or set it aside.*

187. Awards cannot be impeached or set aside, unless for corruption, partiality, or gross misbehavior in the arbitrators, or some palpable mistake of the law, or the fact. *Herrick v. Blair*, 1 J. C. R. 101. S. P. *Shepard v. Merrill*, 2 J. C. R. 276.

188. If there be no corruption or partiality, nor misconduct of the arbitrators, nor any fraud practised by either party, the award is binding and conclusive, and cannot be set aside by the Court, however unreasonable or unjust it may appear. *Underhill v. Van Cortlandt*, 2 J. C. R. 339. S. P. *Todd v. Barlow*, 2 J. C. R. 551.

189. What misconduct of arbitrators is a sufficient ground for setting aside an award. *Underhill v. Van Cortlandt*, 2 J. C. R. 339. S. C. 17 J. C. R. 405.

190. If arbitrators refuse to hear evidence, pertinent and material to the controversy, it is such misconduct as will vitiate the award, in the Court of Chancery. S. C. 17 J. R. 405.

191. As, where the persons chosen by the parties to a lease, to appraise the value of mills

and buildings erected on the premises during the term, refused to hear evidence offered by one of the parties, as to the original cost of the buildings; held, that this was a sufficient cause for setting aside the award. *Ibid*.

192. So, partiality and corruption in either of the arbitrators, or the suppression and concealment of material facts, by either of the parties, if the knowledge of such facts would have produced a different result, are sufficient causes for setting aside the award. *Ibid*.

193. In an action at law, the corruption or misconduct of the arbitrators is no defence. S. C. 2 J. C. R. 339.

194. An award will not be set aside for an over or under valuation of property, by arbitrators chosen by the parties to appraise it. *Underhill v. Van Cortlandt*, 2 J. C. R. 339.

195. But, it seems, that if the assessment of damages or appraisement be so enormous and exorbitant, as to induce a belief, that the arbitrators must have been corrupt or grossly partial, their award may be set aside. S. C. on appeal, 17 J. R. 405.

196. Arbitrators, after a witness had been sworn and examined, and they were left alone to deliberate on their award, called the witness again, and, without the knowledge or presence of the parties, examined him as to matters material to the controversy, on which he had before given testimony, but about which the arbitrators differed as to what the witness did testify on the former hearing; the Court refused to grant an injunction to stay proceedings at law, on the arbitration bond. *Herrick v. Blair*, 1 J. C. R. 101.

*197. Where a cause is referred, [*187] by consent of the parties, under an order of the Court, and the referees, who were two lawyers and a merchant, were to decide all questions in dispute between the parties, as well matters of law as of fact; and a question of law, put at issue by the pleadings in the cause, as to a will, was discussed before the referees, and decided by them, the Court refused to interfere with the award, unless a gross and palpable mistake was shown. *Roosevelt v. Thurman*, 1 J. C. R. 220.

198. The Court refused to grant an injunction to stay a suit at law on an award, on the ground that the plaintiff was surprised by the principal witness of the defendants swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time allowed for making the award. *Woodworth v. Van Buskerk*, 1 J. C. R. 432.

199. Where the matter submitted was, what damages the one party or the other was to pay on the surrender of a lease; and the arbitrators awarded a sum to be paid by the lessor to the lessee, but did not take into consideration the rent payable at the next quarter day, considering that not to be a matter in controversy, or submitted; nor was it mentioned or brought before the arbitrators by the parties; held, that there was no mistake in the award. *Shepard v. Merrill*, 2 J. C. R. 276.

200. Where the parties, by mutual consent, withdraw a cause from the Court, before hearing, for the purpose of settlement by arbitrators, and on certain terms, one of which was, that "the question of costs, in the Chancery suits, being original and cross suits, should be submitted to the chancellor;" the Court will not decide the mere question of costs, but leave each party to pay his own costs. *Eastburn v. Kirk*, 2 J. C. R. 317.

201. *It seems*, that the testimony of an arbitrator is inadmissible to impeach his award. *Underhill v. Van Cortlandt*, 2 J. C. R. 330. S. C. 17 J. R. 405.

202. How far a gross or palpable mistake may be ground for setting aside an award. *Ibid*.

203. Where there is no charge of corruption or misconduct in arbitrators, and the award, on the face of it, is final, nothing *dehors* the award can be pleaded or given in evidence to invalidate it. *Todd v. Barlow*, 2 J. C. R. 551.

204. An award will not be opened or set aside, on the allegation of the discovery of a receipt, which had been lost or mislaid, so that it could not be produced before the arbitrators, to show a payment; unless under special circumstances, and satisfactory proof of all due efforts to discover the receipt before the hearing, or to supply its loss, and of its discovery since the award. *Ibid*.

205. This Court will correct a *mistake*, of an extra-judicial nature, in an award of arbitrators, and decree a performance of the award *in specie*. *Bouck v. Wilber*, 4 J. C. R. 405.

206. As, where the subject of controversy was land, which the arbitrators were to appraise, and the plaintiff was to convey the same to the defendant, who was to pay the amount of the appraisal; and
[*188] *the arbitrators, by a mere clerical mistake, so erroneously described the land in their award, as to include *one* acre only, instead of *fifty* acres; it was decreed, that the award should be corrected according to the truth of the fact, and that there be a specific performance of it accordingly. *Ibid*.

207. An *appraisement* of real estate, of which the widow was to have one *third*, under the will of the testator, made by *appraisers* appointed by the Court, on a bill filed by the widow, who had taken out administration with the will annexed, was set aside, at the instance of the *heirs*, on the ground of gross mistake in the appraisers, in calculating the value of certain parts of the estate, (though no actual misconduct or fraud was imputed to them,) connected with other circumstances. *Rogers v. Cruger*, on appeal, 7 J. R. 557.

VIII. BAILMENT.

208. If a person having charge of the property of another, so confounds it with his own, that it cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he will lose it; and if damages are given to the

plaintiff for the loss of his property, the utmost value will be taken. *Hart v. Ten Eyck*, 2 J. C. R. 62.

209. The defendants, being stock and exchange brokers, in the course of their business, received of the plaintiff 430 shares of *United States Bank* stock, and which it was agreed, in *February*, 1818, that they should hold, as collateral security for the payment of a note given to them by the plaintiff for moneys advanced to him, and payable on the 20th *January*, 1819; and that they should be at liberty, in case the note was not paid at the time, to make immediate sale of the stock, accounting to the plaintiff for any surplus, and holding him responsible for any deficiency; *held*, that as the defendants, at all times since giving the note by the plaintiff, were possessed of shares standing in their names, and under their absolute and rightful control, and subject to no contract, to an amount far exceeding the number of shares deposited with them by the plaintiff, (and which were not marked or identified as his particular property, but blended with the mass of shares of the same stock held and owned by the defendants,) and were ready and able, at any time, to transfer the 430 shares to the plaintiff on payment of the note, they were not bound to account to the plaintiff for his stock, at the *highest price* at which shares were sold by them, at any time during that period; but that the like number of shares held by the defendants when the note became due, were to be considered as the shares so deposited by the plaintiff; and which the defendants were at liberty to sell, according to the agreement, to reimburse the amount of the note which remained unpaid. *Nourse v. Prime*, 4 J. C. R. 490. S. C. 7 J. C. R. 69.

*IX. BANKING. [*189]

210. The right of banking was formerly a common law right belonging to individuals; but since the restraining act of the legislature, it is a *franchise* derived from the legislature. *Attorney General v. The Utica Insurance Company*, 2 J. C. R. 371.

211. Carrying on banking operations contrary to the statute, is not such a mischief or public nuisance, that this Court will grant an injunction to restrain the party, even if it had jurisdiction over public nuisances. *Ibid*.

212. If an incorporated bank of another state, lends money and takes a mortgage in this state, it is not a violation of the act of the legislature, passed *April* 21, 1818, (Sess. 36, c. 71.) relative to banks, &c., for restraining unincorporated associations from carrying on banking business. *Silver Lake Bank v. North*, 4 J. C. R. 370.

X. BANKRUPT.

A. Construction and effect of the bankrupt law of the United States, of *April* 4, 1800, (6th Cong. Sess. 1. c. 19. expired June 1

1806;) and what debts were provable under the commission, and what discharged by the certificate.

B. *Acts of bankruptcy; frauds in relation to the bankrupt law.*

C. *The assignment; assignees; suits by and against them; and set-off.*

D. *Of the operation and effect of bankrupt laws generally, in regard to other countries; and the law of England on the subject.*

A. *Construction and effect of the bankrupt law of the United States, of April 4, 1800; and what debts were provable under the commission, and what discharged by the certificate.*

213. The bankrupt act of the United States, of April 4, 1800, consolidated the provisions of the English statutes of bankruptcy: and the English decisions on the subject are, therefore, applicable in the construction of that act. *Roosevelt v. Mark*, 6 J. C. R. 266.

214. The bankrupt law of the United States did not operate upon acts, declared to be acts of bankruptcy, committed prior to the 1st of June, 1800. *McMenomy v. Murray*, 3 J. C. R. 435.

215. M. & S., partners in trade, being greatly indebted, in the United States, and in Europe, on the 2d of December, 1799, conveyed certain lands to B., in trust, for the security of certain European or German creditors, until they were paid, or S. should be [*190] absolutely exonerated and discharged therefrom by the said creditors, and their demands transferred to M. alone, or S. be otherwise exonerated, acquitted, or discharged therefrom; and after the said debts should be satisfied, or the said S. so discharged and released, then, in trust for M. & S., having committed an act of bankruptcy in July, 1800, were duly discharged from their debts under the bankrupt law of the United States; held, that the deed of trust was valid, and the discharge of S. from the partnership debts, under the bankrupt law, was not a fulfilment of the condition, on which the trust for the German creditors was created. *Ibid.*

216. A discharge, under the bankrupt law of the United States, does not discharge the debtor from debts contracted and made payable in Europe, or a foreign country, unless the foreign creditors come in and prove their debts under the commission. *Ibid.* Or, unless it is so declared in the bankrupt statute, by express words, or by necessary implication. *Murray v. De Rottenham*, 6 J. C. R. 52.

217. But even if the discharge under the bankrupt law of the United States should be deemed a discharge from any suit in the United States, for debts due to the German creditors of S.; yet that would not satisfy the terms and conditions of the deed of trust, unless it operated as a discharge in Germany, where the debts were contracted. *McMenomy v. Murray*, 3 J. C. R. 435.

218. M. and S., in 1799, conveyed a large tract of land to J. S., in trust, for their cred-

itors residing in Germany, specially mortgaging a part of it, for three of their German creditors, particularly mentioned; and M. covenanted to pay and discharge all taxes and assessments which should be charged and assessed on the land, and discharge certain encumbrances specified; M., without having performed any of these covenants, obtained his discharge, under the bankrupt law of the United States. The trustee, afterwards, with his own moneys, paid the taxes upon the trust property, and also paid off the encumbrances, and took an assignment of them to himself; held, that the encumbrances being for debts certain, were provable under the commission; and M. was, therefore, discharged from them, but not from his covenant to pay the taxes which might, from time to time, be laid on the property; it being a personal and distinct engagement for the security of the trust property. *Ibid.*

219. A bond taken as collateral security for actual advances and responsibilities, is a legal debt, provable under the commission; and the bankrupt may, therefore, set up his discharge in bar to any demand which such security was intended to cover. *Roosevelt v. Mark*, 6 J. C. R. 266.

220. So, a judgment given by a debtor to T. in trust for a creditor, as collateral security for existing advances and responsibilities, is legal, and provable as a debt under the commission: and all the demands, to secure which such judgment was given, are barred by the certificate. *Ibid.*

221. But where a judgment or other security is taken merely by way of indemnity, and such is the condition of the bond given, then, until the party is damnified, by having paid, the judgment cannot be proved *by him as a debt, or by the trustee, for his benefit; and therefore, is not discharged by the certificate. *Ibid.* [*191]

222. Bonds, to secure annuities; to trustees, to secure provision for a wife; to replace stock at a certain day, &c., are provable under the commission as legal debts. *Ibid.*

[As to joint or separate commissions, and partners, see D. 239, 240, 241, 242.]

B. *Acts of bankruptcy; frauds in relation to the bankrupt law.*

223. A debtor, in insolvent circumstances, may, *bona fide*, give a preference to one creditor, to the exclusion of others; and such preference, though voluntary, is valid, unless done in contemplation of bankruptcy. *Phanix v. The Assignees of Ingraham*, 5 J. R. 412.

224. Even if an act of bankruptcy be contemplated by the debtor, yet if, at the instance, and on the application, of a particular creditor, he pays such creditor, or assigns his property to him, such payment or assignment will be valid as against the bankrupt's assignees. *Ibid.*

225. Where the grantor of a deed made to defraud creditors, afterwards became a bankrupt, the grantee, the deed having been declared fraudulent and void, is accountable for

the rents and profits subsequent to the act of bankruptcy, or from the time when the right of the creditors to call him to an account accrued. *Sands v. Codwise and others*, 4 J. R. 536.

226. A conveyance by a debtor of his property, to secure a *bona fide* creditor, created prior to the 1st of June, 1800, though made in contemplation of bankruptcy, is valid; not being within the purview of the bankrupt law of the United States, passed April 4, 1800, which did not go into operation until the 1st of June following; nor is such a deed fraudulent at common law. *McMonomy v. Roosevelt*, 3 J. C. R. 446.

C. The assignment; assignees; actions by and against them; and set-off.

227. Where a decree has been pronounced in the Court of Chancery, in a suit brought by certain creditors of a bankrupt, against him, his assignee, and others, and the assignee is afterwards removed, and a new assignee appointed by a majority of the creditors, and the cause is brought by appeal to the Court of Errors, that Court will not stay the proceedings, until a new assignee is appointed. *Sands v. Codwise*, 2 J. R. 485.

228. Where a bill in Chancery was filed by creditors, to set aside the deeds of a bankrupt, on the ground of fraud; *held*, that the property was not to be placed in the hands of a master, but was to be disposed of by the assignees of the bankrupt, according to the bankrupt law. *Sands v. Codwise*, 4 J. R. 536.

229. Where there are mutual dealings between A. and B. and A. having the property of B. in his hands, B. becomes bankrupt, A. is entitled to set off his debts or demands against the funds in his hands,

[*192] *and can be compelled to account to the assignees of the bankrupt for the balance only, even though the subject of the set-off would not be admissible at law. *Murray v. Riggs*, 15 J. R. 571. [See *Ogden v. Cowley*, 2 J. R. 274. where the Supreme Court decided, that in an action brought by the assignees, to recover a debt due the bankrupt, the defendant cannot set off a check of the bankrupt, dated prior to the bankruptcy, unless he prove that it came to his hands prior to the bankruptcy.]

D. Of the operation and effect of bankrupt laws generally, in regard to other countries; and the law of England on the subject.

230. It is a principle of international law, to take notice of and give effect to the title of foreign assignees; and the assignees of a foreign bankrupt may sue here for debts due to the bankrupt's estate, either as such assignees, or in the name of the bankrupt. *Holmes v. Remsen*, 4 J. C. R. 460. [See 1 J. R. 118. 2 J. R. 342.]

231. The same principle of general law, that governs marriage contracts, testamentary dispositions, and the succession to the personal estate of an intestate, applies to the dis-

tribution of the estate of a foreign bankrupt. *Ibid*.

232. The principle of international law on the subject, is a rule of decision, not a question of jurisdiction; and does not affect the rights of territorial sovereignty. *Ibid*.

233. But the title of foreign assignees takes effect only from the date of the assignment to them, and has no relation to the time the act of bankruptcy was committed. *Ibid*.

234. The doctrine of relation, in regard to bankrupts, is a positive rule of mere municipal policy; and the rule of comity among nations does not require its adoption. *Ibid*.

235. Therefore, an assignment by the commissioners of bankrupts in England, of all the estate and choses in action of the bankrupt, passes a debt due by a citizen of this state to the English bankrupt. *Ibid*.

236. And if the assignment is prior in time to an attachment of the same debt here, at the instance of an American creditor of the bankrupt, under the act giving relief against absent debtors, &c., a subsequent payment of the debt to the foreign assignees in England is a bar to a suit brought here by the trustees under the act against the debtor here. *Ibid*.

237. A concurrent separate assignment, made by the foreign bankrupt to the assignees under the commission of bankrupts, though it may strengthen the case before the Court, makes no difference, in the application of the general doctrine. *Ibid*.

238. The effect is the same, whether the transfer be made by the bankrupt himself, or by the law of the place of his domicile for him. *Ibid*.

[Note.—The case of *Holmes v. Remsen* afterwards came before the Supreme Court, and the questions, involving the above principles declared by the chancellor, were fully discussed by the counsel.

Platt, *J. expressed his dissent [*198] from those principles, but the other judges gave no opinion, the cause being decided on another ground, in which they all agreed. See 20 J. R. 229.]

239. The rule in England, in cases of the bankruptcy of joint traders, seems to be, that joint creditors may prove their debts under a separate commission, and separate creditors under a joint commission; but distinct accounts are kept of the joint and separate estates, and the joint estate is first applied to the payment of the partnership debts, and the separate estate to the separate creditors, and the surplus of each estate to the creditors remaining on the other. *Murray v. Murray*, 5 J. C. R. 60.

240. The assignees under a commission of bankrupt can distribute the whole partnership fund; for, after a separate commission, a joint commission cannot issue, and *vice versa*; and where both are issued, one or the other is superseded, as may best answer the ends of justice. *Ibid*.

241. The assignees of the bankrupt, and the solvent partner, must join in a suit at law. *Ibid*.

242. The assignees of a bankrupt partner, under a separate commission, are tenants in common with the solvent partner, and one can-

not call the joint property out of the hands of the other. *Ibid.*

XI. CHAMPERTY AND MAINTENANCE.

243. Where an attorney purchases from his client the whole subject matter of controversy, for his own benefit, though he may have some interest of his own, it is *champerty*. *Arden v. Patterson*, 5 J. C. R. 44.

244. An agreement amounting to *champerty*, cannot be supported in equity. *Ibid.*

245. Advancing money to a poor person to prosecute his suit, is not *maintenance*. *Perine v. Dunn*, 3 J. C. R. 508.

XII. CIVIL DEATH.

246. A person convicted and attainted of felony, and sentenced to the state prison for life, prior to the 29th of March, 1793, (which created a new rule,) was not *civiliter mortuus*; and his estate, therefore, was not devested by the sentence. *Platner v. Sherwood*, 6 J. C. R. 118. In the case of *Troup v. Wood*, (4 J. C. R. 223.) in regard to the same conviction, the same point incidentally arose, and the attention *of the Court not being particularly directed to the subject, it was said, that the act of the 29th of March, 1799, was declaratory of the common law; and the party, by the conviction and sentence to imprisonment for life, was civilly dead. But civil death, at the common law, was confined to monks professed, or to persons who abjured or were banished the realm; imprisonment for life being a punishment unknown to the common law, and created by our statute.

XIII. CONSTITUTION AND GOVERNMENT OF THE UNITED STATES.

247. Under the constitution of the *United States*, citizens of each state are entitled to free ingress and egress to and from any other state, and to all the immunities of citizens of every state. *Livingston v. Tompkins*, 4 J. C. R. 415.

248. The government of the *United States* having sole and exclusive jurisdiction over all differences between two or more states, all acts of reprisal between the states are unlawful and unnecessary. *Ibid.*

249. It belongs to the government of the *United States* to declare whether it will consider a colony, which has thrown off the yoke of the mother country, as an independent state; and, until the government has decided on the question, Courts of justice are bound to consider the ancient state of things as remaining unchanged. *Gelston v. Hoyt*, 1 J. C. R. 543.

XIV. CONTRIBUTION.

In what cases, and in what proportion, contribution shall be made.

250. Where land is charged with a burden, each part ought to bear no more than its due proportion of the charge; and equity will compel each party to a just contribution. *Stevens v. Cooper*, 1 J. C. R. 425.

251. And a creditor cannot, by any act or assignment of his, deprive the co-creditors, or owners of the land, of their right of contribution against each other. *Ibid.* *S. P. Cheesebrough v. Millard*, 1 J. C. R. 409.

252. Chancery will compel the creditor to aid the contribution, by assigning his bonds and securities to the debtor, or surety, or owner of the land, whom he charges with his whole demand; and he will not be permitted, voluntarily, to defeat this right. [*Ibid.* See *Substitution*.]

*253. Where a bond, payable in [*195] two instalments, was secured by a mortgage on a mill, &c., and the debtor, afterwards, gave a second mortgage on six other lots of land, specifically to secure the payment of the first instalment of the bond, but without reference to the first mortgage; and all the parties, afterwards, by an arrangement between them, declared the second instalment paid, and cancelled the first mortgage, leaving the second to remain as security for the first instalment; and at a sale of the six lots, under a subsequent judgment, which was a lien on the equity of redemption on these lots, A. purchased two lots, and B. four lots, knowing, at the time, the situation of the mortgage; and B., afterwards, purchased the second mortgage, and filed a bill to foreclose; decreed, that A. was bound to contribute towards the satisfaction of the principal and interest due on the first instalment, according to the actual relative value of the lots, and not according to the prices for which they were sold at the sheriff's sale. *Cheesebrough v. Millard*, 1 J. C. R. 409.

254. Where six separate lots or parcels of land were mortgaged, and the mortgagee, afterwards, released four of the lots from the mortgage, leaving the original debt to stand charged on the remaining two; held, that the two lots were chargeable with their ratable proportion only of the original debt and interest, according to the relative value of the six lots, at the date of the mortgage. *Stevens v. Cooper*, 1 J. C. R. 425.

255. A purchaser of part of lands mortgaged, from the mortgagor, is not bound to contribute ratably with a purchaser of the equity of redemption, under a judgment subsequently obtained, towards the discharge of the mortgage; unless the residue of the mortgaged premises proves insufficient to extinguish the debt. *Gill v. Lyon*, 1 J. C. R. 447.

256. Equity will not interpose to enforce a contribution between *wrong doers*, especially where they do not stand in equal right, or there is not equal equity between them. *Peck v. Ellis*, 2 J. C. R. 131.

257. Contribution is allowed only between defendants standing in *equi juris*. *Ibid.*

258. There is no contribution between *joint trespassers* at law; nor, *it seems*, in equity. *Ibid.*

259. The representative of a deceased partner, who has paid the whole of a partnership debt, will not be substituted in the place of the creditor, in order to recover a proportion from the survivor. *Sells v. Administrators of Hubbell*, 2 J. C. R. 394.

260. But if the surviving partner alleges that a balance was due to him from the deceased, as much or more than he had been obliged to pay, an account must be taken, before the Court can interfere to enforce the claim for contribution. *Ibid.*

261. The doctrine of contribution is not so much founded on contract, as on the principle of equity and justice, that where the interest is common, the burden also should be common; and the principle that equality of right requires equality of burden, has a more extensive operation in a Court of equity, than in a Court of law. *Campbell v. Mesier*, 4 J. C. R. 334.

*262. Thus, where there was an [*196] old party-wall between two owners of houses, in the city of *New-York*, and one of them, being desirous to build a new house on his lot, pulled down his old house, and with it the party-wall, which was ruinous, and rebuilt it with his new house; *held*, that the owner of the contiguous lot was bound to contribute ratably to the cost of the new party-wall. *Ibid.*

263. But he is not bound to contribute to building the new wall higher than the old; nor, if materials more costly, or of a different nature, are used in it, is he bound to pay any part of the *extra* expense. *Ibid.*

264. And the amount of the *contribution*, as ascertained by a master, being a *lien* on the wall from the time it was demanded and refused, the party is entitled to *interest*, if it remain unpaid. *S. C. 6 J. C. R. 21.*

265. Where, on a bill filed by a mortgagor to redeem, against the administrators of a mortgage in possession, and others claiming under him, the defendants were decreed to pay a certain sum for the *rents and profits* of the land, after deducting the mortgage debt; and, the decree being silent as to the proportion which each defendant was to pay, one of the defendants paid the whole, and the plaintiff gave him liberty to make use of the decree to reimburse himself; *held*, that he could use the decree only for his protection and indemnity, so far as his co-defendants were bound to contribute. *Scribner v. Hickok*, 4 J. C. R. 530.

266. And the Court, on petition and motion of a co-defendant, directed the contribution to be enforced under the decree, so far only as the right was clearly ascertained. *Ibid.*

267. A defendant who has made payments for his co-defendant, towards satisfying a prior mortgage, and beyond his proportion of the burden, is to be deemed substituted for the plaintiff, to that extent, and as far as the fact appears from the proceedings in the cause. *Lawrence v. Cornell*, 4 J. C. R. 542.

268. If A., against whom there is a judgment, being seised of lands, sells part of them, and dies seised of the residue, his heirs are

bound to satisfy the judgment, as far as the assets descended to them are sufficient for that purpose; and they are not entitled to any contribution from the purchaser of a part of the lands of their ancestor, for they stand in his place; and there is no equality of right between them and the purchaser, in respect to the judgment. *Clowes v. Dickenson*, 5 J. C. R. 235.

269. If there are several heirs, and the judgment creditor collects the debt from a part of the inheritance allotted to one of them, such heir is entitled to contribution from his co-heirs. *Ibid.*

270. *It seems*, that between purchasers in succession, at different times, of different parts of the estate of the judgment debtor, there is no contribution, for there is no equality of right between them. *Ibid.*

271. Where a judgment is a lien on different parcels of land, one of the several owners, on a bill against the judgment creditors only, is not entitled to a decree for contribution; nor is he entitled, on paying off the judgment, to have it assigned to him, by way of substitution, in order to enable him to enforce contribution against the other persons *liable to contribute, but who are not parties [*197] to the suit. *Avery v. Petten*, 7 J. C. R. 211.

[See Substitution. Agreement, D (a) pl. 96.]

XV. CORPORATION.

272. There is no particular form of words requisite to create a corporation. *Denton v. Jackson*, 2 J. C. R. 320.

273. Persons may have *corporate* powers, *sub modo*, or for certain specific purposes only. *Ibid.*

274. The *loan officers*, and the *supervisors* of a county, are endowed with a corporate capacity. *Ibid.*

275. The several *towns* in the state may be considered as legal committees, or bodies politic, for certain purposes. *Ibid.*

276. Whether Chancery has jurisdiction over corporations, in respect to *breaches* of trust, unless in the case of a *charity*? *Quære. Attorney General v. Ulica Insurance Company*, 2 J. C. R. 371. 384.

277. Whether Chancery has a *visitation* power, or superintending jurisdiction, over corporations, civil, or eleemosynary? *Quære. Ibid.* 386.

278. But persons exercising corporate powers may, in their character of *trustees*, be made accountable in Chancery for a fraudulent breach of trust. *Ibid.* 389.

279. *Aliter*, where the question is, whether a corporation has forfeited its charter, or has usurped a franchise, or violated a penal statute. *Ibid.*

280. A foreign corporation, or an incorporated bank of another state, may sue in its corporate name, and file a bill for the sale of land in this state, under a mortgage taken to secure money lent. *Silver Lake Bank v. North*, 4 J. C. R. 370.

281. If the loan and the mortgage were concurrent acts, it is within the reason and the spirit of the act of incorporation, by which the

corporation is authorized to take mortgages, &c., for the security of debts previously contracted. *Ibid.*

282. But, it seems, that Chancery will not, in a collateral way, decide a question of misuser of a charter, by setting aside a *bona fide* contract. *Ibid.*

283. If an incorporated bank of another state lends money, and takes a mortgage, it is not a violation of the act of April 21, 1818. (Sess. 36. ch. 71.) *Ibid.*

284. In private unincorporated associations of individuals, the majority cannot bind the minority, unless by special agreement. *Livingston v. Lynch*, 4 J. C. R. 573.

285. A corporation aggregate may be dissolved within the period prescribed by its charter, by the death of all its members, or the destruction of an integral part of it, or by a surrender of its franchises into the hands of the government, or by a forfeiture [*198] for nonuser, or *misuser, of its franchises; but in the two latter cases, the forfeiture must be judicially ascertained and declared. *Slee v. Bloom*, 5 J. C. R. 366. S. C. on appeal, 19 J. R. 456.

286. If a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. S. C. on appeal, 19 J. R. 456. *Contra*, 5 J. C. R. 366.

287. The *Dutchess Cotton Manufactory* became incorporated in December, 1814, for twenty years, under the statute. (Sess. 34. c. 67. 1 N. R. L. 345.) After December, 1817, there was no meeting of the trustees, nor any business or act done by the corporation; and on the 1st of February, 1818, all the property, real and personal, was sold by the sheriff under an execution. In April, 1819, the appellant, a creditor of the corporation, filed his bill against the respondents, to charge them, under the fourth section of the statute, as individually responsible for the debts of the corporation, to the extent of their respective shares of stock, alleging that the corporation was to be considered as dissolved, on the 1st of February, 1818; held, that the corporation, within the meaning of the statute, as regarded creditors, was dissolved, after ceasing to act as a corporation for such a length of time, and after a sale of all its property; and that the respondents were, therefore, individually responsible for the debts of the corporation, according to the act. S. C. on appeal, 19 J. R. 456. *Contra*, 5 J. C. R. 366.

288. But the mere fact of the sale of all the visible property of a corporation, and a temporary suspension of its manufacturing business, is not a sufficient ground for considering such corporation dissolved, so as to render the individual stockholders individually responsible, as long as, by a regular election of trustees, there has been a continued succession, and the company kept in operation, and has capacity to increase the subscription or stock, or call in more capital, and resume its business. *Brinckhoff v. Brown*, 7 J. C. R. 217. And the ground on which the Court of Errors held the corporation dissolved, in the above case of *Slee*

v. Bloom, was, that acts were done equivalent to a direct surrender; for, the trustees ceasing to act, and the regular annual election of trustees being discontinued, there was evidence of a virtual surrender of its franchises. *Ibid.*

289. A resolution or by-law of a corporation, allowing the stockholders, on paying thirty per cent. of their shares, to forfeit their stock, is void, as against creditors suing under the statute. *Slee v. Bloom*, 19 J. R. 456. *Contra*, 5 J. C. R. 366.

290. Where a creditor, who was a trustee of a corporation, so created, openly protested against such a by-law, or resolution, though he accepted money raised under it, and was present at a subsequent meeting of the trustees, when the application of the money was directed, and to which he assented; held, that this was not a ratification by him of the by-law or resolution. *Ibid.*

291. A by-law or resolution of a corporation so created, that any stockholder, paying fifty per cent. on his shares, should be discharged from all future calls on his subscription, &c., other than proceeding by way of forfeiture, is valid; and those who complied with the terms of the resolution, [*199] before the corporation was dissolved, were held to be discharged from all responsibility to the appellant. *Ibid.*

292. A corporation so created, in March, 1817, executed a bond under their corporate seal, on which a judgment was entered in May, 1817; held, that the corporation being considered as dissolved in February, 1818, the judgment was binding and conclusive on the members of the association individually, to the extent of their individual shares. S. C. 20 J. R. 669.

293. Though the trustees or agents of such corporation are not the trustees or agents of the individual stockholders, yet they may bind the individuals to the extent of their respective shares, in case of a dissolution of the corporation. *Ibid.*

294. And the individual stockholders, who, on a dissolution of the corporation, became liable for a judgment debt contracted by the trustees or agents of the company, cannot impeach its consideration, except by showing fraud or imposition, or that it was founded in error. *Ibid.*

295. The remedy against a corporation for a misuser or nonuser of its privileges, so as to work a forfeiture, is not in Chancery, but at law, by a *scire facias*, prosecuted at the instance and in behalf of the government, not on the application of an individual. S. C. 5 J. C. R. 366. 19 J. R. 456. 474.

XVI. COSTS.

A. Costs in general; when granted, and when refused; when charged on the person, and when on the fund.

B. Taxation.

C. Security for costs.



D. Staying proceedings until payment of the costs in another suit.

A. Of costs in general; when granted, and when refused; when charged on the person, and when on the fund.

296. Costs in Chancery do not always follow the event of the cause; but are awarded or not, according to the justice of the case. They rest in the sound discretion of the Court, to be exercised upon a full view of all the merits and circumstances of the case. *Nicoll v. Trustees of Huntington*, 1 J. C. R. 166. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 65. *Eastburn v. Kirk*, 2 J. C. R. 317. *Executors of Getman v. Beardsley*, 2 J. C. R. 274. *Williams v. Wilkins*, 3 J. C. R. 65. *Travis v. Waters*, on appeal, 12 J. R. 500.

297. Costs were decreed against a trustee who had been guilty of negligence. *Gray v. Thompson*, 1 J. C. R. 82.

298. So, costs may be decreed against a trustee, unreasonably refusing a conveyance. *Livingston v. Byrne*, on appeal, 11 J. R. 555.

*299. Where a final decree is [*200] silent as to the costs, they are lost, and cannot afterwards be ordered to be paid, unless, on a rehearing, the decree has been opened for that purpose. *Travis v. Waters*, 1 J. C. R. 85. S. C. on appeal, 12 J. R. 500.

300. A rehearing is not granted for costs only, unless in very special cases. *Eastburn v. Kirk*, 2 J. C. R. 317.

301. Nor will an appeal lie for costs merely. *Ibid.*

302. It is a general rule of law and equity, that when the party dies before judgment, or decree, the costs die with him. *Travis v. Waters*, on appeal, 12 J. R. 500.

303. But if costs have been decreed, and the party dies before they are taxed, they may be recovered by his personal representatives, on a bill of revivor; but to obtain the costs, the executors or personal representatives must appear before the Court expressly in their character as such; for if the bill of revivor states the plaintiffs to be the heirs and devisees of the party deceased, though some of them, in fact, are executors, yet they can only be known in their character as heirs and devisees, and not as executors. *Travis v. Waters*, 1 J. C. R. 85. S. C. on appeal, 12 J. R. 500.

304. On a bill by a legatee against the administrator, where the defendant submitted to, and asked the direction of the Court, his costs were ordered to be paid out of the fund. *Morrell v. Dickey*, 1 J. C. R. 153.

305. Where a plaintiff had probable cause for seeking the aid of the Court, yet failed in establishing his title; but the defendant showed none, or no better title to the property in dispute, the bill was dismissed without costs on either side. *Nicoll v. Trustees of Huntington*, 1 J. C. R. 166.

306. A plaintiff suing in *entre droit* is not responsible for costs, unless under special circumstances. *Goodrich v. Pendleton*, 3 J. C. R. 520.

307. But if heirs, executors, or administrators, bring groundless or vexatious suits, they will be ordered to pay costs. *Executors of Getman v. Beardsley*, 2 J. C. R. 274.

308. An administrator or trustee who resists a claim, and litigates *bona fide*, from a conviction of duty, and where no intentional default is made to appear, will not be charged *personally* with the costs, but they will be ordered to be paid out of the assets. *Moses v. Murgatroyd*, 1 J. C. R. 473. *Duncomb v. Executors of Duncomb*, 1 J. C. R. 508.

309. On a bill filed by the heirs of D. against the heirs, &c. of P., for a specific performance of a contract, it appearing that there was no improper behavior, or unjustifiable defence, the defendants were not decreed to pay costs. *Heirs of Dyer v. Heirs of Potter*, 2 J. C. R. 152.

310. A purchaser of land chargeable with constructive notice only of a *lis pendens*, was not charged with costs, there being no actual fraud, though the purchase was set aside on the ground of implied fraud. *Murray v. Balou*, 1 J. C. R. 566. *S. P. Murray v. Lytlburn*, 2 J. C. R. 441.

*311. When the parties, by mutual [*201] consent, withdrew a cause from the Court, before hearing, for the purpose of a settlement by arbitrators, and on certain terms, one of which was, that the question of costs should be settled and submitted to the chancellor; there being original and cross suits, the Court refused to decide the mere question of costs, but left each party to pay his own costs. *Eastburn and Downes v. Kirk*, 2 J. C. R. 317.

312. A plaintiff will not be allowed to dismiss his bill, without costs, unless it appears that he had reasonable grounds for filing it. *Perine v. Swaim*, 2 J. C. R. 475.

313. Where, on a bill to foreclose a mortgage, a subsequent mortgagee, or judgment creditor, who is made defendant, answers and disclaims, he is entitled to costs against the plaintiff, to be paid out of the fund, if it be sufficient; and if not, to be paid by the plaintiff; he not having applied to such defendant, before suit, to release, or otherwise disclaim. *Cutlin v. Harned*, 3 J. C. R. 61.

314. A plaintiff suing in *forma pauperis*, and recovering a legacy against executors, is entitled only to the actual costs or expenses of the suit, to be paid out of the assets. *Williams v. Wilkins*, 3 J. C. R. 65.

315. And the Court may order *pauper* or *divers* costs, according to the circumstances of the case. *Ibid.*

316. Where both parties are equally innocent, and both are endeavoring to avoid a loss caused by a third person, no costs will be awarded to either party, as against the other. *Pendleton v. Eaton*, 3 J. C. R. 60.

317. Where a plaintiff had color of claim, though barred by the lapse of time, his bill was dismissed without costs. *Demarest v. Wynkoop*, 3 J. C. R. 129.

318. Costs in partition are charged upon the parties respectively, in proportion to their respective rights. *Phelps v. Green*, 3 J. C. R. 302.

319. A defendant who answered an original bill, after a decree against him, petitioned for a *rehearing*, which was granted, and the plaintiff filed a *bill of revivor and supplement*, to which the defendant answered and disclaimed; *held*, that he was not entitled to costs on the dismissal of the bill. *Shaver v. Radley*, 4 J. C. R. 310.

320. Where the defendant set up a judgment and mortgage, and claimed more than was due on the mortgage, and the judgment was proved to have been satisfied; *held*, that he was not entitled to costs against the plaintiff. *Brinkerhoff v. Lansing*, 4 J. C. R. 65, 79.

321. And the plaintiff, though he succeeded in disproving the claim of the defendant, but failed in supporting his charge, that the mortgage was also satisfied and fraudulently kept on foot; *held*, not to be entitled to costs. *Ibid*.

322. A defendant who had no interest in the controversy, and was not a necessary party, but united with the other defendants in setting up a defence which was not true; *held*, not to be entitled to costs, though otherwise he might have been. *Ibid*.

323. On a bill for a perpetual injunction to quiet the possession, costs were not allowed to either party. *De Riemer v. Cantillon*, 4 J. C. R. 85, 93.

*324. On a decree correcting a mistake in a contract, on a bill for that purpose, and for a specific performance, costs were awarded to the plaintiff. *Keiselbrack v. Livingston*, 4 J. C. R. 144.

325. On a bill for discovery merely, the defendant is entitled to costs. *Burnett v. Sanders*, 4 J. C. R. 503.

326. But where the plaintiff, who is entitled to the discovery, goes first to the defendant, and asks for the information sought, which the defendant, though it was in his power, refused to give, and the plaintiff was, therefore, obliged to file a bill, the defendant, though he answer fully, is not entitled to costs. *Ibid*.

327. Where the plaintiff asked for further time to except to the answer, which was granted; and also for leave to amend his bill, after such answer, and after a plea accompanying it, but noticed for argument; the plaintiff, on being allowed to amend his bill, was ordered to pay *five dollars*, for the extra costs of the further answer, and the *taxable costs* of the plea, in case it should become useless in consequence of the amendment of the bill. *French v. Shotwell*, 4 J. C. R. 505.

328. Where the will of the testator is so ambiguously worded as to render it necessary or proper to take the direction of the Court, the costs will be ordered to be paid out of the fund in controversy. *Rogers v. Ross*, 4 J. C. R. 608.

329. The prosecutor of a charge of *lunacy* is not, of course, ordered to pay costs, when the party is found to be of sound mind, if the prosecution was in good faith, and upon probable grounds. *Brewer v. Fisher*, 4 J. C. R. 441.

330. On a bill for dower, where the widow never claimed her dower, and there was no opposition or vexation on the part of the defendant, no costs were allowed against him.

Hazen v. Thurber, 4 J. C. R. 604. *Tubele v. Tubele*, 1 J. C. R. 45.

331. Where a demurrer to the plaintiff's bill is allowed, on the ground that the relief, if any, is at law, the defendant is entitled to costs. *Gregory v. Reeve*, 5 J. C. R. 232.

332. To a bill to correct a mistake in a deed, the defendants put in their answer, and also filed a cross bill for discovery; the plaintiff in the original bill, as of course, without notice, dismissed his bill; *held*, that the defendants were entitled to costs on the dismissal of the plaintiff's bill, and also the costs of their cross bill, as part of their defence in the original suit. *Ferris v. Nelson*, 5 J. C. R. 262.

333. Although a plaintiff be entitled to file his bill for an account and distribution; yet, where all the charges of fraud, collusion, and misconduct, on the part of the defendants, which formed the main ground of the suit, were proved to be false, unjust, and vexatious, the bill was dismissed, with costs as to the defendants not liable to account, and the defendant, who was accountable as trustee, was allowed all his taxable costs, extra charges, and expenses, out of the fund, before distribution. *Minuse v. Cox*, 5 J. C. R. 441.

334. Where a judgment creditor, knowing of a decree ordering the property inherited by the wife to be applied to her maintenance, &c. issued an execution, and caused it to be levied upon the property, he was ordered to pay the costs of a bill filed by the wife against him for an injunction. *Hawland v. Bloom*, 6 J. C. R. 178.

*335. A creditor who came in after the master had filed his report, and obtained leave to prove his debt, without stipulating to contribute to the costs of the suit brought by the other creditors, against the executors, the assets not being sufficient to pay all the debts proved, was not allowed his costs out of the fund. *Mason v. Codriss*, 6 J. C. R. 183.

336. A creditor who comes in to prove his debt, under the general decree, in such a case if he does not prove his debt in season, must bear his own costs; but, where the principal part of the expense of proving the debt arises from the opposition of the original parties to the suit, he will not be ordered to bear the whole expense. *S. C.* 6 J. C. R. 297.

337. A trustee, though not guilty of corruption or intentional fraud, may, in case of gross negligence and misbehavior, be ordered to pay costs. *Tiernan v. Wilson*, 6 J. C. R. 411.

338. Where a devisee said, that, if the legacy had been demanded, he would not have paid it, and admitted a sufficiency of assets, he was decreed to pay the costs of the suit brought against him by the legatee. *Glen v. Fisher*, 6 J. C. R. 33.

339. Where a bill for foreclosure was filed by a second mortgagee, and the first and third mortgagees were made parties, but the latter did not disclaim, or offer to release; *held*, that he was not entitled to be paid his costs, until after the plaintiff's debt and costs were first paid. *Titus v. Felix*, 6 J. C. R. 435.

340. A defendant, who, by setting up a groundless claim, compelled the plaintiff to file

a bill of *interpleader*, was ordered to pay the costs of the other defendant, whose claim was established, and the costs of the plaintiff. *Richards v. Salter*, 6 J. C. R. 445.

B. Taxation.

341. It is too late, after two terms have intervened, and the decree signed, to move for a retaxation of costs. *Morris v. Mullett*, 1 J. C. R. 44.

342. The costs on *exceptions*, like costs in all other cases, are subject to the discretion of the Court. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 66.

343. But the general rule is, that if the defendant submits to the exceptions, the plaintiff has his costs: and if they be referred to a master, the plaintiff shall have costs on the exceptions allowed, and the defendant his costs on the exceptions disallowed, and the balance struck is to be paid. *Ibid.*

C. Security for costs.

344. Though the 54th rule of the Court, June, 1806, where a non-resident files a bill, requires that security for costs should be filed, and if the solicitor of the plaintiff proceeds without filing security, he is liable for costs to the amount of 100 dollars, yet the Court, [*204] if application for that purpose is made in due season, that is, before the answer is put in, or the first opportunity after the defendant knows of the fact of non-residence, will order all proceedings to be staid until adequate security for costs, that is, a greater sum than 100 dollars, is filed by the plaintiff. In this case, the Court ordered a bond, with surety, to be executed to the defendant, for 750 dollars, and filed with the register. *Long v. Majestre*, 1 J. C. R. 202.

345. The 12th section of the act concerning divorces, relative to security for costs, does not apply, where the bill is filed on the ground of adultery, though the bill contains, also, a distinct charge of cruel and inhuman treatment. *Pomeroy v. Pomeroy*, 1 J. C. R. 606.

346. The defendant is not entitled to security for costs from a non-resident plaintiff, suing as *administrator*, especially after a plea. *Goodrich v. Pendleton*, 3 J. C. R. 520.

347. If the non-residence of the plaintiff appears on the face of the bill, and the defendant demurs, pleads, or takes any other step in the cause, or even prays for time to answer, it is a waiver of his right to security for costs. *Ibid.*

D. Staying proceedings until payment of the costs of another suit.

348. Proceedings in a suit in Chancery will not be staid, on motion, until the costs in certain suits at law, between the same parties, relating to the same subject, in which the plaintiffs had been non-suited, or verdicts found against them, be paid. *Demarest v. Wynkoop*, 2 J. C. R. 461.

349. The rule applies only when both suits are in the same Court, or, at least, in Courts

of the same nature, and proceeding in the same manner, and on the same principles, either at law or in equity. *Ibid.*

*XVII. DEBTOR AND CREDITOR. [*205] ITOR.

A. (a) *When and how equity interferes in favor of creditors*; (b) *And of frauds against them.*

B. *Trusts and assignments for the benefit of creditors*; and agreements between debtor and creditor.

C. *Of the order and manner in which debts shall be paid, and different liens enforced*; of preferences between creditors, and the distribution of assets between them.

D. *Insolvent debtors*; their discharge under the statute.

E. *Debtors absent or absconding.*

A. (a) *When and how equity interferes in favor of creditors*; (b) *And of frauds against them.*

(a) *When and how equity interferes in favor of creditors.*

350. A creditor may file a bill, in behalf of himself and all the other creditors. *Hendricks v. Robinson*, 2 J. C. R. 283.

351. And where one judgment creditor filed a bill for himself alone, it was sustained, it not appearing that there were any other creditors; and if there were, there was reason to believe that their judgments had been satisfied, or if not satisfied, that they had not taken any steps at law to enforce payment by execution, and, at any rate, all the parties concerned in such judgments were before the Court. *Ibid.*

352. A creditor filing a bill against an executor, cannot make a *debtor* of the estate a party, except where the executor is insolvent, or there is collusion between the debtor and executor, or other special cause. *Long v. Majestre*, 1 J. C. R. 305.

353. Where the plaintiff and the defendant were the only children and heirs of their mother, who died intestate, and the defendant, who was indebted by bond and mortgage to the estate, would not administer, and there were no creditors of the estate, or other persons entitled to administration; *held*, though generally a bill by a creditor, or a person entitled to a distributive share of the personal estate of an intestate, will not lie against a debtor to the estate, yet that, under the circumstances of the case, the plaintiff might maintain a suit against the defendant for a moiety of the fund or debt in his hands. *M'Doul v. Charles*, 6 J. C. R. 132.

354. A creditor at large, or before judgment, is not entitled to the interference of the Court, by injunction, to prevent the debtor from disposing of his property in fraud of such creditor. *Wiggins v. Armstrong*, 2 J. C. R. 144.

355. Chancery lends its aid to a judgment creditor, by compelling a discovery and ac-

count against a debtor, or third person, who had possession of the debtor's property, and placed it beyond the reach of legal process; but the creditor, before he is entitled to such aid, must have sued out execution at law.

Hendricks v. Robinson, 2 J. C. R. [206] *283. *Brinkerhoff v. Brown*, 4 J. C. R. 671. *Williams v. Brown*, 4 J. C. R. 682. *M'Dermutt v. Strong*, 4 J. C. R. 687.

356. Chancery has power to assist a judgment and execution creditor, to discover and reach the property of his debtor, in whose hands it has been placed, out of the reach of an execution at law. *Hadden v. Spader*, on appeal, 20 J. R. 554. S. C. 5 J. C. R. 280. *S. P. M'Dermutt v. Strong*, 4 J. C. R. 687.

357. And, it seems, that a judgment creditor is entitled to the aid of the Court to attach a judgment debt due to his debtor, who has no property which can be reached by an execution at law; such judgment debt being considered as so much money held in trust. *Egberts v. Pemberton*, 7 J. C. R. 208. *Sed dubitante*.

358. A judgment creditor, who has sued out execution at law, which has been returned *nulla bona*, acquires a priority of right to the property or trust moneys of the debtor, in the hands of the trustee, which cannot be affected or impaired by any subsequent assignment by the debtor for the benefit of all his creditors generally, or for the benefit of a particular creditor; and any payments made by the trustee of the debtor, after a bill filed by the execution creditor, or after notice of his equitable right, are of no avail against such creditor. *Spater v. Davis*, 5 J. C. R. 280. S. C. 20 J. R. 554. *M'Dermutt v. Strong*, 4 J. C. R. 687.

359. And it makes no difference whether the property of the debtor consists in *choses in action*, *money*, or *stock*; for the Court can compel the debtor, or his trustee, to pay it over to the creditor; and can direct a transfer and sale of the *stock* for the benefit of the creditors. *Ibid*.

360. Whether a creditor, in an ordinary case, and without some special cause, can come into Chancery to collect his debt, from an executor or administrator, or merely to enforce a ratable distribution of assets? *Quære*. *M'Kay v. Green*, 3 J. C. R. 56.

361. The creditor can only come into Chancery for an account and discovery of assets, and on the ground of a trust in the executor or administrator for the payment of debts; not for a sale of the real estate, on a supposed equitable lien, arising from the fact that the money advanced by him to the testator or intestate had been laid out in the purchase of land. *Ibid*.

(b) *Of frauds against creditors.*

362. A voluntary settlement, after marriage, by a person indebted at the time, is fraudulent and void against antecedent creditors. *Reade v. Livingston*, 3 J. C. R. 481. *S. P. Bayard v. Hoffman*, 4 J. C. R. 450.

363. Whether the statute of frauds applies to

a settlement of that kind of property which could not be reached by legal process, if no settlement had been made, as *choses in action*, *stock*, &c.? *Quære*. *Bayard v. Hoffman*, 4 J. C. R. 450.

364. A voluntary settlement by a person indebted, is presumed fraudulent as against all existing debts, without regard to their amount, or to the extent of the property settled, or to the circumstances of the party. *Reade v. Livingston*, 3 J. C. R. 481.

*365. But with respect to subsequent debts, it seems, that the presumption of fraud arising from parties being indebted at the time, may be repelled by circumstances; as that existing debts are secured by mortgage, or by a provision made for them in the settlement. *Ibid*.

366. And a subsequent creditor may impeach the settlement, on the ground of prior indebtedness, if he can show antecedent debts, sufficient in amount to afford reasonable evidence of a fraudulent intent; for he is not obliged to show the absolute insolvency of the person making the settlement. *Ibid*.

367. When a voluntary settlement is set aside, as against antecedent debtors, subsequent creditors will be allowed to come in for a satisfaction of their debts. *Ibid*.

368. Under the statute, 13 Eliz. c. 5. (Sess. 10. c. 44. s. 3.) there is a distinction between prior and subsequent creditors; and a settlement by a person not indebted at the time, is good against subsequent creditors, unless they can show that it was made with a fraudulent intent. *Ibid*. [See *Sexton v. Wheaton*, 8 *Wheat. Rep.* 229. *Hildreth v. Sands*, 2 J. C. R. 35. 48, 49.]

369. The proviso in the sixth section of the act to prevent frauds, (Sess. 10. c. 44.) applies to the second and third sections, (or 13 Eliz. c. 5. and 27 Eliz. c. 4.) and that whether the conveyance is from the fraudulent grantor or fraudulent grantee. *Anderson v. Roberts & Boyd*, on appeal, 18 J. R. 515. *Contra*, S. C. 3 J. C. R. 371.

370. The same rule of construction is to be applied to both sections, (second and third,) or statutes. (13 Eliz. c. 5. and 27 Eliz. c. 4.) *Ibid*. *Contra*, 3 J. C. R. 371.

371. There is, therefore, no difference between a deed to defraud creditors, and a deed to defraud subsequent purchasers. *Ibid*. *Contra*, 3 J. C. R. 371.

372. A *bona fide* purchaser, therefore, for a valuable consideration, without notice of the fraud, whether he purchases from the fraudulent grantor, or the fraudulent grantee, is protected by the proviso in the statute; such fraudulent conveyance not being absolutely void, but voidable only at the instance of the party aggrieved. *Ibid*. *Contra*, S. C. 3 J. C. R. 371. And see *Sterry v. Arden*, 1 J. C. R. 261. S. C. on appeal, 12 J. R. 536. *Sands v. Hildreth*, on appeal, 14 J. R. 493.

373. The purchaser from the fraudulent grantee, however, must be prior in time to the purchaser from the fraudulent grantor, or to a sale on execution, at the suit of a creditor. *Ibid*.

374. A deed fraudulent *in fact*, is absolutely void, *ab initio*, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; *aliter*, where it is constructively fraudulent. *Boyd v. Dunlap*, 1 J. C. R. 478. *S. P. Sands v. Codwise*, on appeal, 4 J. R. 536.

375. Where a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the Court to avoid it absolutely, but there are suspicious circumstances, as to the adequacy of the consideration, and fairness of the transaction, the Court will not set aside the conveyance altogether, *but [*208] will permit it to stand as security for the sum actually paid. *Boyd v. Dunlap*, 1 J. C. R. 478.

376. And where the plaintiff was a purchaser at a sheriff's sale, under a judgment, the Court gave the defendant his election, to pay the amount of the judgment, interest and costs, and take a conveyance from the plaintiff; or, in default, to deliver up the deed to be cancelled, on receiving from the plaintiff the sum actually advanced by the defendant. *Ibid*.

377. There is a difference between an active interference of the Court, to compel a party to reconvey or surrender a deed, and its refusing to aid a party who seeks a specific performance of a contract. If actual fraud be not proved, the Court will not set aside the title, but will either make it subservient to the equity of the case, or leave the party complaining to his remedy at law. *Ibid*.

B. Trusts and assignments, for the benefit of creditors; and agreements between debtor and creditor.

378. Collateral securities to creditors are considered as trusts, for the better protection of their debts, and equity will see that their intention is fulfilled. *Moses v. Murgatroyd*, 1 J. C. R. 119.

379. Assignments of personal property by a debtor, in insolvent circumstances, and who has stopped payment, to secure a particular creditor for existing claims and engagements, as well as for future advances and responsibilities, if made *bona fide*, and where there is no reason to doubt the honesty and fairness of the transaction, will be deemed valid. *Hendricks v. Robinson*, 2 J. C. R. 283.

380. Where F., a debtor in embarrassed circumstances, made an assignment (absolute on the face of it) of personal property to W., a creditor, as security for a new loan of money, and for existing claims, and also for his indemnity against existing and future engagements, especially all such as should arise in the management of the property assigned; and W., for the purposes of the assignment, effected a loan of money of P., on condition of guarantying to him a debt due to him from F., to be paid out of the proceeds of the property so assigned; *held*, that P., by lending his money to W. on this guaranty, acquired an equitable lien on, and was entitled to be paid his debt out of, the proceeds of the property in the hands of W., in preference to other creditors. *Ibid*.

381. A creditor to whom his debtor had assigned property, as security for advances and responsibilities, with an agreement that if the property was not redeemed within a certain time, the assignee might, after the expiration of the time limited, sell the property, for his indemnity; and might, with the assent of the debtor, become the purchaser thereof, and of all the equitable or residuary interest of the debtor, at a fair and adequate valuation; *held*, that such purchase, if made *bona fide*, and without intent to defraud or injure creditors, will be valid, not only against the debtor, but against all other persons. *Ibid*.

382. Though assignments in trust, with a power of revocation, may *be good in family settlements, yet a power [*209] reserved by a debtor in an assignment of his property, to pay the trustees and certain other creditors, to revoke, alter or add to the trusts, and to appoint new trustees, renders the assignment fraudulent and void. *Riggs v. Murray*, 2 J. C. R. 565.

383. But it is considered fraudulent only as regards judgment creditors, or such as are taking measures to obtain payment of their debts. *S. C.* on appeal, 15 J. R. 571.

384. The trustees under such a deed of assignment, being also creditors, were decreed to account for the property received by them, deducting their commissions and charges; and to be entitled only to come in *pari passu* with the other creditors. *Ibid*.

385. An assignment by a debtor "of all his estate, real and personal, and of all books, vouchers and securities relative thereto," in trust for the benefit of all his creditors, passes all his estate and interest, equitable and legal; and, therefore, includes stock of the United States, before voluntarily assigned by the debtor, when insolvent, *in trust*, for the benefit of his wife and children; and the trustees under the voluntary settlement, were decreed to hold the stock subject to the order and disposition of the trustees under the general assignment. *Bayard v. Hoffman*, 4 J. C. R. 450.

386. An assignment by a debtor, to trustees, for the benefit of all his creditors, is valid without the previous assent of the creditors. *McCall v. Mumford*, 4 J. C. R. 522.

387. But where the assignment is made directly to the creditors without the intervention of trustees, the assent of the creditors is requisite to give validity to the deed of assignment. *Ibid*.

388. Where a debtor conveys all his estate, real and personal, *in trust* for all his creditors, such trustee is considered as a *bona fide* purchaser. *Dey v. Dunham*, 2 J. C. R. 182.

389. Though there is a schedule annexed to the assignment in trust, which mentions that the title to the land was in the defendant, (the grantee in the original deed,) and that he held it as collateral security to pay certain notes, this is not sufficient notice to the trustee. *Ibid*.

390. A., on the 23d of March, 1798, assigned property to B., in trust, for B. and other creditors, with power of revocation, and to appoint new trusts; and on the 24th of March, 1798 the 21st of March, 1799, and the 22d of March

1799, he executed other assignments to B., all in relation to the same subject, and reserving the like power of revocation, &c.; and on the 21st of May, 1800, he executed an irrevocable deed to B., in trust; A. was, afterwards, declared a bankrupt under the law of the *United States*, and his assignees filed a bill against B. to set aside the several assignments, and for an account of the property received by him; *held*, that although the revocable deeds might have been avoided by a person previously obtaining a title from A., yet, that the deed of the 21st of May, 1800, was valid, and might be taken in connexion with the first deed, and the intermediate deeds laid out of view; and that, therefore, the assignees of the bankrupt, whose title had subsequently accrued, could not impeach it; and that, taking all the deeds together, as parts of one transaction, the four

[*210] first deeds could only be regarded as voidable by creditors, and as no rights of creditors had intervened, they were capable of confirmation, and were, in fact, confirmed by the deed of 1800. *Murray v. Riggs*, on appeal, 15 J. R. 571. *Contra*, S. C. 2 J. C. R. 565.

391. A reservation in an assignment by a creditor, in trust, to pay debts, of a sum sufficient for the maintenance of the assignor, does not render the assignment void; though, in case of a deficiency, the creditors are entitled to have the part reserved applied in satisfaction of their debts. *Ibid.*

392. A creditor is not allowed to make it a condition of a loan, that he shall receive a compensation for his services in procuring the money; as the allowing of such a demand has a tendency to usury and oppression. *Hine v. Hardy*, 1 J. C. R. 6.

393. And if the amount of such compensation is included in the security for the loan, the chancellor will, on the debtor paying into Court the amount reported by a master to be due, after deducting the sum charged for such services, grant an injunction to stay any proceedings on the mortgage security. *Ibid.*

394. The borrower must pay the actual expenses of the writings, or preparing the securities. *Ibid.*

395. If one of several joint makers of a promissory note dies solvent, and the survivors are insolvent, the estate of the deceased is, in equity, chargeable with the payment of the note. *Jenkins v. De Groet*, on appeal, 1 C. C. E. 122.

C. *Of the order and manner in which debts shall be paid, and different liens enforced; of preferences between creditors, and the distribution of assets between them.*

396. If a fund for the payment of debts be created by an order or decree of Chancery, and creditors come in to avail themselves of it, they will be paid *pari passu*, or on the footing of equality. *Codwise v. Gelston*, on appeal, 10 J. R. 507.

397. But where the law gives a priority, equity will not destroy it; and especially where legal assets are created by statute, as in case of judgments, they remain such, though the cred-

itor is obliged to go into Chancery for assistance, and the legal priority will be protected and preserved. *Ibid.*

398. The regular course is for the master to examine and report on the priority of the several judgments; but where a creditor applies by *petition*, and not by bill, so as to bring in the other judgment creditors, the master must determine the priority by the *records*, and cannot resort to proof *alibi*, unless it be the voluntary confession of any prior judgment creditor, that his debt has been satisfied. *Ibid.*

399. Where a debtor was surrendered into the custody of the sheriff by his bail, and G., a judgment creditor, consented to his discharge from prison, and the debtor had made an assignment of property in trust for G. and certain other creditors; *held*, that the discharge of the debtor from imprisonment, on the surrender of his bail, was no satisfaction of the debt, and G. was not bound to make an

*election between his judgment and [*211] the assignment, but might insist on the *lien* of his judgment, and was entitled to the benefit of it, and to be paid out of the fund arising from the sale of the real estate of the debtor, and to a priority of satisfaction before the other general creditors. *Ibid.*

400. In equity, the rule of distribution is equality, and creditors are paid *pari passu*, in ratable proportion. *Riggs v. Murray*, 2 J. C. R. 565.

401. The law recognizes no distinction among creditors, or of such as are *honorary*, or *privileged* to be paid before others. *Ibid.*

402. The personal estate of an intestate is the primary fund for the payment of debts; and is first to be resorted to by the creditor. *M'Kay v. Green*, 3 J. C. R. 56.

403. The trustee under an assignment fraudulent and void, though he be a creditor, will be ordered to account for all the property received under the assignment, with interest, deducting his commissions and costs; and must come in, *pari passu*, with the other creditors, for his ratable proportion of the debtor's estate. *Riggs v. Murray*, 2 J. C. R. 565.

404. G. assigned a cargo, and the proceeds, &c. to K. in trust, for the benefit of K. and M.; but was to be first secured and satisfied for his advances to G., to enable him to pay certain bills accepted by him, drawn and negotiated by M., to pay for the cargo, &c. G. and K., afterwards, with the assent, as they alleged, of the agent of M., but without the knowledge or assent of M., cancelled the deed of assignment, which was dated the 7th of February, and executed another deed of assignment, on the 28th of February, to K. and S., in trust, to pay M. and K. and certain other creditors named therein; and in case the fund proved insufficient to pay all the debts specified, that then it should be distributed ratably, between M., K., and the other creditors named, in proportion to their respective demands; and the fund eventually proved insufficient to pay all the debts specified in the second assignment; *held*, that the cancelling of the first assignment, by G. and K., was fraudulent, as regarded the plaintiff, M., who was, therefore, entitled to the full benefit

of that assignment, and must be first and exclusively paid his whole demand out of the fund; and that the second assignment, so far as it was inconsistent with the first, or as to the right of the plaintiff to be first paid, was void. *Messonnier v. Kauman*, 3 J. C. R. 3.

405. Where there is no bankrupt law, the principle of which is equality among creditors, an insolvent debtor may prefer one creditor to another; but such preferences are to be viewed with jealousy, and should be strictly construed, so as to guard against abuse and fraud. *Riggs v. Murray*, 2 J. C. R. 565.

406. A debtor may give preferences to some of his creditors, when no legal *lien* intervenes, and when it is done fairly and from honest motives. *M'Menomy v. Murray*, 3 J. C. R. 435. *S. P. M'Menomy v. Roosevelt*, 3 J. C. R. 446. *Williams v. Brown*, 4 J. C. R. 682. *Murray v. Riggs*, on appeal, 15 J. R. 571.

407. As, where a debtor, in insolvent circumstances, confesses a judgment in favor of a particular creditor, for a debt justly [*212] due, the "judgment creditor will retain his priority. *Williams v. Brown*, 4 J. C. R. 682.

408. If, however, the debtor causes the judgment so confessed to be made use of for his own purposes, as to effect a sale and change of his property, which is sold at a great sacrifice, and purchased in by the debtor, the Court will interfere, and will either allow the other creditors to redeem it at the price it sold for, or direct it to be resold for their benefit, as to any surplus beyond that price. *Ibid.*

409. M. & S., partners in trade, being greatly indebted in the *United States* and in *Europe*, on the 2d of *December*, 1799, conveyed certain lands to B., in trust, for the security and payment of certain *European* and *German* creditors, until they were paid, or S. should be absolutely exonerated and discharged therefrom by the said creditors, and their demands transferred to M. alone, or S. be otherwise exonerated or discharged therefrom; and after the said debts should be satisfied, or the said S. be so discharged and released, then in trust for M.—M. & S., having committed an act of bankruptcy in *July*, 1800, were duly discharged under the bankrupt law of the *United States*; held, that this was a valid deed, and that the discharge of S. from the partnership debts under the bankrupt law, was not a fulfilment of the condition on which the trust for the *German* creditors was created. *M'Menomy v. Murray*, 3 J. C. R. 435.

410. A suit by one creditor against an *heir*, and a decree for the sale of the assets descended, will enure for the benefit of all the creditors, and draw the distribution of the assets to this Court. *Thompson v. Brown*, 4 J. C. R. 619.

411. And it is the same, in a suit against executors or administrators. *Ibid.*

412. Though it is the favorite policy of the Court of Chancery to distribute the assets of a debtor equally among all his creditors, *pari passu*; yet when a judicial preference has been established, by the superior legal diligence of any one creditor, that preference will

be preserved, in the distribution of the assets. *M'Dermutt v. Strong*, 4 J. C. R. 687.

413. A decree in Chancery is equivalent to a judgment at law, and if prior in time is first to be paid. *Thompson v. Brown*, 4 J. C. R. 619.

414. And from the date of the decree, and a due disclosure of the assets, an injunction will be granted, on the motion of either party, to stay all proceedings of the creditors at law. *Ibid.*

415. Upon the usual decree to account, in a suit by one or more creditors, against an executor or administrator, either separately for themselves, or specially in behalf of themselves and all other creditors who will come in and contribute, &c. the decree is for the benefit of all the creditors, and in the nature of a judgment for all; and all the creditors are entitled, and should have notice for that purpose, to come in and prove their debts before the master; and they are to be paid ratably, after judgment creditors are satisfied, without preference, or regard to the legal priority of specialty over simple contract creditors. *Ibid.*

*416. But creditors will not be restrained from proceeding at law, [*213] merely on a bill being filed in this Court, against an executor or administrator; and a judgment at law, obtained before a decree in this Court, will be protected in its priority. *Ibid.*

417. The doctrine of equitable assets, by which all the creditors are paid *pari passu*, is not affected by the statute; (8ess. 36. ch. 93. 1 N. R. L. 36.) for the omission of the 4th section of the *English* statute, (3 W. and M. c. 114.) which excepts devises of lands to pay debts, does not vary its construction. *Benson v. Le Roy*, 4 J. C. R. 651.

418. A devise of all the testator's estate, real and personal, in trust, to pay debts and to distribute the residue, places the assets under the jurisdiction of this Court. *Ibid.*

419. And the Court will, therefore, enjoin a suit at law, brought for the purpose of gaining a preference over other creditors. *Ibid.*

420. A judgment creditor is not entitled, in equity, to enforce payment of his judgment against the land of a subsequent purchaser, as long as there is sufficient property of the debtor remaining unsold, to satisfy the judgment. *Cloves v. Dickenson*, 5 J. C. R. 235.

421. The creditor, in such case, is entitled to resort to the land purchased of the debtor, to the extent only, of so much of his debt as may remain unpaid, after the estate of the debtor has been exhausted. *Ibid.*

422. The plaintiff purchased two lots of land of V., against whom there was an existing judgment. All the real estate of V. (the residue of which was more than sufficient to satisfy the judgment) was sold subject to all encumbrances, under a subsequent judgment and execution thereon, under which the two lots of land were sold to the defendant, who made improvements thereon, and sold one of the lots; held, that though the Court would have interposed and prevented the sale of the two lots of the plaintiff, if he had applied in due season

for that purpose; yet, as he knew of the sale at the time, and delayed four years before he filed a bill for relief, the Court refused to disturb the sale, or to direct a reconveyance of the lots to him; but the defendant was ordered to pay the plaintiff, as an equitable indemnity, under the circumstances of the case, the sum for which the lots were sold, with interest from the time. *Ibid.*

423. Where a creditor has a lien on two funds, out of which he can satisfy his debt, and a subsequent creditor has a lien on one of them only, the first creditor must resort to the fund which the second creditor cannot touch, in order that the second creditor may avail himself of his only security, provided it can be done without injury to the prior creditor, or impairing his rights. *Evertson v. Booth*, on appeal, 19 J. R. 486. *S. P. Dorr v. Shaw*, 4 J. C. R. 17. *Hawley v. Mancius*, 7 J. C. R. 174. 184.

424. But where the sufficiency of the fund to which the junior creditor cannot resort is doubtful, or the prior creditor refuses to run the hazard of obtaining satisfaction of his debt out of that fund, equity will not take from him any part of his security, unless his debt is paid. *Evertson v. Booth*, 19 J. R. 486.

425. And if the first creditor has a judgment against A. and B., and the second creditor a judgment against B. only; the second creditor cannot compel the first to take the land of A. only; it not appearing
[*214] *whether A. or B. ought to pay the debt due to the first creditor; nor any equitable right shown in B., to have the whole debt charged on A. alone. *Dorr v. Shaw*, 4 J. C. R. 17.

426. A judgment, or other security, may be taken and held for future advances and responsibilities. *Brinkerhoff v. Marvin*, 5 J. C. R. 320.

427. But it seems, that advances made, or responsibilities incurred, after a subsequent judgment has intervened, will not be covered by the prior judgment. *Ibid.*

428. Where a creditor has separate judgments against each of the two partners, the partnership property will be bound to the same extent as if the amount of both judgments had been included in a joint judgment against both partners. *Ibid.*

429. Where there are two judgment creditors, one of whom holds personal property of the debtor, as collateral security, the Court will not confine him to the personal property, or restrain him from prosecuting his remedy under the judgment, until such personal property is exhausted, or the rights concerning it are first settled, if he offers to substitute the other judgment creditors in his place, on being paid the amount of his debt. *Ibid.*

430. A voluntary conveyance, made by a debtor, of his real estate, on a nominal consideration, in trust, to sell the same, and out of the proceeds to pay all his creditors who should come in and prove their debts, and execute releases of their demands, is fraudulent, and not entitled to a preference over a previous judgment entered by confession on a warrant of attorney, though without a specification of

the particulars as required by the statute; (Sess. 41. c. 259. s. 8.) for such judgment is good against the debtor himself, and is fraudulent only as respects bona fide judgment creditors and bona fide purchasers; that is, purchasers in the usual and popular sense of the term, as distinguished from creditors. *Seaving v. Brinkerhoff*, 5 J. C. R. 329.

431. Where a creditor takes from his debtor a bond or sealed note, and a warrant of attorney, to confess judgment thereon, as security for moneys lent and advanced to, and responsibilities incurred for his debtor, he cannot, afterwards, resort to an action of *assumpsit* on an implied or verbal promise of payment or indemnity, but must look to his securities alone. *Roosevelt v. Mark*, 6 J. C. R. 266.

432. Where the plaintiff, whose personal property had been seized under an execution against him, for about 500 dollars, and a sale of it forced with great rigor and oppression, by the deputy sheriff, acting in concert with the creditor, who was the chief bidder at the sale, was induced, in order to avoid a sacrifice of his whole property, to yield to the demands of the creditor, and to give him a bond and mortgage for 2500 dollars, so as to cover not only the amount of the execution, but also a debt due to the creditor from the son of the plaintiff, who was insolvent, the sale was declared oppressive and illegal; and the bond and mortgage, as having been unduly and fraudulently obtained, were directed to stand as security only for the amount of the execution, with interest and costs. *Neilson v. M'Donald*, 6 J. C. R. 201.

*D. Insolvent debtors; their discharge under the statute. [*215]

433. A discharge under the insolvent act passed April 12th, 1813, (Sess. 36. ch. 98.) is not a bar to a suit here, upon a contract made, or debt contracted, between parties in another state, and residing there at the time. *Hicks v. Hotchkies*, 7 J. C. R. 297.

434. A discharge under the insolvent act, from debts contracted within the state, after the passing of the act, is valid; the act, in such case, being prospective in its operation, is considered constitutional. *Ibid.*

435. A re-assignment to the insolvent, by his assignees, of all the residuary interest in his estate, made without the assent of all the creditors having an interest in the estate assigned, is a breach of trust, and void. *Moran v. Hays*, 1 J. C. R. 339.

436. A creditor who has the body of his debtor in execution, cannot be a petitioning creditor under the act, nor is he entitled to apply to a judge for an assignment under the ninth section of the act. (Sess. 36. ch. 98. 1 N. R. L. 460. 464.) *Beatty v. Beatty*, 2 J. C. R. 430.

E. Debtors absent or absconding.

437. A creditor residing abroad may institute proceedings here, under the act for giving relief against absent and absconding debtors. (Sess. 24. ch. 49. 1 N. R. L. 157.) *Robbins v. Cooper*, 6 J. C. R. 186.

438. A joint creditor may institute proceedings under the act against the separate property and effects of an absconding partner, though the other partner resides here, and might be arrested: but the separate property only of the absent or absconding partner can be taken under the attachment; for the creditor has a right only to the absconding debtor's proportion of the *surplus* remaining after payment of all the partnership debts. *Ibid.*

[*216] *XVIII. DEED.

- A. Construction, validity, and operation of deeds.
- B. Execution and delivery of a deed.
- C. Voluntary deeds.

A. Construction, validity, and operation of deeds.

439. It is a general principle, in the construction of deeds, or written instruments, that a particular specification will exclude things not specified. *Nisell v. Trustees of Huntington*, 1 J. C. R. 163.

440. Declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, or of conditions annexed to it, to be effectual, must be made at the time of executing it. *Souwerby v. Arden*, 1 J. C. R. 240.

441. *Plate*, used in the family, passes under a deed or devise of "household goods and furniture." *Bunn v. Winthrop*, 1 J. C. R. 329.

442. Where a deed in fee contained a reservation of the right of "cutting and hewing timber, and grazing, in the woods not appropriated or fenced in; *held*, that the right reserved ceased as soon as the premises were fenced in by the grantee; especially, where it appeared that the premises had been enclosed for above thirty years, and the right during that period, had not been claimed or exercised. *Ten Broeck v. Livingston*, 1 J. C. R. 357.

443. Where a deed has been duly executed and delivered, a subsequent surrender or destruction of it, will not divest the estate conveyed by it. *Nicholson v. Halsey*, 1 J. C. R. 417.

444. A deed false in a material point, is not entitled to full credit. *Wendell v. Van Rensselaer*, 1 J. C. R. 344.

445. A mistake in drawing a deed must be clearly proved. *Souwerby v. Arden*, 1 J. C. R. 240.

446. A recital in a deed, founded in mistake, and untrue in fact, will not be allowed to operate, by way of estoppel, to exclude the truth satisfactorily shown to the Court. *Slough-ton v. Lynch*, 2 J. C. R. 209.

447. Where a sheriff's deed, by mistake, did not include all the parcel of land, or whole premises advertised and intended to be sold, and the defendant in the execution, and all parties, supposed the deed comprised the whole, and the plaintiff bid and paid a price accordingly, and took possession of the whole, the defendant was perpetually enjoined from

prosecuting an ejectment at law to recover the part not included in the deed, and was decreed to release to the plaintiff all his title to it. *De Riemer v. Cantillon*, 4 J. C. R. 85.

448. A general recital in a deed does not conclude a party, though the recital of a particular fact may estop him. *Huntington v. Havens*, 5 J. C. R. 23.

449. A recital cannot control the plain words in the granting part of a deed. *Ibid.*

*450. As, where a deed of as- [*217] signment by a debtor, in trust, for creditors, recited, that the debtor was desirous to convey his property to secure three of his creditors, by name, in full, and the residue for the benefit of other creditors; and in the body of the deed it was expressed to be in trust to pay and satisfy those three creditors, and three others, also named, and the residue to be divided among the other creditors; *held*, that the three creditors named in the recital, were only entitled to be paid ratably with the three other creditors named in the body of the deed, in proportion to their demands. *Ibid.*

451. E., a soldier, entitled to a lot of land as a military bounty, in 1785, before the patent issued, by agreement, sold the lot to S., and bound himself to execute a conveyance; S. sold and assigned the lot, bond, &c., in 1789, to V., who, in 1790, by endorsement, sold and assigned the same, and all his right, title and interest in the land, &c. to C., to whom he delivered the original bond and agreement and discharge of the soldier, and the patent issued in his name; *held*, that although, for want of words of inheritance, the assignment, in law, transferred only an estate for life; yet, as it was clearly the intention of the parties to convey the whole estate, a trust estate in fee was to be considered as created and conveyed; and the Court would, therefore, decree an adequate legal conveyance in fee, according to the intention of the parties. *Higinbotham v. Burnet*, 5 J. C. R. 184.

452. A defective conveyance by a person seised in fee at the time, is good, so as to bind the lands conveyed in the hands of the grantor and his heirs. *Wadsworth v. Wendell*, 5 J. C. R. 224.

453. Such a conveyance is good, also, against a subsequent purchaser with notice of the prior defective conveyance. *Ibid.*

454. As, where a soldier, entitled to military bounty land, under the several acts of the legislature, by an instrument in writing, purporting to be under his hand and seal, but to which no seal was affixed, for a valuable consideration, sold, quit-claimed, and confirmed unto the plaintiff, his heirs and assigns, forever, all his right, title, claim and demand to and for all the land to which he was entitled, &c. with covenant for further assurance, (no patent having then been issued for the land,) which instrument of conveyance was duly deposited in the office of the clerk of the county of Onondaga, on the 29th of April, 1795, pursuant to the act of the 8th of January, 1794, and, afterwards, on the 8th of March, 1799, was duly proved; and the same grantor, on the 25th of October, 1796, executed a deed in

fee of the same land to P., under whom the defendant claimed title; *held*, that although the first instrument, for want of a seal, was defective as a legal conveyance, yet it passed all the right and interest of the grantor, in equity, the omission of the seal being a mistake, and contrary to the express intention of the parties. *Ibid*.

455. But the deposit of the instrument in the clerk's office of the county of Onondaga, pursuant to the "act for registering deeds and conveyances relative to the military bounty lands," passed January 8, 1794, (Sess. 17. ch. 1.) and the act to amend the same, passed March 27, 1794, (Sess. 17. ch. 44.) was not legal notice to subsequent purchasers, nor equivalent to a registry of the deed; and P. was not, therefore, chargeable with notice of the prior conveyance; and the "plaintiff was [*218] not entitled to relief against P., or to a decree for a release from him of his claim and title. S. C. on appeal, 20 J. R. 659. *Contra*, 5 J. C. R. 224.

B. Execution and delivery.

456. If, at the time of executing a deed, there was no delivery or intention to deliver, these are facts which should be explicitly proved by the grantor. *Souwerbye v. Arden*, 1 J. C. R. 240.

457. If a deed has been duly delivered in the first instance, the subsequent custody of it by the grantor will not destroy the effect of the delivery. *Ibid*.

458. A deed may be delivered to a third person, as the servant or bailee of the grantee, and such delivery is good. *Ibid*.

459. If a deed be duly executed and delivered, in the first instance, so as to take effect, any subsequent delivery is of no avail. *Ibid*.

460. A deed may be delivered by words, or acts without words, and the delivery may be either to the grantee or to a third person, without any special authority for the use of the grantee. *Verplank v. Sterry*, on appeal, 12 J. R. 536.

461. Where a deed was deposited by the grantor with W. as an escrow, to be delivered to the grantee, on his producing a mortgage executed and recorded, and a certificate of the clerk of no encumbrances on record, and W., on receiving the mortgage and certificate of registry, &c. delivered the deed to the grantee, and the grantor received the mortgage from W., and treated it, afterwards, as a valid mortgage; *held*, that he was concluded from denying the delivery of the deed, on the ground that the wife of the mortgagor had not acknowledged the mortgage, and that the mortgage was erroneously registered. *Frost v. Beckman*, 1 J. C. R. 268.

462. The deed, in such case, was well delivered to the grantee, the condition on which it was to have been delivered having been performed; and the deed related back, so as to give effect to an intermediate conveyance by the grantee to C. *Beckman v. Frost*, on appeal, 18 J. R. 544. S. C. 1 J. C. R. 268.

463. Such deed takes effect only from the time of the performance of the condition, and

the actual delivery to the grantee; except in case where a relation back to the first delivery is necessary to give effect to the deed, or to the intermediate conveyance of the grantee; but not as between third persons. *Ibid*.

464. Where a deed of marriage settlement was executed in the presence of witnesses, and laid on the table, and the marriage took place immediately after, in the presence of the witnesses; and the deed, without any other or more formal delivery, was taken up by the wife, the *cestui que trust*, and kept in her possession until her death; *held*, that this was a good and valid deed. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 450. S. C. on appeal, 17 J. R. 548.

*C. Voluntary deeds. [*219]

465. A voluntary actual transfer, by deed, of a chattel interest, is valid, as between the parties, without any consideration appearing. *Bunn v. Winthrop*, 1 J. C. R. 329.

466. A voluntary deed of settlement, fairly made, is always binding in equity upon the grantor, unless there is clear and decisive proof, that he never parted, or intended to part, with the possession of the deed; and if he retains it, there must be other circumstances, beside the mere fact of his retaining it, to show that it was not intended to be absolute. *Souwerbye v. Arden*, 1 J. C. R. 240.

467. Whether a voluntary conveyance, by a father, in affluent circumstances, and not indebted, in trust, for the use of his daughters for life, and in case of their death, for their children, fairly made, without any intention to deceive or defraud any person, is not good against a subsequent *bona fide* purchaser for a valuable consideration, with notice of such prior voluntary deed? *Verplank v. Sterry*, on appeal, 12 J. R. 536.

468. A voluntary conveyance, or settlement, though retained by the grantor in his possession until his death, is good. *Bunn v. Winthrop*, 1 J. C. R. 329.

[See further, as to voluntary settlements, *Debtor and Creditor*, A. (b). *Husband and Wife*.]

XIX. DESCENT.

469. Where the legal and equitable estate in land, being coextensive, unite in the same person, the equitable is merged in the legal estate, which descends according to the rules of law. *Nicholson v. Halsey*, 1 J. C. R. 417.

470. Thus, if the legal estate in fee descends *ex parte materna*, and the equitable estate in fee, *ex parte paterna*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate. *Ibid*.

471. As, where A., having paid money for the purchase of land, died before any conveyance was made, and B. afterwards took a conveyance of the land in trust, for the infant daughter of A., to whom he afterwards executed a deed in fee; *held*, that she acquired the legal estate by purchase; and on her

death, without issue, the estate descended to her brothers and sisters of the half-blood, to the exclusion of her paternal uncle. *Ibid.*

[*220] *XX. DEVISE.

- A. Who may devise; and of the estate or interest of the devisor.
 B. Construction of a devise, as to what passes;
 (a) Estate tail, or in fee; (b) Executory devise; (c) Tenancy in common, or joint tenancy.
 C. Devise of lands for the payment of debts and legacies.

A. Who may devise; and of the estate and interest of the devisor.

472. A *feme covert* may make a will in favor of her husband, and in execution of a power reserved to her, while sole, over her separate estate. *Bradish v. Gibbs*, 3 J. C. R. 523. [See *Will. Husband and Wife*.]

473. A testator must have a legal or equitable title in the land devised, at the time of making the will, otherwise nothing passes by the devise. A subsequently acquired title will not pass by it. *McKinnon v. Thompson*, 3 J. C. R. 307. *Livingston v. Newkirk*, 3 J. C. R. 312.

474. To give effect to a devise, the testator must not only be seized of the land, at the time of the will, but he must continue so seized to the time of his death. *Minuse v. Cox*, 5 J. C. R. 441.

475. An equitable interest in lands, founded upon articles of agreement for the purchase, will pass by a subsequent devise; and if there be no devise, the land, in equity, descends to the heir; and the executor must pay the purchase money for the benefit of the heir. *Livingston v. Newkirk*, 3 J. C. R. 312.

476. Where a devise fails for want of a title in the devisor, the devisee will not be relieved out of other parts of the estate, though the devisor had a judgment which was a lien on the land devised. *Ibid.*

477. A gift for life of a chattel, is a gift of the use of it only, except as to such articles, the use of which consists in the consumption. *Gillespie v. Miller*, 5 J. C. R. 21.

- B. Construction of a devise, as to what estate passes; (a) Estate tail, or in fee; (b) Executory devise; (c) Tenancy in common, or joint tenancy.

(a) Estate tail, or in fee.

478. T., by his last will, after giving to his nephews, R., N., S., &c., each 1,000 pounds, as they came of age, devised two houses and lots, "with every right agreeable to the deeds of the same," to R., to be delivered to him as soon as he came to the age of 21 years; and if he died "before he came of age, and without male issue," he devised the same to N., "to be delivered to him, as soon as he comes to

the age of 21 years." "The first possessor, (R.,) as soon as his first male child shall come to the age of 21 [*221] years, it is my will that the right of the said houses be to him, his heirs and assigns forever, but not to be disposed of before his eldest son comes of age; whoever gets the houses, to have no claim to the 1,000 pounds, before left him, but his share to be equally divided with the other legatees." R. arrived at the age of 21 years, but had no issue; held, that by the words, "dying without lawful issue," R. took an estate tail, by the English law, which was converted into an estate in fee simple by our statute, and that the fee vested in R., on his attaining the age of 21 years, or having male issue; either event being sufficient for that purpose. *Roosevelt v. Thurman*, 1 J. C. R. 220.

479. The clause in the will, that the first taker was not to dispose of the estate, before his eldest son came of age, did not engraft an executory devise on the preceding fee; but was intended as a temporary restraint on the power of alienation, and, being repugnant to the nature of the estate, was void. *Ibid.*

(b) Executory devise.

480. Rents and profits, as well as the estate itself, may be given by way of executory devise. *Rogers v. Ross*, 4 J. C. R. 388.

481. The rents and profits may accumulate in the hands of the heir at law, for the benefit of the executory devisee, until the vesting of the estate. *Ibid.* Or the Court may appoint a receiver for that purpose. *Ibid.*

482. The heir at law may be considered as a trustee, in such case, when it is necessary to carry the intention of the testator into effect. *Ibid.*

483. By a devise of all the rest and residue of the real estate of the testator, the rents and profits, from the testator's death to the time of the vesting of the estate, will pass; and whoever takes the legal estate, in the mean time, will be answerable for the rents and profits. *Ibid.*

484. Where the executory devisee was illegitimate, and it did not appear that the testator had any lawful heir, and no person appeared to claim the inheritance, the executor of the testator who had taken possession of the real estate, and was appointed guardian of the executory devisee, and received the rents and profits, from the death of the testator to the happening of the event on which the estate was to vest, was held accountable for them to the executory devisee. *Ibid.*

485. There may be a limitation over by will of a chattel interest, after a life estate therein. *Gillespie v. Miller*, 5 J. C. R. 21. *Westcott v. Cady*, 5 J. C. R. 334.

486. A legatee in remainder after an estate for life, may call on the legatee for life, for an inventory of the property, to be filed. *Westcott v. Cady*, 5 J. C. R. 334.

487. Where a creditor devised his house and lot to his wife, also all his personal property, and also all the rents and profits of the house and

farm at N., for her support, during her natural life; and after her decease, he gave the same to his brother, S., in fee, chargeable [*222] with "certain legacies; held, that the wife took the use only of the personal estate, which went, after her death, to the testator's brother. *Gillespie v. Miller*, 5 J. C. R. 21.

438. Where J. S. devised lands to B. for life, remainder to C. in fee, but if he died without issue, then to D. in fee; held, that the devise over could not take effect as an executory devise, but created an estate tail, which was turned into a fee simple absolute, by the statute. *Burnet v. Denniston*, 5 J. C. R. 35.

See further, LXXXIV. Will.

(c) *Tenancy in common, or joint tenancy.*

489. A testator devised all the real and residue of his estate to his brother and sister, "to them and their heirs for ever," all the children of his said brother and sister to have an equal share in every thing left; and if his brother died without children, the children of his sister should equally enjoy; held, that the brothers and sisters took as tenants in common, not as joint tenants. *Westcott v. Cady*, 5 J. C. R. 334.

C. *Devise of lands for the payment of debts and legacies.*

490. A testator bequeathed legacies to each of his seven children, "to be paid out of the bulk of his real estate;" and if the executors found that the estate fell short of the legacies, then they were to make an abatement in proportion; and he, afterwards, directed that so much of his real estate as should be necessary to furnish the sums bequeathed, should be sold at public auction, when the children should attain full age, and the remainder be leased by the executors; and that when the youngest child arrived at full age, all his real property not otherwise disposed of should be sold, and the proceeds, with the amount of personal property, be divided among his children, &c.; held, that the intention of the testator, as collected from the will, was that his executors were the persons to sell; and that the sole acting executor had the sole power to sell the real estate under the will. *Davoue v. Fanning*, 2 J. C. R. 252.

491. The real estate is not charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, or clearly to be inferred from the language and disposition of the will. *Lupton v. Lupton*, 2 J. C. R. 614.

492. The usual clause devising all the real and residue of the real and personal estate not before devised, is not sufficient to charge the real estate; nor is the mere direction that all debts and legacies are to be paid. *Ibid.*

493. But if the real estate be devised, "after payment of debts and legacies," it is charged with the payment of them. *Ibid.*

494. A devise of all the testator's real and

personal estate in trust, "to pay [*223] debts, and then to distribute the residue, places the assets under the jurisdiction of Chancery. *Benson v. Le Roy*, 4 J. C. R. 651.

495. The words "rents and profits," in a devise, may be so construed as to authorize a sale of the land, when necessary, to raise a sum so as to effect the object of the testator. *Schermerhorne v. Schermerhorne*, 6 J. C. R. 70.

496. As, where J. S. devised all his estate to his wife, for life, and, after her death, to his son A. in fee, on condition, that he should comfortably maintain N., (a daughter of the testator, and a lunatic,) during her life; and if A. and his heirs did not maintain N., then the executors were authorized to take possession of the land, and to lease it, or by any other means, out of the profits thereof arising, to support N. during her natural life, &c. The heir of A., after his death, having refused to maintain N.; held, that in case the rents and profits proved insufficient, the land devised might be sold for that purpose. *Ibid.*

497. A devise of real and personal estate to pay just debts, does not revive a debt barred by the statute of limitations, or discharged by the bankrupt's certificate. *Roosevelt v. Mark*, 6 J. C. R. 266.

498. A devise to executors, with authority to sell the real estate of the testator for the payment of debts, applies as well to a joint and several bond, executed by the testator as surety for his co-obligors, as to any other debt. *Berg v. Radcliff*, 6 J. C. R. 302.

[See further, as to the construction, republication and revocation of wills, Will, B. C. D.]

XXI. ESCHEAT.

499. Where land escheats by reason of the alienage of the devisee, that does not defeat the lien of creditors existing at the death of the devisor. *Mooers v. White*, 6 J. C. R. 360.

500. Where land devised to an alien, after the death of the devisor, was taken for the use of the government, and the damages or the value of the land were assessed, and paid into Court; held, that the creditors of the devisor might follow the proceeds into Court, whose jurisdiction over the application of the money was not affected by the title accruing to the people of the state by escheat. *Ibid.*

501. Though an alien may take land by devise or purchase, and hold until office found, yet, if he dies, the land escheats, without any inquest of office. *Ibid.*

*XXII. EVIDENCE. [*224]

A. *Written evidence*; (a) *Judgments of Courts of competent, exclusive or concurrent jurisdiction*; (b) *Judicial proceedings*; (c) *Private writings.*

B. *Parol evidence to explain, vary or contradict written instruments.*

- C. *Of witnesses, their competency and credit.*
 D. *Presumptive evidence; of payment; of death; of property; of a grant, lease, &c.*

A. *Written evidence; (a) Judgment of Courts of competent, exclusive, or concurrent jurisdiction.*

502. A judgment of a Court of competent jurisdiction, being *res judicata*, is conclusive and binding, in all other Courts of concurrent jurisdiction. *Simpson v. Hart*, 1 J. C. R. 91. [See the same case, on appeal, in which this principle was fully admitted; but the Court of Errors considered the decision of the Court of law upon a summary application to its equity, as a motion for a *set-off*, not to be a judgment, or such a *res judicata* as precluded a Court of Chancery from examining the question; and especially where a new fact is disclosed, which was not proved to the Court of law. *S. C.* 14 J. R. 63. *And see* 18 J. R. 533, 534.]

503. A decree of a Court of competent jurisdiction on the point at issue before it, can only be reviewed in the regular course of appeal. *Gelston v. Hoyt*, 1 J. C. R. 543.

504. The decree of a Court of peculiar and exclusive jurisdiction, is conclusive in all other Courts. *Ibid.*

505. As, where a vessel was seized and libelled in the District Court of the United States, as forfeited, for being fitted out, in violation of an act of Congress, to be employed in the service of a foreign state, and the District Court dismissed the libel, and ordered the vessel to be restored to the claimant, and refused a certificate of probable cause of seizure; *held*, that the decree was conclusive as to the lawfulness or unlawfulness of the seizure. *Ibid.*

506. Where letters of administration, under the seal of the Court of Probates, are produced, Chancery will deem them valid, without looking beyond them. *Westcott v. Cady*, 5 J. C. R. 334.

507. The decision of a Court of law on a summary application to its equity, is not such a *res judicata* as will conclude a Court of Chancery from any inquiry into the case. *Arden v. Patterson*, 5 J. C. R. 44. [See XXXVIII. *Injunction, C.*]

(b) *Judicial proceedings.*

508. An answer of one defendant in Chancery is no evidence against his co-defendant. *Phenix v. Assignees of Ingraham*, on appeal, 5 J. R. 412.

*509. An answer to a bill of discovery is evidence for the defendant, and unless disproved by two witnesses, must prevail against the allegations of the plaintiff's bill. *Claason v. Morris*, on appeal, 10 J. R. 524.

510. Where there is a general denial in the defendant's answer, which is clear and distinct, any ambiguity or apparent evasion in a particular part will not vitiate or destroy the other parts. *Ibid.*

511. The whole answer is to be taken to-

gether; and if any particular part is ambiguous, it ought to be so construed as to comport with the general denial. *Ibid.*

512. A plaintiff cannot read, in evidence, his own answer to a bill of discovery in a cross suit, unless the defendant chooses first to produce it. *Phillips v. Thompson*, 1 J. C. R. 131.

513. Where the facts charged in a bill are fully denied by the answer, there can be no decree against the answer, on the evidence of a single witness only, without corroborating evidence to supply the place of a second witness. *Smith v. Brush*, 1 J. C. R. 459.

514. Where an answer is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact, and insists upon a distinct fact by way of avoidance, he must prove the fact so insisted on in defence. *Hart v. Ten Eyck*, 2 J. C. R. 62. [On appeal, in this cause, Ch. J. Spencer gave a different opinion, as to the latter position, in which a majority of the Court of Errors concurred; but as the case was expected to come up again, and the reporter was not possessed of the reasons of the Court, the case was not reported.]

515. Where the plaintiff, in his bill, inquired as to the consideration of a note, but not as to usury, and the defendant in his answer alleged usury; *held*, that the endorsement of the note by the party was *prima facie* evidence of an adequate consideration, and the answer of the defendant not evidence of usury, which ought to be proved. *Green v. Hart*, on appeal, 1 J. R. 590.

516. A deposition taken in an ejectment suit at law, brought by the defendants against a third person as tenant, to recover the land, the subject of the suit in Chancery, is not admissible evidence against the plaintiffs in equity; it being *res inter alios acta*. *Roberts v. Anderson*, 3 J. C. R. 371.

(c) *Private Writings.*

517. A deed charged in the bill, and admitted in the answer, may be read at the hearing, without having been made an exhibit before the master. *Dey v. Dunham*, 2 J. C. R. 182.

518. Papers or writings of every description, may be proved at the hearing, and the witnesses may be cross examined, at the discretion and under the direction of the Court. *Consequa v. Fanning*, 2 J. C. R. 481.

519. But no paper can be proved as an exhibit at the hearing, unless satisfactory reasons be shown to the Court, why it was not regularly proved, in the usual way, before the examiner. *Ibid.*

*520. A receipt for money, subsequently discovered, is not alone sufficient to open a verdict, judgment, award, or decree. *Todd v. Bartow*, 2 J. C. R. 551.

B. *Parol evidence, to explain, vary, or contradict written instruments.*

521. The rule that parol evidence is inadmissible to contradict or substantially vary the

legal import of a written agreement, is the same in Courts of law, and in equity. *Stevens v. Cooper*, 1 J. C. R. 425.

522. Where an assignment is, on the face of it, general, yet if it be admitted to be different in its purpose, or for a specific security, parol evidence is admissible to show the real intent of the parties. *Moses v. Murgatroyd*, 1 J. C. R. 119.

523. Parol evidence is inadmissible to supply or contradict, enlarge or vary, the words of a will, or to explain the intention of the testator, except there is a latent ambiguity arising *dehors* the will, as to the person or subject meant to be described, or to rebut a resulting trust. *Mann v. Executors of Mann*, 1 J. C. R. 231.

524. Declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, or of conditions annexed to it, to be effectual, must be made at the time of executing it. *Souwerbye v. Arden*, 1 J. C. R. 240.

525. If, at the time of executing a deed, there was no delivery of it, or intention to deliver, these are facts which should be explicitly proved by the grantor. *Ibid.*

526. Where an agreement is reduced to writing, all previous negotiations resting in parol, are extinguished by the written contract, and cannot be resorted to, to help out or explain its meaning. *Parkhurst v. Van Cortlandt*, 1 J. C. R. 273.

527. A contract cannot rest partly in writing and partly in parol; and where a *part performance* is set up to take the case out of the statute of frauds, the party is not allowed to resort to parol evidence in aid of a written agreement. *Ibid.* [But see S. C. on appeal, 14 J. R. 15, where the Court of Errors held, that the part performance, which was the basis of the claim to a specific performance, having been shown, parol evidence might be connected with the written memorandum, for the purpose of making out the contract, under the circumstances of the case.]

528. Parol evidence is inadmissible to support an agreement set up in contradiction to a deed. *Movan v. Hays*, 1 J. C. R. 339.

529. Where no trust appears on the face of a deed, nor any manifestation or evidence of it by writing, parol evidence is inadmissible to show the trust. *Ibid.* [Unless it be a resulting trust.]

530. If a deed, after mentioning a specific consideration, adds, "and for other considerations," it seems, that parol evidence is admissible to show what were those other considerations. *Benedict v. Lynch*, 1 J. C. R. 370.

531. Where several lots of land are mortgaged, the mortgagor, or purchaser under him, cannot set up a parol agreement, made at the time of the mortgage, that in case the [227] mortgagor sold either of the *lots, the mortgagee should release the lot so purchased from the mortgage, on being paid a certain sum per acre, by the purchaser. *Stevens v. Cooper*, 1 J. C. R. 425.

532. Evidence that an agreement in writing concerning lands has been discharged by parol, is good as a defence to a bill for a specific per-

formance, but is totally inadmissible as a ground to compel a specific performance. *Ibid.*

533. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that the defeasance had been destroyed by fraud or mistake, or that the defendant had attempted to convert the loan into a sale. *Marks v. Pell*, 1 J. C. R. 594. *S. P. Strong v. Stewart*, 4 J. C. R. 167.

534. But where a bill was filed for an account and for a reconveyance, *thirty years* after the deed alleged to be a mortgage was given, during all which time the defendant had been in possession, parol evidence of the mere confessions of the defendant *seventeen years* after the deed, that it was taken as a security for a debt, are not sufficient. *Ibid.*

535. A resulting trust may be proved by parol. *Botsford v. Burr*, 2 J. C. R. 405; and that, even in opposition to the deed, and the answer of the defendant denying the trust. *Gillespie v. Moon*, 2 J. C. R. 585.

536. But where a deed has been executed pursuant to a written agreement between the parties, parol evidence is inadmissible to show a resulting trust. *St. John v. Benedict*, 6 J. C. R. 111.

537. If the party who sets up a resulting trust has paid no money, he cannot show, by parol proof, that the purchase was for his benefit. *Botsford v. Burr*, 2 J. C. R. 405.

538. Parol evidence is admissible to rebut a resulting trust. *Ibid.*

539. Parol proof of declarations inconsistent with a deed, are inadmissible. *Ibid.* "There is nothing," observed the chancellor, in *King v. Baldwin*, (2 J. C. R. 554.) "more dangerous than to impair the force and effect of solemn contracts in writing, by careless, idle, and perhaps unmeaning conversation; and as far as such testimony is in contradiction to the language of the note itself, it is utterly inadmissible."

540. A party is concluded by his deed, from setting up a different consideration, except upon the allegation of fraud, mistake, or surprise. *Ibid.*

541. A written agreement may be waived by parol. *Ibid.*

542. Where a bill is filed to correct an alleged mistake in a contract or agreement, the evidence of the mistake must be clear and certain. *Executors of Getman v. Beardsley*, 2 J. C. R. 274. *Gillespie v. Moon*, 2 J. C. R. 585. *Lyman v. United Insurance Company*, 2 J. C. R. 630.

543. Equity relieves against a mistake, as well as against fraud, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, either where the plaintiff seeks relief affirmatively, on the ground of the mistake, or where the defendant sets it up as a defence, to rebut an equity. *Gillespie v. Moon*, 2 J. C. R. 585.

*544. And, it seems, that a party [228] may show a mistake in an agreement of which he seeks the specific performance. *Ibid.* Especially where the contract is imperfect, in the first instance, without referring to facts *aliunde*. *Keisselbrack v. Livingston*, 4 J. C. R. 144.

545. As, where there was an agreement to execute a lease for three lives, containing the usual clauses, restrictions, and reservations contained in leases given by the defendant, it being necessary to ascertain, by proof *dehors* the agreement, what were the usual clauses, &c. in such a lease; *held*, that it was open to the plaintiff, also, to show by parol proof, that it was agreed and understood, at the time, that a particular reservation was not to be inserted in the lease which the defendant was to execute. *Ibid*.

546. Parol evidence to correct a mistake is admissible as well as in favor of the plaintiff as the defendant. *Ibid*.

547. A mistake was rectified after seven years acquiescence. *Gillespie v. Moon*, 2 J. C. R. 585.

548. In all these cases of proof of a mistake in a deed, the evidence must be of the clearest and most satisfactory nature, not only of the mistake itself, but of the real agreement between the parties. *Ibid*. *Lyman v. United Insurance Company*, 2 J. C. R. 630. *Souwerbye v. Arden*, 1 J. C. R. 240.

549. *It seems*, that parol evidence of *confessions or declarations* of the defendant, as to the mistake, made *thirteen* years before, if uncorroborated by other facts or circumstances, will not be sufficient. *Gillespie v. Moon*, 2 J. C. R. 585.

550. Where a trustee for an infant, in 1799, agreed to sell 200 acres of land, (part of a lot containing 250 acres), and executed a deed to the purchaser (a tenant on the lot,) which described the premises by metes and bounds, "containing 200 acres, more or less," and the bounds included the *whole* lot, or 250 acres; and the trustee died in 1814, without having taken any measures to have the mistake corrected, though she expressed her intention to do so; and the *cestui que trust*, immediately after her death, filed a bill for relief against the mistake; *decreed*, that the vendee reconvey to the plaintiff the 50 acres, without any allowance for valuable improvements made thereon, they being made after the vendee knew of the mistake, and had declared his intention to take advantage of it. *Ibid*.

C. Of witnesses, their competency and credit.

551. Proof taken in a cause must be pertinent to the issue; *secundum allegata*. *Underhill v. Van Cortlandt*, 2 J. C. R. 339. [See *James v. M'Kernon*, on appeal, 6 J. C. R. 543.]

552. Declarations of a person, not a party in interest, nor a party to the suit, and who is a witness in the cause, are not admissible in evidence. *Phillips v. Thompson*, 1 J. C. R. 131.

553. A husband cannot be a witness for or against his wife. *Stewart v. Stewart*, 7 J. C. R. 229.

554. The evidence of a single witness only, without any corroborating circumstances to supply the place of a second witness, cannot prevail *against the answer denying the facts charged in the bill. *Smith v. Brush*, 1 J. C. R. 459. *Hart v. Ten Eyck*, 2 J. C. R. 62.

555. A person convicted of perjury, but afterwards pardoned by the governor, is, notwithstanding, an incompetent witness. *Holridge v. Gillespie*, 2 J. C. R. 30.

556. Where land was held in trust for G., for life, with power to her to dispose of the same among her children, a son of G. is a competent witness for the plaintiff, in a suit to recover part of the trust estate, sold in violation of the trust. *Murray v. Finster*, 2 J. C. R. 155.

557. A party to a negotiable instrument, after it has been discharged, and who has released all his interest in the cause, is a competent witness to show usury in the transaction. *Dey v. Dunham*, 2 J. C. R. 182.

558. If a cross bill contains a charge, of fraudulent misconduct in arbitrators, but no such allegation is made in the answer to the original bill, though by a general order of the Court, the depositions taken in the original suit are allowed to be read in the cross suit; yet such parts of those depositions as relate to fraudulent misconduct not charged in the original suit in which they were taken, will be suppressed. *Underhill v. Van Cortlandt*, 2 J. C. R. 339.

559. *It seems*, that the testimony of an arbitrator is not admissible to impeach his award. *Ibid*.

560. Proof taken in a cross suit will not be allowed to be read at the hearing in the original cause, unless the parties, by themselves, or by their privies, or representatives, are the same in both causes. *Perine v. Swaim*, 2 J. C. R. 475.

561. A defendant, who appears to have no interest in a cause, but is made a party, *pro forma* only, may be examined as a witness for his co-defendant, notwithstanding the plaintiff has filed a replication to the answer of such defendant. *Kirk v. Hodgson*, 2 J. C. R. 550.

562. An executor, against whom a bill has been taken *pro confesso*, in a suit by legatees, is a competent witness for the other defendants or devisees. *Lupton v. Lupton*, 2 J. C. R. 614.

563. *It seems*, that a guardian *ad litem* is a competent witness, he being, at most, liable only for costs, which are not of course, but discretionary according to circumstances. *Ibid*.

564. Whether a naked trustee, who is a plaintiff, can be a witness, though liable for costs? *Cook v. Mancius*, 5 J. C. R. 89.

565. Whether a party charged with combining with others in a fraud, against which relief is sought, and, therefore, made defendant, but no particular relief prayed against him, may be a witness for his co-defendants, though liable for costs? *Neilson v. M'Donald*, 6 J. C. R. 201.

566. A person who has fraudulently acquired a title to land, and fraudulently conveyed it, though by a mere quit-claim deed without covenants, is not a competent witness for his grantee, in a suit brought against him by a person claiming it as a *bona fide* purchaser. *Roberts v. Anderson*, 3 J. C. R. 371.

567. The rule of evidence as to impeaching the credit of witnesses who have been examined, should be the same in equity as at law;

[*230] the *inquiry ought to be general, as to the *general character* of the witness for *veracity*. *Troup v. Sherwood*, 3 J. C. R. 538.

568. But, it seems, that on a special application to the Court, the inquiry may be allowed to go beyond the general credit, as to particular facts affecting his character, provided those facts are not material to the matter in issue between the parties. *Ibid.*

569. A defendant who is charged by the plaintiff as fraudulently colluding with his co-defendant, in regard to the transactions sought to be impeached, cannot be a witness for his co-defendant, especially when he has an interest in the cause, arising from his liability for costs, and his ultimate responsibility, if the charge is proved. *Whipple v. Lansing*, 3 J. C. R. 612.

570. And, the cause having been referred to a master, by consent, to take an account; *held*, that such defendant could not be examined before the master, even as a witness *de bene esse*. *Ibid.*

571. Whether a guardian of an infant party is a competent witness in the cause? *Quere. Trustees of Huntington v. Nicoll*, 3 J. C. R. 566. [As to the examination of witnesses, see LIV. Practice.]

D. Presumptive evidence; of payment; of death; of property; of a grant, lease, &c.

572. Presumptions, arising from the lapse of time and the circumstances of the case, of the payment of a debt, are allowed as much in Chancery as in a Court of law. *Giles v. Baremore*, 5 J. C. R. 545. *S. P. Ham v. Schuyler*, 4 J. C. R. 1.

573. Presumptions drawn by Courts against stale demands, are founded in justice and policy. *Ibid.*

574. Presumptions of payment, founded on lapse of time, are matter of evidence; and not, in most cases, *proprio jure*, matter of plea in bar. *Ibid. S. P. Livingston v. Livingston*, 4 J. C. R. 287.

575. Where a defendant, in his answer, does not directly insist on the presumption of payment, but declares his entire ignorance as to the fact, and insists on his having a complete title to the premises mortgaged to secure debts, having purchased, *bona fide*, from the mortgagor, without notice, &c., and had been in the quiet possession above thirty years; *held*, that this was sufficient to entitle him to raise the objection, at the hearing, of a presumption of the payment of the mortgage debt. *Giles v. Baremore*, 5 J. C. R. 545.

576. Where a mortgage had been executed forty years, and there was an interval of thirty-five years from the time the people were supposed to have acquired an interest in the debt, by the attainder of the mortgagee, to the commencement of the suit, and no interest had been paid or demanded, the mortgage was presumed to have been satisfied, either by payment to the mortgagee before his attainder, or to the proper agents of the state afterwards. *Ibid.*

577. If a mortgagee has never entered into possession of the premises, and no interest has been paid for twenty years, the mortgage is *not evidence of a [*231] subsisting title. *Ibid. And see Demarest v. Wynkoop*, 3 J. C. R. 129.

578. If two trustees join in a receipt for money, it is presumptive evidence that the money came equally into the possession and under the control of both; and there must be direct and positive proof to rebut such presumption. *Monell v. Monell*, 5 J. C. R. 283.

579. Where there is fraud or collusion between the executor and debtor, or insolvency, lapse of time is matter of evidence, and not an absolute bar, and may be set up in the defendant's answer. *M'Dowl v. Charles*, 6 J. C. R. 132.

580. A bill filed in 1809, for an account, as to transactions before and at the commencement of the *revolutionary war*, was dismissed, on the ground of the staleness of the demand. *Ellison v. Moffatt*, 1 J. C. R. 46.

581. In a suit between the representatives of a father, and the representatives of his son, where all the matters in controversy were referred to a master, and exceptions taken to his report, because certain charges were not allowed, the Court refused to allow the exceptions, as the transactions were very stale and ancient, and most of them family dealings and concerns, and the parties and their witnesses had been fully examined before the master. *Arden v. Arden*, 1 J. C. R. 313.

582. Lapse of time, or long acquiescence of the husband, after knowledge of the adultery of the wife, without any disability on his part to sue, will be a bar to his suit for a divorce. *Williamson v. Williamson*, 1 J. C. R. 488.

583. Ignorance in a family of the existence of one of the children, who had gone abroad, at the age of twenty-two years, and had not been heard of for forty years, is sufficient, with other circumstances, to warrant the Court or a jury to presume his death without issue. *M'Comb v. Wright*, 5 J. C. R. 263.

584. Where a farm had been occupied and cultivated for above eighty years, during which time the original tenant and his descendants had uniformly paid rent to the landlord, built houses, and made valuable and permanent improvements on the premises; *held*, that a lease in fee, at the acknowledged rent, was to be presumed to have been originally given, or, at least, that there was an agreement for a lease, under which the tenant took possession, and upon the faith of which he made his improvements. *Ham v. Schuyler*, 4 J. C. R. 1.

585. Where a person having the legal title to land, but in trust for the defendants, sold and conveyed his right and title, for a valuable consideration, to a *bona fide* purchaser, without notice, who remained in possession eighteen years before his death, and devised the land by his will; *held*, that after the lapse of thirty years from the date of the deed, there being no evidence of its being fraudulent, the devisees of such purchaser were entitled to hold

the land discharged from the trust. *Coxe v. Smith*, 4 J. C. R. 271.

586. Where the defendant admitted the original covenant to pay rent, and did not, in his answer, pretend payment; *held*, that he could not insist on the lapse of time, being 20 years since the date of the covenant, as presumptive evidence of payment. *Livingston v. Livingston*, 4 J. C. R. 287.

587. Where there was a perpetual lease, reserving an annual rent, and no rent had been demanded for *forty-four* years from the date of the lease; *held*, that the lapse of time was sufficient evidence that the rent had been extinguished by some act or deed of the party entitled to it. *Livingston v. Livingston*, 4 J. C. R. 294.

[See XXXVIII. *Laches, Length of Time, and Possession*. XLI. *Limitations*.]

XXIII. EXECUTION.

588. Where an execution has been paid, a sale under it can be stopped by an order of a judge, and Chancery will not interfere. *Lansing v. Eddy*, 1 J. C. R. 49.

589. An equity of redemption may be sold under a *fi. fa.* against a mortgagor in possession. *Waters v. Stewart*, 1 C. C. E. 47.

590. A mere *chase in action* cannot be taken and sold in execution. Per *Spencer*, Ch. J. *Bogert v. Perry*, on appeal, 17 J. R. 350.

591. The fourth section of the statute of uses, (sess. 10. ch. 37.) rendering lands liable to execution against the *cestui que use*, or *cestui que trust*, applies only to those fraudulent and covenous trusts, in which the *cestui que trust* has the whole real beneficial interest in the land, and the trustee the mere naked and formal legal title. *Bogert v. Perry*, 1 J. C. R. 52. S. C. on appeal, 17 J. R. 350.

592. It is not applicable to the case where a person enters into a contract for the sale and conveyance of land to another, and the vendee pays part of the consideration, and enters into possession, but neglects to pay the residue of the money; for the vendor is not considered as seized to the use of the vendee, until the whole consideration is paid; and until then the vendee has a mere *equitable* interest, on which a judgment is not a *lien*, and which cannot be sold under an execution. *Ibid*.

593. A judgment at law is not a *lien* upon a mere *equitable* interest; and an execution under it will not pass an interest which a Court of law cannot protect and enforce. *Ibid*.

594. Where a tract of land is divided into separate and distinct lots and parcels, it is the duty of the sheriff, who has an execution against the land, to sell it in parcels, and not the whole land together. *Woods v. Monell*, 1 J. C. R. 502.

595. But to set aside the sheriff's sale, there must be satisfactory evidence of fraud or abuse of power in the sheriff. *Ibid*.

596. A sheriff ought not to sell more land than is requisite to satisfy the execution; and

if he sell a whole tract, when a small part of it would be sufficient, or probably sufficient for the purpose, it is a fraud, and the sale will be set aside. *Ibid*. *Tiernan v. Wilson*, 6 J. C. R. 411.

*597. He ought not to sell more [*233] of the defendant's property, than, in the exercise of a sound discretion, would appear sufficient to satisfy the debt, if the part selected for the sale can be conveniently and reasonably detached from the rest, and sold separately. *Tiernan v. Wilson*, 6 J. C. R. 411.

598. Where, on an execution for 10 dollars and 25 cents, the sheriff sold two lots containing together 446 acres, a moiety of which belonged to the defendant, and was worth above 800 dollars, for the sum of 13 dollars, the sale was set aside as fraudulent and void. *Ibid*.

599. And though the sheriff was not guilty of intentional fraud, yet on account of his gross negligence and abuse of his trust, he was decreed to pay costs. *Ibid*.

600. Where an execution has been acted upon, by taking the property into possession, or, perhaps, by advertising it for sale, the person who began, must finish it. *Mason v. Sudam*, 2 J. C. R. 172. 180.

601. Before the statute, (Sess. 36. c. 203. s. 50.) interest could not be levied by execution on a judgment, nor can it be levied on a judgment entered up previous to that act. *Ibid*.

602. The interest of one partner in the partnership property, may be taken and sold under an execution at law, on a judgment against such partner, for his separate debt; and equity will not stop such execution and sale, by injunction, until the partnership accounts are taken and liquidated. *Moody v. Payne*, 2 J. C. R. 548.

603. A judgment creditor, other than the mortgagee, may sell the equity of redemption on execution. *Shottenkirk v. Wheeler*, 3 J. C. R. 275.

604. A *certiorari* is not a supersedeas to an execution already executed. *People v. Goodhue*, 2 J. C. R. 198.

XXIV. EXECUTORS AND ADMINISTRATORS.

A. *Power and duty, and how far liable for the acts of each other.*

B. (a) *Assets legal and equitable, how applied;* (b) *How marshalled, and the order in which debts are to be paid;* (c) *By descent in the hands of heirs or devisees.*

C. *Actions by and against; account; allowances; and when charged with interest and costs.*

D. *Administration, when and to whom granted; when letters may be taken out and produced.*

E. *Distribution.*

A. *Power and duties of, and how far liable for each other's acts.*

605. A devise to executors in trust for C,

for life, and if C died without issue, then remainder over, with power to the [*234] executors, "to sell and dispose of so much of the real estate as should be necessary to fulfil the will," is sufficient to authorize executors (the persons in remainder being infants) to execute leases for years of the real estate, for such terms, and upon such conditions, as are reasonable and necessary to carry into effect the intention of the testator, expressed in the will. *Hedges v. Riker*, 5 J. C. R. 163.

606. But, without resorting to such power as was necessarily implied in the will, Chancery, having a general jurisdiction over the property of infants, may authorize executors to make such leases, with consent of the tenants for life, for the term of 21 years, or building leases, as may be deemed most beneficial to the interest of the tenant for life, and those entitled to the reversion or remainder in fee. *Ibid.*

607. An executor is not allowed to use the assets, and retain the profits arising therefrom. *Brown v. Rickets*, 4 J. C. R. 303. And if he uses them in his business or trade, and the profits are unknown, he must pay interest. *Ibid.*

608. An executor cannot buy in mortgages, judgments or other debts of the testator for his own benefit; nor can he deal or traffic with the estate for his own emolument. *Van Horne v. Fonda*, 5 J. C. R. 388.

609. An executor or administrator cannot, at any time, apply to the surrogate, under the statute, for a sale of the real estate, on the ground of a deficiency of personal assets, but must make his application within a reasonable time. *Moore v. White*, 6 J. C. R. 360.

610. And what is a reasonable time must be determined by the surrogate, in his discretion, under the circumstances of the case. *Ibid.*

611. It seems, that one year after the executor or administrator has entered on the execution of his trust, is a reasonable time within which to apply for a sale of the real estate, unless, under the peculiar circumstances of the case, the surrogate, in the exercise of a sound discretion, should think it consistent with the spirit and policy of the statute, to grant the application, after the lapse of a year. *Ibid.*

612. That the debts are not yet due, is no objection to an application to the surrogate, for a sale of the real estate, if the personal estate is not sufficient to meet the debts. *Ibid.*

613. An heir, or purchaser, or person interested in the real estate of the testator or intestate, may appear before the surrogate, and oppose the application of the executor or administrator for a sale, and may interpose the statute of limitations. *Ibid.*

614. Administration extends only to assets of the intestate within the state or jurisdiction where it is granted. *Doolittle v. Lewis*, 7 J. C. R. 45. And see *Morrell v. Dickey*, 1 J. C. R. 153. *Williams v. Storrs*, 6 J. C. R. 353.

615. Where a person named as executor in a will, but who never qualified as such, took possession of part of the personal estate of the

testator, and paid some of the debts; held, that these acts were proof of his election to act as executor, and made him chargeable as such. *Van Horne v. Fonda*, 5 J. C. R. 388.

616. If two executors, or trustees, join in a receipt for money, it is presumptive evidence that the money came equally into the possession or under the control of both; and there must be direct and positive proof to rebut the presumption. *Monell v. Monell*, 5 J. C. R. 283.

*617. If one executor or trustee [*235] proves that his joining in the receipt was necessary, and merely formal, and that the money was, in fact, paid to his co-executor, without his direction or consent, and that it was out of his power to control or secure the money, he will not be held responsible for it. *Ibid.*

618. Where, by any act or agreement of one executor or trustee, money gets into the hands of his co-executor, or co-trustee, both are answerable for it. *Ibid.*

619. An executor is not responsible for a *devastavit* of his co-executor, except so far as he has concurred in such waste or misapplication of the assets. *Sutherland v. Brush*, 7 J. C. R. 17.

B. (a) *Assets, legal and equitable, how applied;*
(b) *How marshalled, and the order in which debts are to be paid;* (c) *By descent in the hands of heirs or devisees.*

(n) *Assets, legal and equitable, how applied.*

620. Assets may be partly legal and partly equitable, and the Court will discriminate in the distribution of them, following the rule of law, as to the legal assets, so as to prevent confusion in the administration of the estate; but directing the equitable assets to be applied ratably among all the creditors, without preference. *Moses v. Murgatroyd*, 1 J. C. R. 119.

621. The surplus money arising from the sale of mortgaged premises, goes to the heirs, as part of the real estate, or assets; and where the heirs were before the Court, by their parent, the assets were ordered to be distributed, as equitable, among all the creditors, *pari passu*. *Ibid.*

622. But as the creditor has a remedy at law against an equity of redemption, it is questionable, whether, before a sale of the mortgaged premises, it could be deemed equitable assets. *Ibid.*

623. The Court refused to order the costs of the administrator of the mortgagor, on the sale of the premises mortgaged in fee, to be paid out of the proceeds in Court. *Ibid.*

624. A mortgage interest, before foreclosure, is a chattel, and personal assets belonging to the executor. *Demarest v. Wynkoop*, 3 J. C. R. 129.

625. If a grandfather devises land to his grandchild, and directs the rents and profits thereof to be applied by his executors to the education of such grandchild, the executors, not the guardian appointed by the surrogate, are entitled to apply the rents and profits according to the direction of the will; and the

Court will not, on a bill filed by the infant and his guardian, direct the executors to pay over the rents and profits to such guardian; but leave them in the hands of the executors, until the infant comes of age. *Fullerton v. Jackson*, 5 J. C. R. 276.

626. If one of three joint makers of a promissory note dies solvent, and the two surviving makers are insolvent, equity will direct the payment of the note out of the assets of the deceased. *Jenkins v. De Groot*, on appeal, 1 C. C. E. 122.

*627. A bona fide purchaser is not [*236] answerable for the application of the proceeds of the sale of personal property by an executor or administrator. *Field v. Schieffelin*, 7 J. C. R. 150.

628. The mere knowledge of the purchaser that the property misapplied was assets, and that there were debts, is not sufficient to make him responsible; but there must be fraud or collusion. *Ibid.*

629. And if there be no fraud or collusion, the bare act of sale for money fairly advanced at the time, is sufficient to indemnify the purchaser, who can never be made responsible for the misapplication of the money. *Ibid.* *S. P. Sudherland v. Brush*, 7 J. C. R. 17.

630. For it is only in cases of fraud or collusion that the Court will follow the assets into the hands of a purchaser. *Field v. Schieffelin*, 7 J. C. R. 150.

631. But if a person knowingly buys or takes the assets in extinguishment of the private debt of the executor, it seems, that he will not be allowed to retain them against creditors and legatees. *Ibid.*

(b) *How marshalled, and the order in which debts and legacies are to be paid.*

632. Where a testator directed his executors to sell his real estate, to pay debts and legacies, in case of a deficiency of the personal estate; and a bill filed by the executors of a legatee, and creditor, prayed a sale of the real estate, the executor of the testator having admitted that the personal estate was insufficient for the purpose; ordered, that the master first ascertain and report whether the executors had duly administered all the assets, before recourse should be had to the land, or deciding whether the devisees in remainder were to be brought into Court. *Arden v. Arden*, 1 J. C. R. 313.

633. The real estate is not charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, and clearly to be inferred from the language and disposition of the will. *Lupton v. Lupton*, 2 J. C. R. 614.

634. The usual clause in a will devising all the rest of the testator's real and personal estate not before devised, for the payment of debts, is not sufficient to show an intention to charge the real estate; nor is the mere direction that all debts and legacies are to be paid, sufficient for that purpose. But if the real estate be devised, "after payment of debts and legacies," it is charged with the payment of them. *Ibid.*

635. Though the real estate be charged, yet

the personal estate is the proper fund for the payment of debts and legacies, and is to be first applied, before charging the real estate. *Ibid.* *S. P. M'Kay v. Green*, 3 J. C. R. 56.

636. If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. *Lupton v. Lupton*, 2 J. C. R. 614.

637. But if the deficiency of assets has been occasioned by the waste of the executor, the legatee who has been paid, may retain the advantage *he has gained [*237] by his legal diligence, as against his co-legatees, but not against creditors. *Ibid.*

638. A legatee may compel an executor to bring into Court money in his hands, or to give security, where the legacy is payable at a future day. *Ibid.*

639. A creditor can only come into Chancery for an account and discovery of assets, and on the ground of a trust in the executor or administrator to pay debts; not for the sale of the real estate, on a supposed equitable lien, arising from the money advanced by him to the intestate having been applied to purchase the land. *M'Kay v. Green*, 3 J. C. R. 56.

640. Whether a creditor, in an ordinary case, and without some special cause, can come into this Court, to collect his debt from an executor or administrator, or merely to enforce a ratable distribution of assets? *Quære. Ibid.*

641. In marshalling of assets, the estate descended to the heir is to be applied to the payment of debts, before the estate devised, unless devised specially to pay debts. *Livingston v. Livingston*, 3 J. C. R. 148. [See *Livingston v. Newkirk*, 3 J. C. R. 312.]

642. Where the personal estate is insufficient for the payment of the testator's or intestate's debts, the Court of Probates, under the statute for that purpose, may sell the real estate of which the testator died seised; but not lands held in trust for the testator. *Ibid.*

643. The heir is not entitled to contribution from the devisees, towards the satisfaction of the creditors of the testator. *Ibid.*

644. Nor does equity help a pecuniary legatee to throw a debt against the personal estate, upon a devisee of land. *Ibid.*

645. But different devisees, in respect to a charge on all the estate devised, must contribute, on a deficiency of assets, in proportion to the value of their respective interests; as, to pay an annuity to the widow of the testator, or debts remaining unsatisfied after the personal and all the real estate not devised had been exhausted. *Ibid.*

646. Equity will marshal assets descended to the heir, in favor of, and for the relief of, specific legatees. *Ibid.*

647. Where a person takes a conveyance of land, subject to a mortgage, covenanting to indemnify the grantor against the mortgage, and having paid off part of the encumbrances, dies intestate, the land is the primary fund to be resorted to for the payment of the residue; and the heir cannot throw the charge upon the personal representatives. *Duke of Cumberland*

and others v. Codrington and others, 3 J. C. R. 22. [And see Mortgage D.]

648. If the purchaser has even rendered himself liable, at law, to the mortgagee or creditor, for the payment of the debt, this circumstance alone will not be sufficient to change the regular course of assets; there must be also proof of a strong and decided intention to subject the personal estate to the charge. *Ibid.*

649. By an express direction of a testator, or by language equivalent to an express direction, he may throw the charge upon his personal assets. *Ibid.*

650. If the purchaser of land, having subjected his personal estate to the charge, dies, and the land descends to his heir, who is also his personal representative, although the personal funds of the ancestor in [*239] the hands of the heir were liable for the debt, yet on the death of the heir, his personal assets are not the primary fund for the payment of the debt. *Ibid.*

651. Where a person gives a bond and mortgage for a debt of his own, the mortgage is merely collateral security; and his personal estate is the primary fund for the payment of the debt. *Ibid.*

652. An executor or administrator cannot bind the personal assets for a debt not chargeable on them before. *Ibid.*

653. The order of marshalling assets towards the payment of debts, is to apply, 1st. The general personal estate; 2d. Estate specifically devised for the payment of debts, and for that purpose only; 3d. Estates descended; 4th. Estates specifically devised, though generally charged with the payment of debts. *Livingston v. Newkirk*, 3 J. C. R. 312.

654. An equitable interest in land, founded on articles of agreement for the purchase, will pass by a subsequent devise; and if there is no devise, will descend to the heir, and the executor must pay the purchase money, for the benefit of the heir. *Ibid.*

655. And the heir may call on the executor or administrator to discharge the contract out of the personal estate of the vendee, so as to enable the heir to demand a conveyance of the land from the vendor. *Champion v. Brown*, 6 J. C. R. 308.

656. And the executor and administrator of the vendor cannot assign the contract, or compel its performance, without the consent of the heir. *Ibid.*

657. And when the administrator of the vendee assigned a contract for the purchase of land to the defendants, and covenanted with them to take up and cancel the contract, and to indemnify and save them harmless from all damages, &c. by reason of the contract, &c.; held, that the administrators were entitled to a specific performance of the covenants on the part of the defendants, who could not set up a want of personal assets as an objection, in limine, to the relief sought by the bill. *Ibid.*

658. If an executor or administrator pays debts out of his own moneys, to the value of the personal assets in hand, he may apply those assets to reimburse himself, and by such elec-

tion the assets become his own property. *Livingston v. Newkirk*, 3 J. C. R. 312.

659. If an executor be directed to sell land, it seems, that he cannot retain it, as he may personal assets. *Ibid.*

660. But if the personal assets prove insufficient, and the executor has paid debts out of his own money to the value of the land, he may, if the land is ordered to be sold, retain the proceeds for his own indemnity. *Ibid.*

661. Where the testator devised his real and personal estate to his executors, for the payment of his debts; on a bill for an account, stating that the executors refused to distribute the proceeds of the real estate ratably among the creditors, and threatened to transfer them to certain favorite creditors, who were not entitled to a preference in law or equity, the Court granted an injunction to restrain the executors from selling or disposing of the estate. *Depau v. Moses*, 3 J. C. R. 349.

662. But whether, in such case, it will, at the instance of a creditor, compel a ratable distribution of the assets [*239] by the executors? *Quære. Ibid.*

663. In a suit by one or more creditors against an executor or administrator, either separately for themselves, or specially in behalf of themselves and all other creditors who will come in, &c., the usual decree to account is for the benefit of all the creditors, and in the nature of a judgment for all; and such suit, and a decree for the sale of the assets, draws to this Court the entire distribution of them; and after judgment creditors are satisfied, the other creditors are to be paid ratably, without any preference, or regard to legal priority of special over simple contract creditors. *Thompson v. Brown*, 4 J. C. R. 619.

664. And after a due disclosure of assets, and a decree for the sale of them, &c., an injunction will be granted, on motion of either party, to stay all proceedings of the creditors at law. *Ibid.*

665. But such injunction will not be granted on the mere filing of the bill; and a judgment at law, obtained before a decree, will be protected in its priority. *Ibid.*

666. A devise of all the testator's real and personal estate, in trust to pay debts, and to distribute the residue, places the assets under the jurisdiction of this Court. *Benson v. Le Roy*, 4 J. C. R. 651.

667. And the doctrine, as to equitable assets, that all the creditors are to be paid, *pari passu*, is not affected by the statute. (Sess. 36. c. 93.) *Ibid.*

668. Chancery cannot interfere with the law of descent of real property, or the established order of distribution of personal property, for the purpose of shifting the burden of paying the debts of the intestate from the personal to the real estate, or to correct any alleged hardship or inequality produced by the law. *Thompson v. Tappen*, 5 J. C. R. 518.

669. A devise to executors, with authority to sell the real estate of the testator for the payment of his debts, applies as well to a joint and several bond executed by him, as *surety* for his co-obligors, as to any other debt; and Chancery will enforce the performance of the trust

in the executor, and compel a sale of the real estate, or so much thereof as is necessary to pay such bond, as well as the other debts of the testator. *Berg v. Radcliff*, 6 J. C. R. 302.

670. An executor or administrator, pending a suit in equity, and prior to a decree, may confess a judgment at law, so as to give priority; and Chancery will not interfere with the remedy at law, in favor of a simple contract debtor, until there is a decree. *Mactier v. Lawrence*, 7 J. C. R. 206.

(c) *Assets by descent in the hands of heirs or devisees.*

671. The administrator of a mortgagor is not, as such, entitled to the surplus money arising from the sale of the mortgaged premises; but it is considered part of the real estate, and goes to the heirs, and is assets in their hands. *Moses v. Murgatroyd*, 1 J. C. R. 119. *And see ante*, (b) 641. 643. 646. 653. 668.

[*240] *C. *Actions by and against; account; allowances; when charged with interest and costs.*

672. Where a bill is filed by an executor, for a settlement of his accounts, and for disclosures, as to distribution, &c., the defendants are not entitled, on petition, to an inspection of the accounts and vouchers of the executor, to enable them to answer the bill. *Denning v. Smith*, 3 J. C. R. 409.

673. An executor, on a bill filed against him by his co-executors, was restrained from all further interference in the management of the estate, and ordered to restore to the plaintiffs a bond and note of the estate in his possession, but not to account for the money he had received on the bond, or to pay the costs of the suit. *Ibid.*

674. If an administrator omits to file an inventory of the goods of the intestate, pursuant to the statute, it is a strong circumstance to support the charge of improper conduct. *Hart v. Ten Eyck*, 2 J. C. R. 62.

675. If an administrator exhibits an untrue account of the personal estate of the intestate to the Court of Probate, by which he fraudulently obtains an order for the sale of the real estate, he must not only account for the personal effects omitted in his statement, but is answerable for the real estate sold, and that according to its value at the time of filing the bill against him. *Ibid.*

676. Where administrators sold the leasehold estate of the intestate, and took the promissory note of the purchaser, on a credit, without any security for the payment, the administrators were held liable to the next of kin for the amount, the purchaser having become insolvent. *King v. King*, 3 J. C. R. 552.

677. Executors and administrators, acting with good faith, and without any wilful default or fraud, will not be responsible for losses that may arise. *Thompson v. Brown*, 4 J. C. R. 619.

678. Where an executor mismanages the estate confided to his care, or puts the assets in jeopardy, by his actual or impending insolvency, the Court will restrain him from all further

interneddling with the estate, and compel him to restore the funds in his hands. *Elmendorf v. Lansing*, 4 J. C. R. 562.

679. Where an administrator of a deceased partner, without applying to the Court for its direction, *bona fide* permitted the surviving partner to sell the joint stock, in the usual course of the trade, for the joint benefit of himself and the intestate's estate; *held*, that he was not to be responsible to the creditors for any loss; though he might be personally liable for any debts contracted by such assumed partner. *Thompson v. Brown*, 4 J. C. R. 619.

680. But, if the administrator of a deceased partner puts into the hands of the surviving partner assets which he had in his own hands, and under his own control, to trade with, he will be responsible for any loss.

681. A creditor may come into Chancery against an executor or administrator, for a discovery of assets. *Ibid.*

682. A widow and administratrix, who, under her claim of dower, *and as guardian to her infant children, [*241] had received the rents and profits of the real estate, and applied them to the necessary maintenance of the children, before any application or notice of creditors, was not held to account for the rents and profits so received and expended. *Ibid.*

683. An account taken before a master, pursuant to an order of Court, on the petition of an executrix, when no suit was pending, is not binding on infant heirs, who may, on coming of age, file their bill against her for account. *Everton v. Tappen*, 5 J. C. R. 497.

684. But where the father and guardian of the infant heirs attended in their behalf, in taking such account before the master, the Court refused to open it, further than was necessary to correct such errors in it as they might point out. *Ibid.*

685. An executrix suffered land, of which the testator died seised, subject to a mortgage, to be sold under it, and became the purchaser thereof, in her own right, and sold it; *held*, that she was liable to account to the heirs for the proceeds of the sale; but as the widow of the testator, she was entitled to dower out of the proceeds, subject to her ratable contribution towards the extinguishment of the mortgaged debt. *Ibid.*

686. Where a testator devised to his wife the use and possession of all his estate, real and personal, during her natural life, or widowhood, and made her executrix; *held*, that she was accountable to the heirs, for the use of such part only of the real estate, as the testator had acquired after the date of his will; and that she was to be allowed in her account, for so much of the rents and profits of such after acquired lands, as were applied by her towards the payment of the testator's debts, after the personal estate had been applied for that purpose, and exhausted. *Ibid.*

687. Where the mother, as executrix, charges her children, being infant heirs, with board, clothing, &c., they are entitled to be allowed in account for the value of their labor and services. *Ibid.*

688. Where an *administratrix*, a few days after the death of the intestate, committed the entire possession and management of the estate to R., to whom she gave a power of attorney to collect the debts, &c.; *held*, that R., who admitted that he accepted the agency as a friend and relation of the family, and from motives of benevolence, was not entitled to *commissions* on the moneys received and paid by him, nor any allowance for his services, in relation to the estate. *Mason v. Roosevelt*, 5 J. C. R. 534.

689. Such an agent, however, is not chargeable with *interest* on moneys belonging to the estate received by him, under the direction of the *administratrix*. *Ibid*.

690. *Aliter*, when he assumes to act as guardian of the infant heirs, and receives the rents and profits of the real estate. *Ibid*.

691. On a bill filed against such agent of the *administratrix*, by the heirs of the intestate, for an account, the testimony of the *administratrix*, though released by the plaintiff, is not, of itself, sufficient against the answer of the defendant. *Ibid*.

692. *It seems*, that a release of the [*242] *administratrix*, as principal, in such a case, would be a discharge, also, of the defendant, as her agent. *Ibid*.

693. Compound interest is not allowed in favor of an executor or trustee, though it is sometimes permitted against him, when he refuses to disclose the profits made out of the assets or trust property. *Evertson v. Tappen*, 5 J. C. R. 497.

694. Executors or trustees are not entitled to *commissions*, or compensation for their services, in the execution of their trust. *Manning v. Manning*, 1 J. C. R. 527. *Green v. Winter*, 1 J. C. R. 27. [But after these decisions, the legislature, sess. 40. c. 251. April 15, 1817, passed an act, authorizing the chancellor to allow executors, administrators, and guardians, a reasonable compensation. See LXXII. *Trusts*.]

695. Where an administrator resists a claim, and litigates *bona fide*, from a conviction of duty, and where no intentional default is made to appear, he will not, under the circumstances of the case, be charged personally with the costs; but they must be paid out of the assets of the intestate. *Moses v. Murgatroyd*, 1 J. C. R. 473.

696. The Court refused to order the costs of the administrator of the mortgagor, on a sale of the premises mortgaged, to be paid out of the proceeds in Court. *Ibid*.

697. Though the general rule is, that executors must pay costs, when they pay interest, because they are in default; yet, where the devisee, or *cestui que trust*, demands more than he is entitled to receive, and the executor properly submits to the direction of the Court, he will not be compelled to pay costs. *Dunscorn v. Dunscorn*, 1 J. C. R. 508.

698. Executors keeping part of a fund for commissions, and litigating in favor of their claim, were decreed to pay costs. *Manning v. Manning*, 1 J. C. R. 527.

699. On a bill by a legatee against an ad-

ministrator, who submitted to, and asked the direction of the Court, his costs were ordered to be paid out of the fund. *Morrell v. Dickey*, 1 J. C. R. 153.

700. If executors, administrators, or heirs, bring groundless and vexatious suits, they will be ordered to pay costs. *Executors of Gelman v. Beardsley*, 2 J. C. R. 274.

701. Where a plaintiff claimed as legatee and as creditor, and proved only his right as legatee; and the executors, who were the defendants, had caused great delay and expense, by raising unfounded objections, nether party were allowed costs. *Brown v. Rickels*, 4 J. C. R. 303.

702. Since the statute gives a remedy at law to recover legacies and distributive shares, an executor may plead the statute of limitations in bar, in equity, as well as at law. *Kane v. Bloodgood*, 7 J. C. R. 90. *Contra*, *Decouche v. Savetier*, 3 J. C. R. 217. See XLI. *Limitations*.

D. *Administration, when and to whom granted; when letters of administration may be taken out and produced.*

703. Courts in this state do not take notice of letters testamentary, [*243] *or letters of administration, granted abroad, or out of the state. *Morrell v. Dickey*, 1 J. C. R. 153. *S. P. Doolittle v. Lewis*, 7 J. C. R. 45.

704. Nor has an administrator, appointed abroad, or in another state, any authority here; but, *it seems*, that a voluntary payment to an administrator so appointed, would protect the party. *Williams v. Storrs*, 6 J. C. R. 353.

705. And *it seems*, that an executor or administrator of a creditor in another state, having possession of a bond, and a mortgage on lands in this state, may lawfully receive payment of the debt, and give an acquittance, which will be valid, without his having obtained letters of administration in this state. *Doolittle v. Lewis*, 7 J. C. R. 45.

706. So, a power of sale contained in a mortgage of lands in this state, to a person residing in another state, may be lawfully executed in this state, by an administrator of the mortgagee, appointed in another state, where the mortgagee died; the power and the exercise of it being a matter of private contract between the parties, and not of jurisdiction. *Doolittle v. Lewis*, 7 J. C. R. 45.

707. *It seems*, that the public administrator of the city of New-York has no power, under the act relative to persons dying intestate, &c., in that city, (Sess. 38. ch. 157.) to administer on goods shipped at a foreign port, and arriving here after the death of the intestate. *Hammond v. M'Lea*, 2 J. C. R. 493.

708. At any rate, Chancery will not interfere by injunction, in such a case, but leave the parties to contest their rights at law. *Ibid*.

709. The surrogate may, in his discretion, grant administration to any one of the next of kin to the testator or intestate, to the exclu-

sion of the others in equal degree. *Taylor v. Delancy*, on appeal, 2 C. C. E. 143.

710. If the probate of a will be taken out before the hearing of a cause, it is sufficient to support the plaintiff's demand; no objection having been made to the want of it, by pleading. *Osgood v. Franklin*, 2 J. C. R. 1. *S. P. Doolittle v. Lewis*, 7 J. C. R. 45.

E. Distribution.

711. Payment of a legacy or distributive share to the *guardian by nature* of an infant, is at the peril of the administrator, who may be compelled to pay it over *in gain*. *Genet v. Tallmadge*, 1 J. C. R. 3.

712. A person appointed *guardian* to an infant, in another state, is not entitled to receive from the administrator the legacy or portion of such infant. *Morrell v. Dickey*, 1 J. C. R. 153.

713. The guardian must be appointed here, and give competent security, to be approved of by the Court, before payment of the infant's money will be ordered. *Ibid*.

[See further, as to the application of the distribution of assets, *ante*, B.]



[*244] *XXV. FOREIGN LAWS.

714. Courts in this state do not take notice of letters testamentary, or of administration granted abroad, or out of the state. *Morrell v. Dickey*, 1 J. C. R. 153. See XXIV. *Executors and Administrators*, D.

715. Nor can a person appointed a *guardian* to an infant, in another state, be entitled to receive from the administrator here the legacy or portion of the infant. *Ibid*.

716. Rights dependent on the nuptial contract, are governed by the *lex loci contractus*. *Decouche v. Savetier*, 3 J. C. R. 190.

717. A contract of marriage executed in *Paris*, between *French* citizens, contained a clause, (*donation mutuelle*) by which the parties mutually gave to each, and the survivor, all the estate and property acquired and purchased, or belonging to either, at the time of his or her death, to be enjoyed by the survivor exclusively; the husband, afterwards, abandoned the wife, and came to reside in *New-York*, where he lived many years, acquired a large personal estate, and died intestate, without lawful issue, leaving his wife living in *France*; held, that the wife, as survivor, took all the estate, under the *donation*, according to the law of *France*, to the exclusion of the relations of the husband; and, that her legal representatives, after her decease, were entitled to the whole, including not only what originally entered into *communauté* under the contract, but the separate property intended, in case of issue living at the death of either, to go to the children, as well as the joint increase of the common stock during the life of the intestate, and the increase thereof since his death, in the hands of the administrator. *Ibid*.

718. The time of limitation of actions depends upon the *lex fori*, not on the *lex loci contractus*. *Ibid*.

719. The descent of personal property, wherever situated, is governed by the laws of the country of the intestate's domicile. *Ibid*.

720. A discharge under the bankrupt law of this country does not discharge the debtor from debts contracted and made payable in *Europe*, or a foreign country, unless the foreign creditors come in and prove the debts under the commission. *M'Menomy v. Murray*, 3 J. C. R. 435. Or unless so declared by the statute, in express words, or by necessary implication. *Murray v. De Rottenham*, 6 J. C. R. 52. (See X. *Bankrupt*, D.)

721. In all questions arising between the subjects of different states, each is to be considered as a party to the laws and authoritative acts of his own government. *Consequa v. Fanning*, 3 J. C. R. 587.

722. But whether the principle applies to a question between principal and agent, as in the case of a foreign merchant consigning goods to his factor here for sale, and he is prevented by an embargo from remitting the proceeds to his principal? *Quere*. S. C. on appeal, 17 J. R. 511.

723. Interest is payable according to the laws of the country where the debt is contracted, or the contract is made. *Ibid*.

724. But if, by the terms of the contract, it appears that it is to be executed in another country, or that the parties had reference to the laws of another country, then the place in which it is made becomes immaterial, and it is to be governed by the laws of the country in which it is to be performed. S. C. on appeal, 17 J. R. 511. [*245]

725. Where a *Chinese* merchant, residing in *Canton*, consigned goods to a merchant in *New-York*, and which were delivered at *Canton* to the agent of the *New-York* merchant, to be sold, and the proceeds remitted to the consignor, at *Canton*, and the consignee neglected to remit the proceeds to the consignor; held, that the latter was entitled to recover interest according to the laws of *New-York*, not according to the law or custom of *Canton*. S. C. on appeal, 17 J. R. 511. *Contra*, S. C. 3 J. C. R. 587.

726. It is a principle of international law, to take notice of, and give effect to, the title of foreign assignees; and assignees of a foreign bankrupt may sue here, for debts due to the bankrupt's estate, either as such assignees, or in the name of the bankrupt. *Holmes v. Remsen*, 4 J. C. R. 460.

727. The same principle of general law that governs marriage contracts, testamentary dispositions, and the succession to the personal estate of an intestate, applies to the distribution of the estate of a foreign bankrupt. *Ibid*. [See further, as to the application of this principle, X. *Bankrupt*, C.]

728. Foreign laws may be proved by witnesses, as matters of fact. *Brush v. Wilkins*, 4 J. C. R. 506.

XXVI. FRAUD.

- A. Acts considered fraudulent at common law, or in equity.
 B. Frauds against the statute; (a) *Parol agreements*; (b) *Agreements and conveyances fraudulent as against creditors and purchasers.*

A. Acts fraudulent at common law, or in equity.

729. Equity grants relief, not only against deeds, writings, and solemn assurances, but against judgments and decrees, obtained by fraud and imposition. *Reigal v. Wood*, 1 J. C. R. 402.

730. Where an attorney revived, by *scire facias*, an old outstanding judgment, on which but a very small sum, if any thing, was due, knowing that the land on which the judgment remained a lien, was in the possession of innocent and *bona fide* purchasers; and afterwards made use of the judgment to compel the purchasers, who were ignorant of the proceedings under the *scire facias*, to pay and secure to him a debt against the person under whom they had purchased; the Court, on the ground of imposition and undue advantage taken by the attorney, ordered him to refund the money he had so obtained, and set aside the security taken by him, with costs. *Ibid.*

731. A deed by a client to his attorney and scrivener, for the consideration of affection and friendship, and also for a sum of [*246] money, *but not one third of the value of the land conveyed, will not be set aside on the ground of ignorance and blind confidence on the one side, and undue influence on the other, there being no evidence of imbecility or incapacity in the grantor, nor of fraud or imposition by the grantee; nor of that relationship between the parties, which might imply the existence of an undue influence. *Wendell v. Van Rensselaer*, 1 J. C. R. 344.

732. Where a person having a conveyance of land, keeps it secret for several years, and knowingly suffers third persons, afterwards, to purchase parts of the same premises from the grantor, who remained in possession, and was the reputed owner, and to expend money on the land so purchased, without any notice of his claim, he will not be permitted, afterwards, to assert his legal title against such innocent and *bona fide* purchasers. *Ibid.*

733. Where a person, having a claim to land, stands by while another is making a bargain for the purchase of it, without disclosing his claim, he cannot afterwards set it up against the purchaser. *Niven v. Bellmap*, on appeal, 2 J. R. 573.

734. On the ground of oppression, imposition and undue advantage taken of the necessities of the plaintiff, as well as mistake and omission, the Court set aside the settlements of accounts between the parties, and the bonds and securities taken for the balances, and opened the accounts at large, *Barrow v. Rhinelanders*, 1 J. C. R. 550.

735. Where B. obtained a deed from L. by

fraud, in which H. was concerned, and B. afterwards confessed a judgment to H., who assigned it to R. for a valuable consideration, without notice of the fraud; *held*, that the deed to B. being null, on account of the fraud, the judgment created no valid lien on the land; that R. took the assignment at his peril, and subject to all the existing rights of the debtor; and the land was decreed to be reconveyed, and discharged from the judgment, against which a perpetual injunction was awarded. *Livingston v. Hubbs*, 2 J. C. R. 512.

736. Where the attorney of the plaintiff attended the sale of a farm of the defendant, under an execution, and the farm, which was worth two thousand dollars, was sold to the attorney for ten dollars, the gross inadequacy of the price, connected with the fact that the sale was on a stormy day, when no person but the attorney and the deputy sheriff were present, was held sufficient to warrant the inference of fraud. *Howell v. Baker*, 4 J. C. R. 118.

737. Where a judgment and execution which had been fully paid and satisfied, were kept on foot by the assignees of the judgment, fraudulently, for the purpose of speculating on the property of the debtor, and which the defendants (being such assignees) purchased at the sheriff's sale; *decreed*, that the defendants release all the title and interest so acquired by them, to the owner of the lands so fraudulently sold on execution, and deliver up the possession thereof, pay the rents and profits, and damages for any waste committed, and all costs, &c. *Troup v. Wood*, 4 J. C. R. 228.

738. An agreement by the owner of an execution, on which lands to an amount in value far exceeding the debt, had been seized, to prevent the usual competition among bidders at the sheriff's sale, and in *order to leave a balance due on [*247] the execution, for the purpose of having lands of the debtor in other counties seized and sold, is fraudulent, and the execution is deemed in law satisfied. *Ibid.*

739. J. S. sold and conveyed a lot to H., and took a mortgage to secure part of the purchase money. The mortgage was duly recorded in the county of O., where the land was situated, but H. neglected to have the deed to him recorded pursuant to the statute. The defendants having purchased the claim of a person in possession, without title, procured a release and quit-claim from J. S., for the consideration of ten dollars, though the land was worth six thousand, and had such quit-claim deed recorded, before the deed from J. S. to H.; *held*, that the subsequent release and quit-claim by J. S. was fraudulent, the record of the mortgage being sufficient notice that J. S. had then no title; and the defendants were decreed to release all claim to H., so as to quiet his title. *Lupton v. Cornell*, 4 J. C. R. 262.

740. Where G. and W., one by the purchase of a mortgage, and the other by the purchase of the equity of redemption, became possessed of the whole estate, and leased it to C. for a term of years, and G. afterwards assigned the mortgage, with notice of the term;

held, that the assignment was not a fraud on the lessee. *Chesterman v. Gardner*, 5 J. C. R. 29.

741. And though the property was afterwards sold, on a bill filed for foreclosure and sale, by the assignee of the mortgage, and the term became thereby merged in the inheritance; yet as C. himself became the purchaser at the sale under the decree, he thereby waived all right, if he had any, to relief for any damage sustained by the loss of his term. *Ibid.*

742. The fraud, in such cases, which will entitle a party to relief, is fraud at the time of the execution of the deed or lease, not a fraud in a subsequent and distinct transaction. *Ibid.*

743. Relief will not be afforded against a contract, on the ground of fraud, unless it be made a distinct ground of allegation, and be put at issue in the pleadings. *Gouverneur v. Elmendorf*, 5 J. C. R. 79.

744. A mortgagee, to whom the mortgagor had, by an absolute deed, which was duly recorded, conveyed the premises in fee, with full covenants, gave to the mortgagor a bond, conditioned, that if the mortgagor paid the mortgagee 400 dollars on a certain day, the mortgagee would reconvey the premises; but the defeasance was not recorded; and the mortgagee afterwards sold and assigned the bond and mortgage to C., and several years after, sold and conveyed the premises in fee, with full covenants, to M., a *bona fide* purchaser, for a valuable consideration, without notice of the bond and defeasance, or of the assignment of the bond and mortgage to C.; *held*, that the bond and defeasance, and the assignment of the bond and mortgage, were fraudulent and void as against M. *Mills v. Comstock*, 5 J. C. R. 214.

745. A person having the legal title, who acquiesces in the sale of the land by another claiming or having color of title to it, is estopped from afterwards asserting his title against the purchaser; especially when he has advised and encouraged the parties to the sale, to deal with each other. *Storrs v. Barker*, 6 J. C. R. 166. *See ante*, 732, 733.

*746. A deed by husband and [*248] wife of their joint estate, in trust, to pay all the debts of the husband, and the residue to the use of the wife and her heirs in fee, is a valid conveyance, and cannot be impeached by a subsequent purchaser, without notice of the trust. *Rogers v. Benson*, 5 J. C. R. 431.

747. A conveyance voidable on account of fraud or covin, may be made valid and effectual, by matter *ex post facto*. *Verplank v. Sterry*, on appeal, 12 J. R. 536.

748. A deed fraudulent in part is void, and incapable of confirmation; but a deed *constructively* fraudulent, as being contrary to the policy and provisions of a particular statute, is voidable only, and may be confirmed by matter *ex post facto*. *Murray v. Riggs*, on appeal, 15 J. R. 571.

749. If one person represents to another, going to deal in a matter of interest on the faith of the representation, the former, if he knew

that representation to be false, shall make it good. *Bacon v. Bronson*, 7 J. C. R. 194.

750. A party is responsible in equity for damages resulting from a wilfully false assertion. *Ibid.*

751. Fraud and damage coupled together, entitle the party injured to relief in any Court of justice. *Ibid.*

B. *Frauds against the statute*; (a) *Parol agreements*; (b) *Agreements and conveyances fraudulent as against creditors and purchasers.*

(a) *Parol agreements.*

As to agreements within the statute, and the effect of part performance, and other circumstances, to take the case out of the statute, see ante, III. *Agreement*, E.

(b) *Agreements and conveyances fraudulent as against creditors and purchasers.*

752. Conveyances made to defeat creditors, are void by common law, as well as by statute. *Sands v. Codwise*, on appeal, 4 J. R. 536.

753. The statute of frauds, as far as it relates to fraudulent conveyances, is an exposition of the common law. *Per Spencer*, J. *Sands v. Hildreth*, on appeal, 14 J. R. 493.

754. Whether a deed fraudulent on the part of the grantor, may be set aside, though the grantee is a *bona fide* purchaser, and ignorant of the fraud? *Quære. Sands v. Hildreth*, 2 J. C. R. 35. *S. C.* on appeal, 14 J. R. 493. *And see Roberts v. Anderson*, 8 J. C. R. 371. [But see the *S. C.* on appeal, 18 J. R. 515. and XVII. *Debtor and Creditor. A. (b).*]

755. Where an insolvent debtor, against whom suits were pending, conveyed land to his brother, for an inadequate price, the whole (if any part) of which did not clearly appear to have been paid, and the conveyance was for some time kept secret, and there being no proof [*249] that it was executed when it bore date, and the grantor still continuing in possession, erecting buildings, and receiving the rents and profits; *held*, that the deed was fraudulent and void, as against a subsequent purchaser of land, at a sale under an execution against the grantor. *Sands v. Hildreth*, on appeal, 14 J. R. 493.

756. A purchaser at a sheriff's sale, under the judgment of a creditor, is entitled to the benefit of the statute of frauds, equally as the creditor himself, and may file a bill to set aside a previous fraudulent conveyance. *S. C.* 2 J. C. R. 35. *S. P.* 14 J. R. 493.

757. Fraud may be inferred from circumstances, such as the smallness or inadequacy of the consideration expressed, compared with the fair value of the property conveyed; the want of any price or consideration actually paid; the grantor continuing in possession, and exercising acts of ownership, or circumstances attending the delivery and execution of the deed, &c. *S. C.* 2 J. C. R. 35.

758. A deed brought forward, as founded

on a valuable consideration, cannot be set up as a gift or voluntary conveyance, but the party is bound by the consideration alleged. *Ibid.*

759. A deed not fraudulent at first, may become so, afterwards, by being concealed, or not pursued, by which means, creditors have been drawn in to lend their money. *Ibid.*

760. Possession of land, and taking the rents and profits, after an absolute conveyance, is evidence of fraud, within the statute, unless such possession be consistent with the terms and object of the deed, or the character of it be openly and explicitly understood. *Ibid.*

761. Where, on a sale of real estate, no security, other than the personal responsibility of the purchaser, was taken for the consideration; held, that this was a circumstance from which to infer fraud. *Hendricks v. Robinson*, 2 J. C. R. 283.

762. Subsequent transactions, as, the assignment of debts by the grantor to the grantee, to secure money advanced after the sale by the latter to the former, or the sale of personal property, to a great amount, by the grantor to the grantee, and taking his personal security only, are circumstances leading to the conclusion of fraud. *Ibid.*

763. A notice, that is to break in on the registry act, must be such as, with the attending circumstances, will affect the subsequent purchaser with fraud. *Dey v. Dunham*, 2 J. C. R. 182.

764. A notice merely sufficient to put the party on inquiry, is not enough for that purpose. *Ibid.*

765. Where a deed is set aside as constructively fraudulent, it is usual to direct a release and reconveyance, by the party claiming under the deed, with a covenant against his own acts. *Ibid.*

766. A voluntary deed, not delivered to the grantee, and kept concealed from the public for nearly eighteen years, during which time the grantor remained in possession of the premises, as owner, cannot be set up against a third person, dealing with the grantor, as owner, although he may have heard of the existence of the deed, at the time he took a mortgage. *Perce v. Dunn*, 3 J. C. R. 508. But the grantee, being the heir at law of the grantor, was allowed to redeem the mortgage. *Ibid.*

*767. To support the plea of a [*250] *bona fide* purchaser, without notice, so as to entitle the party to relief against a conveyance, alleged to be fraudulent, the party must aver and prove, not only that he had no notice of the rights of the other party, before his purchase, but that he had actually paid the purchase money before any such notice. *Jewett v. Palmer*, 7 J. C. R. 65.

768. Though he had paid the purchase money, yet if he had not, in fact paid it before notice, it is not sufficient to sustain the character of a *bona fide* purchaser for a valuable consideration without notice. *Ibid.*

[See further, as to cases of agreements and conveyances, fraudulent in respect to creditors and purchasers, and as against marital rights, *Agreement, Debtor and Creditor, Husband and Wife, Deed.*]

XXVII. FUGITIVES FROM JUSTICE.

769. It is the law of nations, to deliver up offenders charged with felonies and other high crimes, and who have fled from the country where such crimes were committed, into a foreign and friendly jurisdiction. *Matter of Washburn*, 4 J. C. R. 106.

770. It is the duty of the civil magistrate to commit such fugitives from justice, to the end that a reasonable time may be afforded for the government here to deliver them up, or for the foreign government to make application to the proper authorities here, for that purpose. *Ibid.*

771. But if such application is not made in a reasonable time, the party ought to be discharged. *Ibid.*

772. The evidence, to detain a fugitive from justice, for the purpose of being surrendered to his government, ought to be such as would be sufficient to commit him for trial, if the offence was committed here. *Ibid.*

773. The 27th article of the treaty of 1796, between the *United States and Great Britain*, was merely declaratory of the law of nations, on the subject; and since the expiration of that treaty, the general principles of the law of nations remain obligatory on the two powers. *Ibid.*

774. Therefore, the chancellor, or a judge of the Supreme Court in vacation, has jurisdiction to examine a prisoner brought before him on *habeas corpus*, and who had been taken in custody, on a charge of theft or felony committed in *Canada*, or a foreign state, from which he had fled; and if sufficient evidence appears against him, he may be remanded; otherwise, he must be discharged. *Ibid.*

*XXVIII. GUARDIAN AND [*251] WARD.

- A. *How appointed or removed.*
- B. *Guardian's power over the person and estate of his ward.*
- C. *How a guardian shall account.*

A. *How appointed or removed.*

775. A guardian appointed by Chancery, continues until the infant ward arrives at the age of twenty-one years, unless changed by order of the Court, on good cause shown. *In the matter of Nicoll*, 1 J. C. R. 25.

776. An infant, on arriving at the age of fourteen, is not entitled, as a matter of course, to change the guardian appointed by the Court. *Ibid.*

777. A surrogate has power to appoint a guardian, but has no power over him as a trustee. *In the matter of Andrews*, 1 J. C. R. 99.

778. Chancery has the same superintendence and control over guardians by statute, or testamentary guardians, as it has over guardians in *socage*. *Ibid.*

779. Every guardian, however appointed, is responsible to the Court of Chancery for his conduct, and may be removed for misbehavior. *Ibid.*

780. Chancery may discharge or change a guardian appointed by a *surrogate*; but this is not done without special cause shown. *Ex parte Crumb*, 2 J. C. R. 439.

781. A guardian to an infant, appointed in another state, is not recognized here. *Morrell v. Dickey*, 1 J. C. R. 153.

782. A father of an infant residing in another state, is not entitled to demand money here, belonging to the infant; but a guardian should be appointed here, in order to make a valid demand of the money. *Williams v. Storrs*, 6 J. C. R. 353.

783. A guardian must be appointed by Chancery, and give competent security, to be approved of by the Court, before payment of a legacy, or infant's share, by the administrator, will be ordered. *Ibid.*

784. Where a bond given by a surety for the guardian of an infant, was taken by the *surrogate*, in the name of the people, instead of the infant, the Court corrected the mistake, and considered the bond as of equal validity, as if taken in the name of the infant. *Wiser v. Blachly*, 1 J. C. R. 607.

785. It is not the usual practice of Chancery to appoint a guardian to an infant who is a *feme covert*; nor can the husband be guardian for his wife, as to the sale of the infant's lands, under the statute, by direction of the Court. (Sess. 37. c. 108. and sess. 38. c. 106.) *Matter of Whitaker*, 4 J. C. R. 378.

786. These statutes do not apply to the case of a female infant who is married. *Ibid.* They were intended to authorize a sale of the estate of infants, for their better education and maintenance, and for *their special benefit; not that the proceeds of the sale should be placed at the disposition of the husband of the infant. *Ibid.*

787. It seems, that a female ward of Chancery is not, of course, discharged from its protection by marriage, without an order of the Court for that purpose. *Ibid.*

788. A grandfather has no right under the statute, to appoint by his will, a guardian to his grandchild. *Fullerton v. Jackson*, 5 J. C. R. 278.

B. Guardian's power over the person and estate of his ward.

789. A guardian has no power or control over the real estate of his ward, further than concerns the rents and profits. *Genet v. Tallmadge*, 1 J. C. R. 561.

790. A Chancery guardian may, in his discretion, sell the personal property of his ward, for the purposes of his trust without a previous order of the Court for that purpose. *Field v. Schieffelin*, 7 J. C. R. 150.

791. So, he may lease the real estate, but cannot sell it, without the authority of the Court. *Ibid.*

792. A guardian having the legal power to sell or dispose of the personal property of his

ward, a purchaser acting fairly has a right to presume, that the guardian acts for the benefit of his ward, and is not bound to inquire into the state of the trust; nor is he answerable for the faithful application of the money, unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was, in fact, by the very transaction, applying it to his own private purpose. *Ibid.*

793. A stranger or *bona fide* purchaser is not answerable for the application of the money by a guardian. *Ibid.* [As to a *bona fide* purchaser of an executor or administrator, see *Executor and Administrator*.]

794. Where one of the sureties, given by the guardian, had become insolvent, the Court refused to order moneys belonging to the infants, and which had been paid into Court by the administrator, to be paid over to the guardian, until other and further security had been given by him. *Genet v. Tallmadge*, 1 J. C. R. 561.

795. Where certain commissioners appointed to make a partition of the real estate of an intestate, pursuant to an act of the legislature, sold parts of the estate, and paid the proceeds into this Court, pursuant to an order for that purpose, and which had been invested in public stocks, by the assistant register, the Court refused, on petition of the guardian, to order the money to be paid over, or the stocks transferred to him. *Ibid.*

796. A father, who has been appointed guardian to his infant children, by Chancery, and has given competent security to the executor or administrator under the statute, (Sess. 36. c. 75. s. 18.) and approved security to account to his children, on their coming of age, is entitled to receive legacies and distributive shares belonging to them. *Ibid.* S. P. 1 J. C. R. 3.

*797. But payment by an executor or administrator to the father, as guardian by nature merely, is at the peril of the executor or administrator, who may be compelled to pay the same over again, on the infant's arriving at full age. *Genet v. Tallmadge*, 1 J. C. R. 3. *Morrell v. Dickey*, 1 J. C. R. 153.

798. A guardian of an infant appointed in another state, has no power to receive the money or property of the infant, of the executor or administrator here. *Morrell v. Dickey*, 1 J. C. R. 153.

799. If a grandfather devises land to his grandchild, and directs the rents and profits thereof to be applied by his executors, for the education of such grandchild, the guardian of of such grandchild, appointed by the *surrogate*, is not entitled to receive or apply the rents and profits. *Fullerton v. Jackson*, 5 J. C. R. 278.

C. How a guardian shall account.

800. It seems, that a release given by a ward, six months after he comes of age, to his guardian, freely and fairly, without any fraud, misrepresentation, or undue means used for the

purpose, is valid. *Kirby v. Taylor*, 6 J. C. R. 242.

801. And such a release given by a ward, is a discharge of the surety, who had given a bond for the guardian, by order of the surrogate, and may be pleaded in bar to a suit brought by the ward against such guardian and his surety, for an account, &c. *Ibid*.

XXIX. HABEAS CORPUS.

802. Under the *habeas corpus* act, the chancellor will not discharge a prisoner, who has been committed by a justice of the peace, under the act for apprehending and punishing disorderly persons; the warrant of commitment stating that the prisoner had been duly convicted, &c., and the conviction being *prima facie*, legal and regular. *People v. Goodhue*, 2 J. C. R. 198.

803. Whether Chancery, independently of the statute, has any common law jurisdiction in such case? *Quære. Ibid*.

804. The chancellor, or a judge in vacation, has jurisdiction to examine a prisoner brought up on *habeas corpus*, and who has been taken into custody, on a charge of theft or felony committed in *Canada*, or a foreign state, from which he has fled; and if sufficient evidence appears against him, he may be remanded; otherwise, he may be discharged. *Matter of Washburn*, 4 J. C. R. 106.

[*See Infant. Fugitives from Justice.*]

[*254] *XXX. HEIR.

805. An equitable interest in land, founded on articles of agreement for the purchase, if undevise, passes to the heir; and the executor must pay the purchase money for the benefit of the heir. *Livingston v. Newkirk*, 3 J. C. R. 312. *S. P. Champion v. Brown*, 6 J. C. R. 398.

806. Where a deed to the testator comes into the possession of the executor, who does not produce it, nor account for its loss, the most favorable intendment, as to its contents, will be made for the benefit of the heir. *Ibid*.

807. A creditor may file a bill against heirs and devisees for an account, and for a sale and distribution of the real estate descended or devised, to make good any deficiency of personal assets. *Thompson v. Brown*, 4 J. C. R. 619.

808. It is no objection to the sale of real estate for the payment of debts, that the heirs are infants. *Ibid*.

809. But the real estate will not be directed to be sold, until the debts and the deficiency of the personal estate have been duly ascertained. *Ibid*.

810. Where there is a decree for the sale of assets descended, it enures for the benefit of all the creditors, and draws the entire distribution of the assets into the Court of Chancery. *Ibid*.

811. If an heir redeem land by paying off a mortgage, the widow is not entitled to claim her dower, without contributing towards the sum so paid by the heir. *Swaine v. Perine*, 5 J. C. R. 482.

812. Where there are several heirs, and a judgment creditor collects the whole debt from a part of the inheritance allotted to one of them, the others are bound to contribute. *Clowes v. Dickenson*, 5 J. C. R. 235.

813. An account taken before a master, by order of the Court, on petition of an executrix, when no suit was pending, is not binding on the infant heirs. *Evertson v. Tappen*, 5 J. C. R. 497.

814. When an executrix suffers land, of which the testator died seised, to be sold under a mortgage, and becomes the purchaser thereof, in her own right, and sells it, she is accountable to the heirs for the proceeds of the sale. *Ibid*.

815. An heir may appear before the surrogate, and oppose the application of an executor to sell the real estate, on the ground of a deficiency of personal assets to pay debts. *Moers v. White*, 6 J. C. R. 360.

[*See Executors and Administrators.*]

*XXXI. HUSBAND AND WIFE. [*255]

A. (a) *Marriage*; (b) *Settlements before marriage*; (c) *Voluntary settlements*.

B. *Husband's interest in his wife's estate; and his power over it; and how the wife's equity to a suitable provision out of it will be secured to her.*

C. *Of the wife's power over her separate estate; how far she is considered as a feme sole in regard to it, during cohabitation; and of her consent to the acts of her husband relative to her separate property; and her appointment in his favor.*

D. *Of the acquisitions of the wife after marriage.*

E. *Of dower; title of the widow; of what lands and how endowed; of her remedy; election; and what is a bar to her right.*

F. *Adultery; divorce; alimony.*

G. *Supplicavit.*

A. (a) *Marriage*; (h) *Settlements before marriage*; (c) *Voluntary settlements*.

(a) *Marriage.*

816. Where the defendant married an infant under twelve years of age, who immediately declared her ignorance of the nature and consequences of the marriage, and her dissent to it; Chancery, on a bill filed by her next friend, ordered her to be placed under its protection, as a ward of the Court, and forbade all intercourse or correspondence with her by the defendant, under pain of contempt. *Aymar v. Roff*, 3 J. C. R. 49.

817. Rights dependent on the nuptial contract are governed by the *lex loci contractus*. *Decouche v. Savetier*, 3 J. C. R. 190.

818. Marriage is a good, valuable, and meritorious consideration, for an *ante-nuptial* contract. *Bradish v. Gibbs*, 3 J. C. R. 523. *S. P. Verplank v. Sterry*, 12 J. R. 536.

819. Though a marriage with a *lunatic* is absolutely void, yet, as well for the sake of the good order of society, as the quiet and relief of the party, its nullity should be declared by the decision of some Court of competent jurisdiction. *Wightman v. Wightman*, 4 J. C. R. 343.

820. And, Chancery possessing an exclusive jurisdiction over cases of *lunacy*, and *matrimonial causes*, is the proper, and, indeed, since there are no ecclesiastical Courts having cognizance of such causes, the only tribunal to afford relief in such a case, and to sustain a suit instituted to pronounce the nullity of the marriage. *Ibid.*

821. Therefore, where a person, insane at the time of her marriage, after her return to a lucid interval, refused to ratify or consummate it, and filed her bill to annul it, the Court declared the marriage null and void, and the parties absolved from its obligations. *Ibid.*

*822. So, where a marriage is unlawful and void *ab initio*, being contrary to the law of nature, as between persons, ascendants or descendants, in the *lineal* line of consanguinity, or between *brothers and sisters*, in the *collateral* line, Chancery will declare such a marriage, in a suit instituted for that purpose, null and void. *Ibid.*

823. Whether Chancery, there being no *statute* regulating marriages, or defining the prohibited degrees which render them unlawful, will go farther, and declare marriages void between persons in other degrees of *collateral* consanguinity or affinity? *Quære. Ibid.*

(b) *Settlements before marriage.*

824. Where a woman, before her marriage, executed a deed, to which her intended husband was a party, by which she conveyed all her estate, real and personal, to C. *in trust*, to her use, until her marriage, and then to such persons and uses, as she, with the consent of her intended husband, should appoint by deed, or by her last will, without his consent, and the wife retained the deed during life, and executed a deed to her husband's brother, and also made a will, disposing of her estate, &c.; it seems, that this deed, though it might not be legally valid, on account of some technical objection to its delivery, would be good evidence of the agreement, and binding on the husband. *Methodist Episcopal Church v. Jaques*. 1 J. C. R. 65. [See *S. C.* on appeal, 17 J. R. 548, where the Court of Errors decided, that the deed, under the circumstances, was valid; the husband having, by repeated and solemn acts, recognized the deed, could not be allowed to object to its validity on the ground of its not having been delivered.]

825. Where a deed of marriage settlement was duly executed by the parties, and laid on the table, and the wife, the *cestui que trust*, took it up, and kept it in her possession until her death; *held*, under the circumstances, that

there was a good and valid delivery of the deed. *Ibid.*

826. Where, in a deed of settlement, the husband, after covenanting to allow his wife to enjoy her separate property to her own use, during coverture, and that she might convey the same, &c., and that she should enjoy the rents and profits of the real estate, as if she were a *feme sole*, the husband thereby releasing all his marital rights in and over the same, &c.; *held*, that the release was to be construed with the words immediately preceding, in regard to the rents and profits, &c., and operated only as to his rights during coverture, and did not affect his rights as survivor of his wife, in regard to her personal estate. *Stewart v. Stewart*, 7 J. C. R. 229.

(c) *Voluntary settlements.*

827. A voluntary settlement, fairly made, is always binding in equity, upon the grantor, unless there be clear and decisive proof, that he never intended to part with the possession of the deed; and if he retain it, there must be other circumstances, besides the mere fact of his retaining it, to [*257] show that it was not intended to be absolute. *Southerby v. Arden*, 1 J. C. R. 240.

828. A voluntary settlement, without power of revocation, cannot be revoked. *Ibid.*

829. A voluntary conveyance or settlement, though retained by the grantor in his possession until his death, is good. *Bunn v. Winthrop*, 1 J. C. R. 329.

830. As between the parties, a voluntary actual transfer, by deed, of a chattel interest, is valid, without any consideration appearing. *Ibid.*

831. A voluntary conveyance may become valid, by matter *ex facto*, or by some valuable consideration intervening. *Sterry and wife v. Arden*, 1 J. C. R. 261. *S. P. Verplank v. Sterry*, on appeal, 12 J. R. 536.

832. Marriage is such a valuable consideration; and if the grantee, in a voluntary deed gains credit by the conveyance, and a person is induced to marry her on account of the provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary, and becomes good against a subsequent *bona fide* purchaser of the grantor, for a valuable consideration. *Ibid.*

833. And it makes no difference whether any particular marriage was in contemplation, at the time of the execution of the voluntary deed, or not. *Ibid.*

834. Whether a voluntary conveyance, by a father in affluent circumstances, and not indebted at the time, to trustees, for the use of his daughter for life, and in case of her death to her children, fairly made, without any fraudulent intention, is not good against a subsequent *bona fide* purchaser, for a valuable consideration, with notice of such deed? *Quære. S. C.* on appeal, 12 J. R. 536. *S. C.* 1 J. C. R. 261.

[How far post-nuptial voluntary settlements are valid as against creditors. See *Agreement, Debtor and Creditor.*]

B. *The husband's interest in his wife's estate, and his power over it; and how the wife's equity to a suitable provision out of it will be secured to her.*

835. Where a husband asks the aid of the Court, to enable him to get possession of his wife's property, he must do what is equitable, by making a reasonable provision out of it, for the maintenance of her and her children. *Howard v. Moffatt*, 2 J. C. R. 206. [S. P. *Glen v. Fisher*, 6 J. C. R. 33.]

836. And the rule is the same, whether the husband applies to the Court himself, or a suit for the wife's debt, legacy, portion, &c. is brought by his legal representatives. *Ibid.* And the extent of the provision will depend on the circumstances of the case. *Ibid.*

837. The practice is, for the husband, on a reference to a master, to make proposals of a settlement, and on the coming in of the report, the Court judges of its sufficiency. *Ibid.*

*838. But if the husband can lay [*258] hold of his wife's property, without the aid of the Court, he may do it, the Court having no power to coerce a settlement, by interfering with his remedies at law. *Ibid.*

839. Where the husband and wife sue for the wife's legacy, the Court will direct a suitable provision to be made for her out of it, for the maintenance of her and her children, before decreeing payment of the legacy to the husband. *Glen v. Fisher*, 6 J. C. R. 33.

840. The Court will lay hold of the property of a wife which may be within its power, for the purpose of providing maintenance for her when she is abandoned by her husband, or prevented, by his ill treatment, from cohabiting with him. *Dumond v. Magee*, 4 J. C. R. 318.

841. Where the husband abandoned his wife, and married another woman, with whom he continued to live for twenty years; *held*, that he had forfeited all just claim to his wife's distributive share of personal estate inherited by her. *Ibid.*

842. And the Court, in such case, directed the principal of the wife's share to be brought into Court, and placed at interest; and, after her death, the principal to go to her children, by her lawful husband, or to their representatives; she having, after being abandoned by her husband, upon the report and belief of his death, married another. *Ibid.*

843. If a husband appoints an attorney, to recover a debt, legacy, &c., due to his wife, and the attorney receives the money; or if the husband mortgages the wife's interest, or assigns it, absolutely, for a valuable consideration; or if he recovers it by a suit at law, in his own name, or releases the debt; in these cases, the survivorship of the wife ceases. *Schuyler v. Hoyle*, 5 J. C. R. 196.

844. Where the husband and wife, and other heirs of F., who died intestate, in *England*, made a joint power of attorney to V., authorizing him to take out letters of administration there on the estate of F., to collect the property, &c., to pay over to the parties their

distributive shares respectively, &c., and after V. had taken out administration, but before he had received the property, or paid over the entire share, the husband died: *decree*, that the wife was entitled in her right, as survivor, to that portion of her distributive share which had not been actually paid over to her husband. *Ibid.*

845. The equitable right of the wife to personal property in the hands of her trustees, cannot be disposed of by her husband, without making a suitable provision for her. *Kenny v. Udall*, 5 J. C. R. 464.

846. This *equity of the wife* stands on the peculiar doctrine and practice of the Court of Chancery, rather than on any general reasoning. *Ibid.*

847. The *wife's equity*, as it is called, attaches upon her personal property whenever it is subject to the jurisdiction of the Court, and is the object of a suit, into whose soever hands it may have come, or in whatever manner it may have been transferred. *Ibid.* [S. P. *Haviland v. Myers*, 6 J. C. R. 25.]

848. The equity of the wife is equally binding, whether the transfer of the property be by operation of law, or by the act of the party to general assignees or to an individual, or whether the particular *trans- [*259] fer was voluntary, or made upon a good and valuable consideration. *Ibid.* [See also, *Haviland v. Myers*, and *Haviland v. Bloom and Myers*, 6 J. C. R. 25. and 178. S. P.]

849. It makes no difference whether the application to the Court, in order to obtain possession of the wife's property, be made by the husband, or his representatives, or assignees; or whether it be by the wife or her trustee, seeking a provision out of it. *Ibid.*

850. The Court may, in its discretion, give the whole, or a part only, of the property to the wife for her maintenance, according to the circumstances of the case. *Ibid.* [See also, *Haviland v. Bloom and Myers*, 6 J. C. R. 178.]

851. Where the husband lives with the wife, and maintains her, and has not misbehaved, the course is to allow him to receive the interest and dividends on her property. *Ibid.*

852. As, where bank stock, settled by a father on his infant daughter, placed in the hands of the assistant register of the Court, as trustee, to execute the trusts declared in her favor by the deed of settlement, was, within one year after her marriage, and while she was an infant, sold and transferred by her husband and her, for a valuable consideration, the assignee knowing at the same time of the deed of settlement, and the infancy of the wife, the assignment, on a bill filed by the wife against her husband and the assignee, was declared null and void, so far as respected the wife's equity; and, the husband having misbehaved himself, the dividends on the stock were directed to be paid to the wife herself, until she came of age, with liberty for her to apply for such suitable provision out of the property, as might be determined, on the usual reference to a master. *Ibid.*

853. If a husband survives his wife, and

dies without administering on her property, or before completing the administration, and the wife's next of kin administers, such administrator is a trustee for the representatives of the husband. *Stewart v. Stewart*, 7 J. C. R. 229.

854. The husband may be considered as the next of kin to his wife, by relation of marriage, and as taking her personal property, in case of her death, as next of kin; but whether so considered or not, her personal property, remaining after her death, goes to her husband, either *jure mariti*, or as next of kin. *Ibid.*

855. Where a marriage settlement gives the wife the control of her separate estate during the coverture, and a power of appointment with the consent of her husband, but contains no provision for the disposition of her personal property, in the event of her death and in default of appointment, and she dies without making any appointment, the property goes to the husband, as survivor, as if no such settlement had been made. *Ibid.*

856. In a suit by the husband for the wife's distributive share, the wife must be made a party. *Schuyler v. Hoyle*, 5 J. C. R. 196.

857. Where a bill is filed by the husband and wife, for a demand in right of the wife, and the husband dies, the suit does not abate, but the action survives to the wife. *McDowell v. Charles*, 6 J. C. R. 132.

[*260] *C. Of the wife's power over her separate estate; how far she is considered as a *feme sole* in regard to it, during coverture; of her consent to the acts of her husband in relation to her separate property, and her appointment in his favor.

858. A *feme covert*, with regard to her separate estate, is to be regarded as a *feme sole*, and may dispose of her property, without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate. *Jaques v. Methodist Episcopal Church*, on appeal, 17 J. R. 548. *Contra*, S. C. 1 J. C. R. 450. 3 J. C. R. 77.

859. And, it seems, that though a particular mode of disposition be specifically pointed out, in the instrument or deed of settlement, it will not preclude her from adopting any other mode of disposition, unless there be negative words, restraining her power of disposition, except in the very mode pointed out. *Ibid.* *Contra*, S. C. 3 J. C. R. 77.

860. Therefore, if she enters into any agreement, clearly indicating her intention to affect by it her separate property, a Court of equity, if there be no fraud, or unfair advantage taken of her, will apply her separate property to satisfy such engagement. *Ibid.*

861. And she may give her property to her husband, as well as to any other person, if her disposition of it be not the result of flattery, or force, or improper treatment. *Ibid.*

862. As, where the wife agreed to defray the expenses of the family establishment, out of her separate estate; held, that the husband not only was not accountable for the moneys received by him from the wife, and expended

for that purpose, but that he was to be allowed for all advances made by him out of his own moneys, for that object. *Ibid.*

[Note.—In the same case, 3 J. C. R. 77. the chancellor went into a very full examination of the decisions of the *English* Chancery, on the question, how far the wife was to be considered as a *feme sole* in regard to her separate property, settled to her separate use; and he concluded that the *English* decisions were so floating and contradictory, as to leave the Court here at liberty to adopt the true principles of these settlements, which he stated to be, that the wife, as to her separate property, is to be deemed a *feme sole*, *sub modo*, only, or to the extent of the power clearly given by the settlement. That her incapacity is general, and the exception was to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of the law; that the intention of the settlement was to govern, and to be collected from the terms of the instrument; and her power of disposition must be exercised according to the mode prescribed in the deed or will, under which she becomes entitled to the property. That, therefore, when she has a power of appointment by will, she cannot appoint by deed; nor, when she is empowered to appoint by deed, is the giving a bond, note, or parol promise, without reference to the property, or making a parol gift, such an appointment; nor when it is said, in the settlement, that she is to receive from the trustee the income of her property, as it may, from time to time, become due, can she, by anticipation, dispose at once of the whole income. But the decision of the Court of Errors, in the same case, does not confirm these restrictions, farther than they are specified, in express and positive terms, in the deed of settlement.]

863. Where the husband is permitted by the wife to have the management of her separate property secured to her by marriage settlement, to receive her rents, &c., very strict proof of his payment to her, or for her use, or of his having settled with her, during her life, is not required; but from the confidential nature of the connection, the most favorable presumptions are indulged towards him. S. C. 3 J. C. R. 17.

864. And, it seems, that parol declarations of the wife, as to debts due to her, received by the husband, or the rents and profits of her real estate, are admissible in favor of the husband. S. C. 17 J. R. 548. *Contra*, 3 J. C. R. 77.

865. If a *feme covert*, having a separate estate secured to her by settlement, provides by will for the payment of her funeral expenses, the husband is not to be charged with them; *aliter*, if no such provision had been made. S. C. 3 J. C. R. 77.

866. Where, by a marriage settlement, the whole real and personal estate of the wife is secured to her separate use, the husband is, notwithstanding, bound to maintain his wife and family during the coverture; but the consent or agreement of the wife, during coverture, that the expenses shall be borne by her

separate estate, is valid. *Ibid.* S. C. 17 J. R. 548. *Contra*, S. C. 1 J. C. R. 450.

867. The husband is entitled to an allowance for moneys expended in necessary reparations of the wife's estate, and for any specific appropriation of her property, with her assent and direction, and for her benefit. *Ibid.*

868. Where husband and wife agreed by parol, that he should purchase a lot of ground in her name, and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seised in her own right, and which should be sold for that purpose; and, the husband having executed the agreement on his part, the wife died, leaving children, to whom the property in both lots descended, before the contract was carried into execution on the part of the wife; *decreed*, that the agreement should be carried into effect; and the lot was ordered to be sold, and a conveyance to be executed by the infant children, by their guardian *ad litem*; and their father (the plaintiff) and the master was directed to join in the conveyance to the purchaser; and the plaintiff to be reimbursed the advances made by him out of the moneys arising from the sale. *Livingston v. Livingston*, 2 J. C. R. 537.

869. A husband and wife may contract, for a *bona fide* and valuable consideration, for a transfer of property from him to her. *Ibid.* But the conveyance must be for the purpose of making a suitable provision for her. *Shepard v. Shepard*, 7 J. C. R. 57.

870. Though such conveyance from the husband to the use of his wife is presumed, in the first instance, to be intended as an advancement and provision for her, yet that presumption may be rebutted by parol proof. *Ibid.*

*871. A *feme covert* may mortgage her separate property for her husband's debts. *Demarest v. Wynkoop*, 3 J. C. R. 129.

872. So she may execute a valid power to sell, contained in the mortgage, in case of default of payment, pursuant to the statute. *Ibid.*

873. In a mortgage by husband and wife, of the wife's separate property, she may, if she choose, reserve the equity of redemption to the husband alone, who may sell and dispose of it. *Ibid.*

874. A *feme covert* may execute, by a will in favor of her husband, a power given or reserved to her, while *sole*, over her real estate. *Bradish v. Gibbs*, 3 J. C. R. 523.

875. As, where the wife, before marriage, entered into an agreement with her intended husband, that she should have power, during the coverture, to dispose of her real estate by will, and she, after the marriage, devised the whole of her estate to her husband; this was held to be a valid disposition of her estate in equity; and the heirs at law of the wife were decreed to convey the legal title to the devisee. *Ibid.*

876. A will made by a *feme covert*, in execution of a power contained in an *ante-nuptial* contract, still retains all the properties of a will, and is revocable at the pleasure of the wife. *Ibid.*

877. Though the will does not refer to the

ante-nuptial contract, yet it is a good execution of the power, if it can have no operation without it. *Ibid.*

878. And to enable a *feme covert* to dispose of her real estate in equity, it is not necessary that the legal estate should be vested in trustees; but an agreement before marriage, with her intended husband, that she should have power to dispose of her real estate, during coverture, will enable her to do so. *Ibid.*

879. A husband, in regard to a devise to him by his wife, in execution of a power, is not a volunteer; the marriage is a good, valuable, and meritorious consideration. *Ibid.*

880. If there is no provision in a marriage settlement for the disposition of the wife's personal estate, in the event of her death, and in default of her appointment, and she dies without making any appointment, the property goes to the husband, as survivor, in the same manner as if no settlement had been made. *Stewart v. Stewart*, 7 J. C. R. 229.

D. Of the acquisitions by the wife, after marriage.

881. Where land is conveyed to husband and wife, they do not take as *joint tenants*, nor as *tenants in common*, but both are seised of an entirety; neither can sell without the consent of the other, and the survivor takes the whole; this case not being within the provision of the act relative to joint tenancies. (Sess. 9. c. 12. s. 6.) *Rogers v. Benson*, 5 J. C. R. 431.

882. A deed by husband and wife of their joint estate, in trust, to pay all the debts of the husband, and the residue to the use of the wife and her heirs in fee, is a valid conveyance, being founded on a valuable *and meritorious consideration, and can- [*263] not be impeached by a subsequent purchaser, without notice of the trust. *Ibid.*

883. A testator, by his will, dated September 25, 1810, gave to his daughter, during her separation from W. C. her husband, one thousand dollars *per annum*, which he charged on his real estate. W. C. and his wife were living separate when the will was made, but cohabited together in February, 1815, (when the testator made a codicil to his will, only changing the executors,) and also at the time of the testator's death, but separated immediately after his decease, and continued to live separate until within a short time previous to filing the bill by W. C. and his wife, against the executors of the testator, for the legacy; *decreed*, that the plaintiffs were not entitled to the legacy, as it was to be inferred that they separated for the sole purpose of entitling themselves to it, and the bill was dismissed with costs. *Cooper and wife v. Remsen and others*, 3 J. C. R. 382.

884. Afterwards, upon the same clause in the will, *held*, that a voluntary separation of the wife from her husband would not entitle her to the annuity, for she could establish no claim on her own violation of conjugal duty. *Cooper and wife v. Clason and others*, S. C. 3 J. C. R. 521.

885. On the same clause, in the same case, *held*, that the legacy depending on a separation,* which existed at the time of the execution of

the will, between the legatee and her husband, and with a view to that fact, the condition annexed was lawful and proper; and the separation having ceased when the will took effect by the death of the testator, there was an end of the legacy; and a voluntary separation after the death of the testator would not entitle her to it; and even if it had been involuntary, it would not have satisfied the terms of the will. *S. C. 5 J. C. R. 459.*

886. Though a deed from a husband to his wife is void in law; yet where the conveyance from the husband is for the purpose of making a suitable provision for the wife, as, giving her a deed for certain lands, parcel of his estate, during her widowhood, equity will lend its aid to enforce the provision; especially, when the wife had, by an ante-nuptial agreement, released all right of dower to arise under the marriage, on the agreement of the husband, that she should be endowed of all lands acquired by them during the marriage. *Shepard v. Shepard, 7 J. C. R. 57. [See Livingston v. Livingston, 2 J. C. R. 537.]*

887. And where a husband conveyed land to his son, on his covenanting to pay an annuity to his mother during her widowhood, a release of the covenant by the son to his father is fraudulent and void as against the wife, who may, after the death of her husband, maintain an action against the son on the covenant so made for her benefit. *Ibid.*

[*264] *E. Dower; title of the widow; of what lands, and how endowed; remedy; election; bar.

888. A widow of a mortgagor being entitled at law to dower, subject to the mortgage; held, that she was entitled to the use of one third of the surplus proceeds of the sale of the mortgaged premises, remaining in Court after satisfying the mortgage debt, as her equitable dower; and having answered and submitted to a decree, her costs were ordered to be paid out of the other two thirds. *Tabele v. Tabele, 1 J. C. R. 45.*

889. Where a testator gave to his wife 500 dollars, "to be left in the hands of his executors to be paid to her, for her support, at any time, or at all times, as her need might require," and also, gave her what household goods she needed; and after bequeathing pecuniary legacies to her grandchildren, directed his farm, &c., to be sold by his executors, who sold it for 6000 dollars; and the wife, after the death of the testator, accepted the legacy, which was paid to her out of the proceeds of the farm; decreed, that the legacy was not, according to the fair construction of the will, given in lieu or bar of dower, but as a mere pecuniary bequest; that the acceptance of the legacy by the wife did not affect her right of dower; and that the purchaser of the farm took it subject to that right. *Adsit v. Adsit, 2 J. C. R. 448.*

890. Where a legacy to the wife is not declared, in express terms, to be in lieu of dower, it will not be so intended, unless such intention can be deduced, by clear and manifest

implication, from the provisions of the will, so that the claim of dower would be inconsistent with the will, or repugnant to the dispositions made by the testator; it must, in fact, if admitted, disturb and defeat the will. *Ibid.*

891. Where a testator, possessed of real and personal estate, devised to his wife his household furniture, &c., and "a comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors," &c.; held, that though the charge of a comfortable support and maintenance might fall upon the real as well as the personal estate, yet, there being no express declaration of the testator on the subject, nor any thing inconsistent in the two claims, it did not affect the widow's right of dower, and she was not, therefore, to be put to her election. *Smith v. Kniskern, 4 J. C. R. 9.*

892. On a bill for dower, the widow is entitled to the value of the *mesne profits*, arising from the use of the undivided third of the premises of which her husband died seised, from the death of her husband, exclusive of the improvements since made thereon. *Hazen v. Thurber, 4 J. C. R. 604. [And see Swaine v. Perine, 5 J. C. R. 482.]*

893. And where there were several heirs and terretenants, the amount was directed to be assessed upon them respectively, according to the time of their enjoyment of the premises. *Ibid.*

894. But as the widow had never demanded her dower, and there was no opposition or vexation on the part of the defendants, she was denied costs. [*265]

Ibid. *S. P. Hale v. James, 6 J. C. R. 258.*

895. Chancery follows the doctrine of the Courts of law, that a mortgagor in possession of land mortgaged in fee, before foreclosure, has, in regard to all the rest of the world, except the mortgagee, the legal seisin; and, in case of his death, while in possession, and before foreclosure, his widow is entitled to dower in the land mortgaged, and of which she cannot be deprived by a purchaser of the equity of redemption of her husband; and, therefore, she will be allowed her dower out of the proceeds of the sale of the mortgaged premises. *Titus v. Neilson, 5 J. C. R. 452. S. P. Tabele v. Tabele, 1 J. C. R. 45.*

896. As, where the wife of a mortgagor joined in a mortgage in fee, and the mortgagor, afterwards, executed a second mortgage, in which she did not join, and there was a decree for a sale, on a bill filed by the first mortgagee, but before the sale, the mortgagor died; decreed, that the widow was entitled to her dower out of the surplus of the proceeds remaining after the first mortgage debt was satisfied. *Ibid.*

897. A release by the husband of his equity of redemption in lands mortgaged, not executed by the wife, though she joined in the mortgage, is no bar to her claim of dower in the equity of redemption, or remaining interest of the husband in the land, after satisfaction of the mortgage. *Swaine v. Perine, 5 J. C. R. 482.*

898. She is, however, bound to contribute ratably to the redemption of the mortgage. *Ibid.*

899. Where the heir has redeemed the land, by paying off the mortgage, and the widow files her bill against him for dower, the mode in which she is to contribute, is, by paying, during life, to the heir, the one third of the interest on the amount paid by him, to be computed from the time of such payment, or the value of such an annuity, according to the circumstances of the case, to be computed by the master. *Ibid.*

900. After the death of a testator, who had, in his life-time, purchased land, and given a bond and mortgage for the purchase money, his widow, who was sole executrix, and empowered to sell the estate to pay debts, &c., conveyed the estate to S. M., who gave his bond and mortgage for the same sum, which were accepted by the first mortgagee, in lieu of the testator's bond and mortgage, which were thereupon given up and cancelled; decreed, that the widow, in her account, as executrix, with the heirs, was not to be allowed the estimate of the value of the dower in the land, as the heirs derived no benefit from the sale. *Evertson v. Tappen*, 5 J. C. R. 497.

901. Where a widow and executrix was empowered to sell the real estate of the testator, &c., and to release her dower on such sale, and to retain the value thereof out of the proceeds; decreed, that the dower was to be computed according to the value of the property at the time of the death of her husband. *Ibid.*

902. An executrix suffered land of which the testator died seised, subject to a mortgage, to be sold under the mortgage, and became the purchaser thereof; decreed, that she [*266] was liable to account to the heirs for the proceeds of the sale; but as widow of the testator, she was entitled to her dower out of the proceeds, subject to her ratable contribution towards the extinguishment of the mortgage debt. *Ibid.*

903. Though a widow's remedy for dower is, *prima facie*, in a Court of law, yet when the title is admitted, and impediments are thrown in the way of her proceeding at law, Chancery will sustain a bill filed by her for dower. *Suzanne v. Perine*, 5 J. C. R. 482.

904. An ante-nuptial agreement that the intended wife shall exclusively enjoy property held by her as widow and administratrix of her former husband, and which is not expressed to be in lieu of dower, is no bar to her claim for dower in the estate of her second husband. *Ibid.*

905. A conveyance of land by the husband, during the coverture, in trust for his wife, to whom the trustee afterwards conveyed it, but which was not intended or accepted in lieu of dower, is no bar to her claim of dower, after his death. *Ibid.*

906. A deed given by the husband, just before his second marriage, to his daughter, without any consideration, and kept secret until after the marriage, is fraudulent and void, as against the wife's claim of dower. *Ibid.*

907. It seems, that the statute of limitations

(Sess. 24. c. 188.) does not apply to the action of dower, as, by the statute relative to dower, (Sess. 10. c. 168.) the widow may, at any time during her life, demand her dower, and the tenant of the freehold has the means of coercing an assignment of dower. *Jones v. Powell*, 6 J. C. R. 194.

908. Where land is aliened by the husband, the widow's dower is to be taken according to the value of the land, at the time of alienation. *Hale v. James*, 6 J. C. R. 258.

909. If the husband mortgages the land, but continues in possession, and afterwards releases the equity of redemption to the mortgagee, the time of the release of the equity of redemption is to be deemed the time of alienation, at which the value of the land is to be taken, and which is to be estimated without regard to the subsequent improvements made by the purchaser. *Ibid.*

910. If the husband dies seised, the widow takes her dower, at the value at the time it is assigned to her by the heir. *Ibid.*

911. Whether the widow is entitled to the advantage of an increase of value arising from extrinsic causes, as a discovery of a mine, &c.? *Quære. Ibid.*

912. Where it is agreed, between the widow and the tenant, that he shall allow her a yearly sum, instead of having the dower assigned to her, according to law, the interest of one third of the value of the premises is the proper measure of the annuity; but where the house and buildings on the land constituted the chief value of the premises, one per cent. was allowed, as a compensation to the tenant, on account of the necessary repairs, and the risk of loss by fire. *Ibid.*

F. Adultery; divorce; alimony.

913. Where a bill for a divorce, on the ground of adultery, is taken *pro confesso*, or the defendant in his answer admits the adultery charged, and a [*267] reference is made to a master, under the third section of the act concerning divorces, (Sess. 36. c. 102. 2 N. R. L. 197, 198.) to take the proof of the adultery, and to report thereon, &c.; by the proof to be taken by the master, is meant legal proof generally; and he may, therefore, receive proof of the confession of the defendant, which must, however, be connected with and supported by other proofs, before the Court will decree a divorce *a vinculo matrimonii*. *Betts v. Betts*, 1 J. C. R. 197.

914. But by the 51st rule of the Court of Chancery, June, 1806, evidence of the confessions of the defendant is not admissible at all, on a *signed issue*, awarded to try the fact of adultery. *Ibid.*

915. But whether that rule does not go too far in rejecting this species of proof altogether? *Quære. Ibid.*

916. To give the Court jurisdiction to decree a divorce *a vinculo matrimonii* on the ground of adultery, when the marriage was solemnized abroad, it must clearly and distinctly appear from the bill, that both parties

were inhabitants of this state, at the time the adultery was committed. *Mix v. Mix*, 1 J. C. R. 204.

917. To maintain a bill for a divorce, the plaintiff must be an actual and *bona fide* inhabitant of the state, at the time of the adultery committed, and at the time of exhibiting the bill. *Williamson v. Parisien*, 1 J. C. R. 389.

918. Where the plaintiff, a native of Scotland, married a wife in New-York, in 1780, and left her in 1784, and went to the West Indies, and continually resided abroad, (excepting only a short visit to New-York in 1792,) until the time of filing the bill for a divorce, in 1813, a period of 28 years; held, that he was not an inhabitant of the state, within the words or intent of the act. *Ibid.*

919. Though the adultery is fully ascertained, a decree of divorce *a vinculo matrimonii* is not granted of course in all cases. *Williamson v. Williamson*, 1 J. C. R. 488.

920. It will not be decreed on the consent of the parties. *Ibid.*

921. If the husband, subsequently to the adultery of his wife, cohabits with her, with knowledge of her guilt, it is a remission of the offence, and a bar to a divorce. *Ibid.*

922. Lapse of time, also, or long acquiescence of the husband, without any disability on his part to sue, will be a bar to a prosecution for a divorce. *Ibid.*

923. As, where a husband having been absent from his wife eight years, in a foreign country, and she supposing him to be dead, married another person; and the first husband afterwards returned, and finding his wife cohabiting with a second husband, without taking any steps to obtain a divorce, went abroad again, and continued absent twenty years, and then returned again, and filed a bill for a divorce against his wife, who was living with her second husband, by whom she had several children; the Court, though the counsel of both parties consented to a decree, dismissed the bill with costs. *Ibid.*

924. Pending a bill by a wife for a divorce, to which the defendant had demurred, and before a hearing on the demurrer, on the petition of the plaintiff, setting forth that she was abandoned by the defendant, and wholly

destitute of the means of support, [***268**] and for carrying on the *suit, the Court, under the circumstances of the case, ordered an allowance of thirty dollars, to be paid by the defendant to the plaintiff, monthly, or to the register, for her use, until the further order of the Court. *Mix v. Mix*, 1 J. C. R. 108.

925. Where a wife had filed a bill against her husband for *alimony*, &c., and it appeared that he had abandoned her, without any support, and threatened to leave the state, the Court, on petition of the wife, granted a writ of *ne exeat republica* against him. *Denton v. Denton*, 1 J. C. R. 364.

926. Pending a bill of divorce by a wife against her husband, and before answer, the Court will allow a monthly sum to the wife, as *alimony*, and also a sum to be paid to her,

by her husband, towards defraying the expenses of the suit. *Ibid.*

927. On a bill by the wife against the husband for a divorce *a mensa et thoro*, on the ground of cruel usage, and for maintenance, the Court, under the circumstances of the case, having a due regard to the age and expectations of the parties, decreed a divorce for five years; that the plaintiff, in the mean time, should have the custody and care of the child, a daughter; and that the defendant should pay 100 dollars a year, in half-yearly payments, the one half for the maintenance of the mother, and the other for that of the child; it appearing from the master's report, that the defendant was worth about 3500 dollars, the annual income of which was about 100 dollars; and the defendant was directed to pay the costs of the suit. *Bedell v. Bedell*, 1 J. C. R. 604.

928. Licentious conduct and misbehavior of the wife before the alleged acts of ill treatment or cruel usage by her husband, will destroy her claim for *alimony* or maintenance. *Ibid.*

929. The 12th section of the act concerning divorces, (Sess. 36. c. 102.) relative to security for costs to be given by the plaintiff, does not apply where a bill is filed on the ground of adultery, though the bill contains a distinct charge of cruel and inhuman treatment. *Pomeroy v. Pomeroy*, 1 J. C. R. 606.

930. It seems, that the charges of adultery and of cruel treatment, cannot both be contained in the same bill. *Ibid.*

931. Though the absence of five years of one of the married parties from the state, may exempt the other, who marries again, from the penal consequences of *bigamy*, under the provision of the act, (1 N. R. L. 113.) yet the second marriage is null and void; for nothing but the death of one of the parties, or the judicial decree of a competent Court, can dissolve the marriage tie. *Williamson v. Parisien*, 1 J. C. R. 389.

932. On a bill for a divorce, a feigned issue to try the truth of the charge of adultery, will not be awarded, unless the adultery is specifically charged, and with that degree of certainty as to time, place, &c., as may enable the defendant to meet the fact at the trial. *Codd v. Codd*, 2 J. C. R. 224.

933. Pending proceedings for a divorce, the Court, under the circumstances of the case, ordered, that the wife should have the exclusive custody, care and direction of the children; and that the husband *should not be permitted to visit [***269**] them, except under the direction of a master. *Ibid.*

934. Where a bill was filed by a wife against her husband, charging him with ill usage, and neglect to provide for her support, and that he was endeavoring to get possession of a legacy left her by her father, the Court, under the 10th section of the act, (Sess. 36. c. 102.) ordered the legacy to be paid into Court, and the money to be put out at interest by the register, in her name, and the interest to be paid to her separate order, from time to time, &c., until

the further order of the Court. *Turrel v. Turrel*, 2 J. C. R. 391.

935. On a bill by a husband for a divorce, the wife will not be allowed alimony, nor will the Court, on her petition, order the husband to advance money to enable her to defend the suit, until she has, by her answer, disclosed the nature of her defence. *Lewis v. Lewis*, 3 J. C. R. 519.

936. Where a divorce, *a mensa et thoro*, for cruel and inhuman treatment of the wife by the husband, is decreed, the separation will be made perpetual, with a *proviso*, that the parties may, at any time, by their mutual and voluntary act, apply to the Court for leave to be discharged from the decree. *Barrere v. Barrere*, 4 J. C. R. 187.

937. The wife, under the circumstances of that case, was allowed to retain the custody of an infant son, subject to the future order and direction of the Court; and the husband was directed to pay a certain sum for the support of his wife and child, and the costs of the suit. *Ibid.*

938. A husband cannot file a bill for a divorce *a mensa et thoro*, on the ground of cruelty, desertion, or improper conduct of his wife. *Van Veghten v. Van Veghten*, 4 J. C. R. 501.

939. So that, if in an answer to a bill filed by the wife against the husband, for a divorce, under the statute, on the ground of cruel treatment, the husband denies the charge, and sets up acts of cruel and abusive treatment on the part of the wife, and asks for a divorce, the bill will be dismissed. *Ibid.*

940. The Court will not take notice of any consent or agreement of the parties to a divorce *a mensa et thoro*. *Ibid.*

941. On a bill by a wife for a divorce *a vinculo matrimonii*, a decree of divorce having been pronounced, the master reported the value of the husband's real estate to be 3750 dollars, and his personal estate 300 dollars, and the whole annual value to be 325 dollars; and the Court allowed the plaintiff 100 dollars *per annum*, for her *alimony*, payable half-yearly. *Miller v. Miller*, 6 J. C. R. 91.

942. The general rule, in such cases, seems to be to allow the wife *one third*, or at least *one fourth*, of the annual income of the husband's real estate; but it is in the power and discretion of the Court to vary the allowance, from time to time, according to the circumstances of the parties. *Ibid.*

943. It seems, that in a bill for a divorce, on the ground of adultery, it is sufficient to charge, that the offence was committed with one or more persons unknown to the plaintiff. *Germond v. Germond*, 6 J. C. R. 347.

944. But where, on a *feigned issue*, directed by the Court, to try *the fact, the allegation on which the issue was taken was, "that the defendant had committed adultery with one W. C. F., on or about the 1st day of April, 1816, in Rensselaer county," the evidence must be confined to the specific charge put in issue; and the plaintiff cannot give evidence of adultery committed with any other person than the one named, although the charges in the bill are general,

"that the defendant committed adultery, at divers times, with W. C. F. and others, to the plaintiff unknown." *Ibid.*

945. And where evidence was given, at the trial, of adultery committed by the defendant, with other persons, besides W. C. F., the verdict was set aside, and a new trial awarded, with leave to the plaintiff to amend the feigned issue. *Ibid.*

G. *Supplicavit*.

946. Whether Chancery grant a writ of *supplicavit*, to protect a wife from violence threatened to her by her husband, by compelling him to give sureties to keep the peace? *Quere*. *Codd v. Codd*, 2 J. C. R. 141.

947. A writ of *supplicavit* will not be granted where the *menaces*, &c. sworn to, were uttered eight years before the application for the writ, during which interval, the husband was absent from the state, and had lately returned. *Ibid.*

XXXII. INFANT.

- A. *Of the incapacity of infants.*
- B. *Of the acts of infants; when void or voidable.*
- C. *How far bound in equity, and how favored.*
- D. *Ward of the Court.*

A. *Of the incapacity of infants.*

948. An infant must appear in Chancery, in all cases, by his guardian or next friend. *Bradwell v. Weeks*, 1 J. C. R. 325.

949. Where a suit is instituted in behalf of an infant, by his *prochein amy*, the Court, on a suggestion of its being improperly instituted, will refer it to a master, to inquire into the circumstances, and report whether the suit is for the benefit of the infant. *Garr v. Drake*, 2 J. C. R. 542.

*B. *Of the acts of an infant; when* [*271] *void or voidable.*

950. Where a man was married to an infant under twelve years of age, and she immediately declared her ignorance of the nature and consequence of the marriage, and her dissent to it; on a bill filed by her next friend, the Court ordered her to be placed under its protection, as a ward of the Court, and forbade all intercourse or correspondence with her by the defendant, under pain of contempt. *Aymar v. Raff*, 3 J. C. R. 49.

C. *How far bound in equity; and how favored.*

951. The acts of an *infant*, done even with the consent of his guardian, will be relieved against, if they are prejudicial to the infant. *Rogers v. Cruger*, on appeal, 7 J. R. 557.

952. There can be no valid decree against an infant by default, nor on his answer by his guardian; but the plaintiff must prove his demand in Court, or before a master, and the

infant will have a day in Court, after he comes of age, to show error in the decree. *Mills v. Dennis*, 3 J. C. R. 367.

953. But if, instead of a mere foreclosure of a mortgage against an infant heir of a mortgagor, there is a decree for the sale of the mortgaged premises, the decree will bind the infant. *Ibid.*

954. And it is the practice of Chancery here, to direct a sale in all cases, as most beneficial to the parties. *Ibid.*

955. But before a decree of sale, there must be a special report of the master, as to the proof of the debt before him, of the amount due, and of what part, if less than the whole, of the mortgaged premises, a sale will be sufficient to raise the amount of the debt, and at the same time be most beneficial to the infant. *Ibid.*

956. Chancery may change the estate of an infant from real to personal, and from personal to real, whenever it is deemed most beneficial to him. *Ibid.*

957. When an infant is brought up on *habeas corpus*, the Court will inquire whether he is under any illegal restraint; and if he is, will set him at liberty; but if there is no improper restraint, the Court will not, in this summary way, decide upon the right of guardianship, or deliver over the infant to the custody of another. *Matter of Wollstonecraft*, 4 J. C. R. 80.

958. If the infant is competent to form a judgment and declare his election, the Court, after examination, will allow him to go where he pleases; otherwise, the Court will exercise its judgment for him. *Ibid.*

959. Where a deed was ordered to be cancelled as fraudulent and void, on a bill for that purpose, filed against the representatives of a grantee, and a perpetual injunction granted against using the deed or exemplification of it in evidence, the decree was declared binding on such of the defendants as were infants, unless, within six months after coming of age, they should show cause to the contrary, [**272*] on being **served* with process for that purpose. *Bushnell v. Harford*, 4 J. C. R. 301.

960. Where a conveyance is directed to be made by infants, in performance of an agreement made by their ancestor, who had stipulated to give a deed with full covenants to the vendee, the Court will not order the infants to enter into personal covenants, but only to release and convey all the title whereof their ancestor died seised. *Matter of Ellison*, 5 J. C. R. 261.

961. In such a case, the principal of the purchase money was ordered to be retained, subject to the further order of the Court, or until the infants came of age, to provide an indemnity to the purchaser, in case the title should, in the mean time, fail. *Ibid.*

962. Chancery will not sustain a suit by an infant, for the *interest* due on a legacy, directed by the will of the testator to be applied to her education, when the amount is less than *fifty* dollars, and the party may sue the executor in a Court of Common Pleas. *Fullerton v. Jackson*, 5 J. C. R. 276.

D. Ward of the Court.

963. It seems, that a female ward of Chancery is not, of course, discharged from its protection, by marriage, without an order of the Court for that purpose. *Matter of Whitaker*, 4 J. C. R. 378.

XXXIII. INJUNCTION.

- A. In what cases granted, and against whom.
- B. To stay waste, or trespass.
- C. To stay proceedings at law.
- D. Injunction for other purposes.
- E. When dissolved, continued or renewed.
- F. When made perpetual.

A. In what cases granted, and against whom.

964. The granting and continuing of injunctions rests in the discretion of the Court, to be governed by the nature and circumstances of the case. *Roberts v. Anderson*, 2 J. C. R. 202.

965. An injunction will always be granted to secure the enjoyment of a statute privilege, of which the party is in the actual possession, unless the right be doubtful. *Livingston v. Van Ingen*, on appeal, 9 J. R. 507. [*See D. post.*]

966. As, where an exclusive right to navigate the waters of this state with *steam-boats* was granted by the legislature, the act being decided by the Court, on appeal, to be constitutional, and the right, **there-* [**273*] fore, not doubtful, a perpetual injunction was awarded to restrain boats, used in violation of the plaintiffs' right, from navigating the waters of the state, although by another statute, boats so used in opposition to the plaintiffs' right were declared to be forfeited to them, and they had brought an action of *detinue*, to recover the boat so forfeited. *Ibid.*

967. Where a party is in the actual possession of an exclusive privilege, under color and claim of title, an injunction will not be granted to restrain him from the exercise of his privilege, or the use of the means provided by law for its protection, especially in favor of a party who sets up no particular right of his own, but merely denies the privilege of the other party. *Lansing v. The North River Steam-boat Company*, 7 J. C. R. 162.

968. A creditor at large, or before judgment, is not entitled to the interference of the Court, by injunction, to prevent the debtor from disposing of his property in fraud of such creditor. *Wiggins v. Armstrong*, 2 J. C. R. 144.

969. Chancery has a concurrent jurisdiction with Courts of law, in case of a private nuisance, by obstructing an ancient water course; and may issue an injunction to prevent the interruption, though the plaintiff has not established his title at law. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162. *See Newburgh Turnpike Company v. Miller*, 5 J. C. R. 101.

970. *B seems*, that Chancery has no jurisdiction in the case of a public nuisance; but if it had, the carrying on of banking operations, contrary to statute, is not such a public mischief, or nuisance, that the Court would grant an injunction to restrain its proceedings. *Attorney General v. Ulica Insurance Company*, 2 J. C. R. 371.

971. Where an act of the legislature authorizes the taking of private property for public purposes, it is bound to provide for a fair compensation to the individual whose property is taken; and if no such provision is made, Chancery will grant an injunction to stay proceedings under the act, until a just compensation is provided. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162.

972. Where a bill charges an executor or trustee with abusing his trust, &c., an injunction will not be awarded in the first instance, but a receiver may be appointed. *Boyd v. Murray*, 3 J. C. R. 48.

973. The apprehension of one partner, that the other will misapply the partnership funds and abuse his trust, is not a ground for an injunction to restrain him from interfering with the partnership accounts and effects. *Woodward v. Schatzell*, 3 J. C. R. 412.

974. An injunction is never granted against persons who are not parties to the suit. *Fellows v. Fellows*, 4 J. C. R. 25.

975. An injunction will not be granted to restrain the defendant from diverting water from the plaintiff's mill, by means of a tunnel dug five years ago, until the plaintiff has first established his right. *Reid v. Gifford*, 6 J. C. R. 19.

976. Chancery does not interfere by an injunction, unless the party applying for the remedy has a vested right, legal or equitable, which may be greatly or irreparably affected by the acts sought to be prevented or restrained. *City of New York v. Mapes*, 6 J. C. R. 46.

*977. Where no commissioners [274] of estimate and assessment had been appointed, under the act relative to opening, altering, &c., the streets in the city of New-York, (Sess. 36. c. 86. s. 178.) no rights became vested in the corporation of the city, or in the owners of the property to be affected by the proposed improvement, &c.; an injunction, therefore, will not be granted, at the instance of the corporation, to restrain the owners of the property from erecting buildings on the ground, or using it at their discretion. *Ibid.*

978. An injunction lies to restrain a defendant from obstructing a street in the city of New-York, by building a bouse therein, it being not only a public nuisance, but producing a special injury to the plaintiffs, by affecting the enjoyment of their property in the vicinity, and the value of it. *Corning v. Louerre*, 6 J. C. R. 431.

979. On filing a bill against an incorporated banking company, charging the defendants with a fraudulent abuse of their trust, in the election of directors, an injunction will not be granted *in limine*, before answer, to restrain the new directors, whose election was colorable

by law, from the exercise of their powers; nor will commissioners or receivers be appointed, to take charge of the affairs of the bank, there being no impending mischief, irreparable in case of delay. *Ogden v. Kip*, 6 J. C. R. 160.

B. To stay waste or trespass.

980. An injunction to stay waste will be granted, though there is no suit pending, and though no action at law can be maintained against the tenant. *Kane v. Vanderburgh*, 1 J. C. R. 11.

981. An injunction will be granted to prevent a lessee from making material alterations in a dwelling-house, by changing it into a warehouse, which would produce a permanent injury to the building. *Douglass v. Wiggins*, 1 J. C. R. 435.

982. A mortgagor who has sold his equity of redemption without taking any indemnity against his bond, cannot have an injunction to stay waste, against his vendee, on the ground that he will be answerable for what the land may fail to satisfy the mortgage. *Brunley v. Fanning*, 1 J. C. R. 501.

983. An injunction to stay waste between tenants in common lies, in special cases; as, to prevent one tenant in common from cutting down timber, growing, and not wanted for the necessary uses of the farm. *Hawley v. Clowes*, 2 J. C. R. 122.

984. An injunction lies against a mortgagor in possession, to stay waste. *Brady v. Waldron*, 2 J. C. R. 148.

985. On affidavits of a breach of injunction to stay waste, and of service of a copy of the affidavits and notice of the motion, an attachment was ordered, to bring up the party to answer for a contempt. *Schoonmaker v. Gullett*, 3 J. C. R. 311.

986. An injunction to stay waste will not be granted, where the right is doubtful, or where the defendant is in possession claiming adversely, and the plaintiff has brought an action of ejectment to recover*the [275] possession at law, and which is undetermined. *Storm v. Mann*, 4 J. C. R. 21.

987. The Court will not, unless under very special circumstances, grant an injunction where waste has been committed by a tenant, to prevent the timber which he has cut down from being removed. *Watson v. Hunter*, 5 J. C. R. 169.

988. In ordinary cases, the Court interferes only to stay future waste. *Ibid.*

989. An injunction is not granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of a perfect pecuniary compensation, and for which the party may obtain adequate satisfaction, in the ordinary course of law. *Jerome v. Ross*, 7 J. C. R. 315.

990. But it must be a strong and peculiar case of trespass, going to the destruction of the inheritance; or where the mischief is remediless. *Ibid.*

991. The canal commissioners, by virtue of the statutes relative to canals, may lawfully enter on land near the Hudson river, for the pur-

pose of digging up and taking away stones, &c., necessary for filling up and completing the dam in the river between *Waterford* and *Troy*, "in order to connect the *Champlain canal* with sloop navigation;" and Chancery refused an injunction to restrain the commissioners or their agents from so doing; there being no unnecessary damage done to the party. *Ibid.*

992. An injunction is not granted in order to prevent the repetition of a trespass, in entering and cutting down timber, on land of which the plaintiff is in possession as owner, and has adequate remedy at law. *Stevens v. Beekman*, 1 J. C. R. 318.

993. An injunction may be allowed to prevent trespass, as well as to stay waste, where the mischief would be irreparable, and to prevent a multiplicity of suits, or under special circumstances. *Livingston v. Livingston*, 6 J. C. R. 497. *Stevens v. Beekman*, 1 J. C. R. 318.

994. As, where there was a claim by the defendant to *estovers* in the land of the plaintiff, and there had been an action at law, decided in favor of the plaintiff, and another suit was pending on the same question. *Ibid.*

C. To stay proceedings at law.

995. Where a bill in Chancery is filed to prevent a multiplicity of suits at law, and to have the title tried, and finally settled, by one suit, under the direction of the Court, it seems, that the bill will be sustained, though there has been but one or two trials at law. *Trustees of Huntington v. Nicoll*, on appeal, 3 J. R. 566.

996. In the case of a sale of lands, held adversely, Chancery will not interfere, either to compel the vendor to refund the purchase money, or to enjoin him from prosecuting his action for it against the vendee; but will leave the parties to their remedies, if any, at law. *Woodworth v. James*, on appeal, 2 J. C. 417.

997. An injunction will not be granted to stay a sale under an execution, on the ground that the judgment has been fully paid and satisfied; *for the party has a prompt and adequate remedy at law. *Lansing v. Eddy*, 1 J. C. R. 49.

998. Nor will it be granted, on the charge of usury, where the plaintiff seeks a discovery of the usury, and a return of the excess beyond the lawful interest; for the usury would have been a good defence at law; and no reason was given why the party did not seek a discovery while the suit was pending at law, and before judgment. *Ibid.*

999. Chancery will not relieve against a judgment at law, unless the defendant was ignorant of the fact in question pending the suit, or it could not be received as a defence. *Ibid.* *S. P. Simpson v. Hart*, 1 J. C. R. 91. *S. P. Foster v. Wood*, 6 J. C. R. 87.

1000. Where a Court of common law, after a full consideration of all the circumstances of the case, refused to allow two judgments to be set off against each other, Chancery refused to sustain a bill for an injunction and a set-off. *Simpson v. Hart*, 1 J. C. R. 91. [But see the *S. C.* on appeal, 14 J. R. 63. in which the Court of Errors, not considering the decision of the

Court of law, on a motion for the set-off, as such a *res judicata* or judgment, as would preclude Chancery from sustaining a bill, reversed the decree as to this point.]

1001. An injunction will not be granted to stay proceeding at law, on a judgment, on the ground that the defendant at law was prevented, by public business, for making due preparations for, and attending at, the trial, and the plaintiff had, on the evidence of one witness, whom he had suborned to swear falsely, recovered a verdict for a much larger sum in damages, than he was justly entitled to; and that the Supreme Court had refused to grant a new trial in the cause. *Smith v. Lowry*, 1 J. C. R. 320.

1002. If a defendant neglect to set up matters of defence, before arbitrators or a jury, he cannot, afterwards, make such matters the basis of a suit in equity, unless there was some accident or fraud, of which the party could not avail himself at law. *M'Vickar v. Walcott*, on appeal, 4 J. R. 510.

1003. The cases of relief in equity against judgments at law, are when the fraud goes to the whole judgment, and not to the mere excess of damages, is a case properly sounding in damages; and when the fraud could not have been met and defeated at the trial. *Smith v. Lowry*, 1 J. C. R. 320.

1004. On a bill of discovery, on a charge of usury, an injunction will not be granted to stay proceedings at law on the note, or usurious contract, unless the plaintiff tenders or brings into Court the money actually lent and the lawful interest thereon. *Rogers v. Rathbun*, 1 J. C. R. 367. *Tupper v. Powell*, *Id.* 439.

1005. An injunction will not be granted to stay an action at law, on an award, on the ground that the plaintiff was surprised by the principal witness swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time for making the award. *Woodworth v. Van Buskerk*, 1 J. C. R. 432.

1006. Where a defendant, in an action at law, has not used due diligence *in making his defence, or in ap- [*277] plying to Chancery for a discovery, to assist his defence at law, he cannot, after a verdict against him, obtain the aid of that Court to stay the proceedings at law, or to have a new trial. *Barker v. Elkins*, 1 J. C. R. 465. *S. P. Dodge v. Strong*, 2 J. C. R. 228. For if he has knowledge of his defence, and neglects to make it, he is concluded by the judgment at law. *Le Guen v. Gouverneur*, on appeal, 1 J. C. 436.

1007. It seems, that Chancery will not sustain a bill of discovery and for an injunction, merely to procure such admissions by the party as might be used in mitigation of damages in an action of trespass at law, unless, perhaps, in very special cases. *Gelston v. Hoyt*, 1 J. C. R. 543.

1008. In injunction causes, where the title at law is admitted, or no discovery is sought for to aid a defence at law, an injunction will be granted upon terms only, so as to leave the

party at liberty to proceed to trial and judgment at law. *Ham v. Schuyler*, 2 J. C. R. 140.

1009. Where a rule for a new trial was granted by the Supreme Court, on conditions which the party failed to perform within the time prescribed by the rule, Chancery refused its aid, it not appearing that the failure arose from the act of the opposite party, or from unavoidable necessity. *Dodge v. Strong*, 2 J. C. R. 228.

1010. *A bill of peace*, to prevent litigation at law, is allowed only in case the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous, as to render an issue, under the direction of the Court, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits. *Eldridge v. Hill*, 2 J. C. R. 281.

1011. On a bill for discovery of matters material to the defence of the party in a suit at law, the nature of the defence at law must be stated, otherwise Chancery will not grant an injunction. *M'Intyre v. Mancius*, 3 J. C. R. 45.

1012. Where a creditor agreed to collect the money due on a note from the several parties to the note, *ratably*, on their giving a bond and judgment for the amount, an injunction was granted to stay all proceedings on the judgment against the plaintiff, one of the parties, on his paying into Court his ratable proportion, &c. *Briggs v. Law*, 4 J. C. R. 22.

1013. A creditor in *New-Jersey*, where all the parties resided, took from the maker of a promissory note, endorsed by the plaintiff, a bond and mortgage, which was ample security for the debt, and instead of resorting to the mortgage, or the principal debtor, sued the plaintiff, the endorser, who was transiently in this state, at law; the Court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage, in *New-Jersey*. *Hayes v. Ward*, 4 J. C. R. 123.

1014. A. and B., being partners, dissolved their partnership; and A. undertook to pay the partnership debts, and particularly a debt to C., and received partnership property for that purpose; A. having confessed a judgment in the names of A. and B. in favor of C., a piece of land which B. had sold to D. was seized and sold, under an execution issued on the judgment, and A. became the [*278] purchaser at the sheriff's sale; held, that A. be enjoined from deriving any benefit under the judgment, or bringing an action of ejectment to recover the possession of the land, until he had fully accounted for the property which he had received for the purpose of paying the debt to C. *Soyt v. Dean*, on appeal, 6 J. R. 523.

D. For other purposes.

1015. An injunction was granted to stay proceedings under a power of sale in a mortgage, on payment of the costs, and paying into Court the amount reported by the master to be due. *Hine v. Handy*, 1 J. C. R. 6.

1016. An injunction will be granted to secure a party in the enjoyment of a privilege

conferred by statute, of which he is in the actual possession, and when his legal title is not put in doubt. *Croton Turnpike Company v. Ryder*, 1 J. C. R. 611. [See *Newburgh Turnpike Company v. Miller*, 5 J. C. R. 101. *Ogden v. Gibbons*, 4 J. C. R. 150. *Livingston v. Van Ingen*, on appeal, 9 J. R. 587. And see *ante*, A. 964, 965, 966.]

1017. As, where a turnpike company, incorporated with the exclusive privilege of erecting toll-gates and receiving toll, had duly opened and established the road, with gates, &c.; and certain persons, with a view to avoid the payment of toll, opened a by-road near the turnpike, and kept it open, at their own expense, by which travellers were enabled to avoid passing through the gate and paying toll to the plaintiffs; the Court granted a perpetual injunction, to prevent the defendants from using or allowing others to use such by-road, and ordered the same to be shut up. *Ibid.*

1018. An act of the legislature for the incorporation of a bank, appointed certain commissioners, for the special and sole purpose of receiving subscriptions, and they were directed "to apportion the excess of shares among the several subscribers, as they should judge discreet and proper;" on a bill charging inequality and partiality in making the apportionment, an injunction was granted; but on coming in of the answer of the commissioners, denying the charges, it was dissolved. *Haight v. Day and others*, 1 J. C. R. 18.

1019. On a bill for an account against executors, stating that the testator devised his real and personal estate to them, for the payment of his debts, and that they refused to distribute the personal estate, and to sell the real estate, and distribute the proceeds *ratably* among all the creditors, and threatened to transfer it to secure certain favorite creditors, who were not entitled to any preference, the Court granted an injunction to restrain the executors from selling or disposing of the estate. *Depara v. Moses*, 3 J. C. R. 349.

1020. An injunction was granted to restrain commissioners from proceeding to sell lands, to pay the sum assessed, under the Act to amend the act entitled, *An act to incorporate the Ulster and Orange Turnpike Company*, (Sess. 40. c. 213.) for making the road, so as to give the owners of the lands an opportunity to complete the road themselves, through their own lands, according to the true construction [*279] of the second section of the act. *Couch v. Ulster and Orange Branch Turnpike Company*, 4 J. C. R. 26.

1021. An injunction will be granted to restrain persons from navigating with steam-boats, in violation of the exclusive privilege granted by the legislature to L. and F., to navigate the waters of this state with steam-boats, on the waters lying between Staten Island and Ponoles Hook and the Jersey shore, the same being within the jurisdiction of this state. *Livingston v. Ogden*, 4 J. C. R. 48. See *Ogden v. Gibbons*, *Id.* 150. 174. *Livingston v. Tompkins*, *Id.* 415. *The North River Steam-boat Company v. Hoffman*, 5 J. C. R. 300. [But see *Gibbons v. Ogden*, 9 *Wheat. Rep.* 1.]

1022. A second injunction will not be granted, while the first is in force, unless the first has been withdrawn by some agreement between the parties, and satisfactory reasons shown for a renewal of it. *Livingston v. Gibbons*, 4 J. C. R. 571.

1023. Nor will an injunction be granted to restrain the defendant, in such a case, from removing his boat, pending an action at law, brought to recover the boat, as forfeited under the act of the first of April, 1811, to protect L. and F. in their exclusive privilege; unless there is a direct and positive charge of danger that the boat will be eloiigned pending the suit. *Ibid.*

1024. Where the defendants, a banking company, agreed with B. to hold the bills of the plaintiffs, a banking company, subject to his order, and B. engaged to accept the drafts of the defendants at ten days' sight, for the amount, no injunction lies to restrain the bills in the possession of the defendant, or from their demanding payment of them from the plaintiffs; for the agreement with B. merely suspended the right of the defendants to demand payment of the bills until ten days after the acceptance of their drafts, and the suspension ceased when B. made default in accepting and paying the drafts. *Washington and Warren Bank v. Farmers' Bank*, 4 J. C. R. 62.

1025. On a bill filed by a wife, who had property, descended to her, during coverture, an injunction was granted to prevent a creditor of the husband from selling the property, under an execution issued on a judgment confessed by him, for a *bona fide debt*, until a suitable provision out of the property was made for the wife and her children. *Haviland v. Myers*, 6 J. C. R. 25.

E. When dissolved, continued, or renewed.

1026. If the answer denies all the equity of the bill, the injunction to stay proceedings at law will be dissolved, of course; otherwise, it will be continued until the hearing; and where it may be necessary to ascertain any matter of fact, for the information of the Court, it must be on an issue at law, awarded for that purpose. *Hoffman v. Livingston*, 1 J. C. R. 211. *S. P. Roberts v. Anderson*, 2 J. C. R. 202. *Couch v. Ulester and Orange Turnpike Company*, 4 J. C. R. 26.

1027. Affidavits taken *ex parte*, cannot be read in opposition to a motion made, on the coming in of the answer, to dissolve an injunction restraining one copartner from using the copartnership name, or *doing any [*280] thing relative to the partnership concern; nor in support of the allegations in the bill. *Eastburn v. Kirk*, 1 J. C. R. 444. *S. P. Roberts v. Anderson*, 2 J. C. R. 202.

1028. If all the defendants are implicated in the same charge, the answer of all will, in general, be required; but if the defendant, on whom the *gravamen* of the charge rests, has fully answered, that may be sufficient; but where the answer of all the defendants can and ought to come in, yet, if the plaintiff does not

take the requisite steps, with all diligence, to expedite his cause, the injunction may be dissolved. *Depeyster v. Graves*, 2 J. C. R. 148.

1029. Where the bill, on which an injunction was issued, to stay proceedings at law, in an ejectment suit, charges the deeds on which the defendant sets up his title at law to be fraudulent, the injunction will not be dissolved on the coming in of the answer, unless it be full and satisfactory as to the fraud, but will be continued to the hearing. *Roberts v. Anderson*, 2 J. C. R. 202. Stating that the defendants were not privy to the fraud, and were *bona fide* purchasers; that they believe the title was good, and that they do not know or believe that the deeds under which they derive title were fraudulent, is not sufficient. *Ibid.*

1030. If the party obtaining an injunction to stay proceedings at law, neglects to deposit 100 dollars, at the time, pursuant to the 43d rule of the Court, the irregularity will be cured, by his making the deposit before a motion is made to dissolve the injunction; but he must pay the costs of the motion. *Skinner v. Dayton*, 2 J. C. R. 226.

1031. So, if the party omits to enter the order for the injunction with the register, at the time, a subsequent entry of it, before motion, will cure the neglect, but he will have to pay costs. *Ibid.*

1032. A creditor, who had filed a bill for relief, and had obtained an injunction against a judgment confessed by his debtor, while the suit was pending in Chancery, proceeded at law against his debtor, and obtained judgment and issued execution, under which the debtor's property was seized and advertised for sale; the Court, on petition of the defendant, ordered the plaintiff to elect to stay his execution at law, during the injunction, or consent to have the injunction dissolved; and, the plaintiff refusing to make an election, the injunction was forthwith dissolved. *Livingston v. Kane*, 3 J. C. R. 224.

1033. When new facts are stated in a *supplemental bill*, a fresh injunction may be awarded, though the former injunction was dissolved on the merits. *Fanning v. Dunham*, 4 J. C. R. 35.

1034. Where an injunction had been granted to stay a sale under a power contained in a mortgage, a few days before the expiration of the *six months'* notice, it was dissolved, after answer, on terms, viz.; giving six weeks' further notice of the time and place of a sale, and a reference, in the mean time, to a master, to ascertain the balance due, &c. *Nichols v. Wilson*, 4 J. C. R. 115.

1035. When an injunction is allowed by the Chancellor, the defendant, before he puts in an answer, may move to dissolve it, on the ground of a want of equity in the bill. *Minturn v. Seymour*, 4 J. C. R. 173.

*1036. Where the defendant, in his answer to an injunction bill, [*281] admits the equity of the bill, but sets up new matter of defence on which he relies, the injunction will be continued to the hearing. *S. C.* 4 J. C. R. 497.

1037. Where an injunction has been voluntarily dissolved by the plaintiff, or having been dissolved by an order obtained by his solicitor or agent, without his knowledge or consent, but which was afterwards recognized and acted upon by him, the injunction will not be renewed, on his petition, without some new and special reasons, which did not exist when it was granted or dissolved. *Livingston v. Gibbons*, 5 J. C. R. 250.

1038. An injunction to stay proceedings under a power of sale contained in a mortgage, was continued, though it appeared that the mortgage had been discharged, until an action at law brought by the plaintiff against the defendant, on the covenant of seisin contained in his deed, had been decided. *Tillou v. Sharpsteen*, 5 J. C. R. 260.

F. When perpetual.

1039. Where bail, having become fixed at law, are, under the equity of the case, entitled to be discharged, Chancery will grant a perpetual injunction against an action on the recognizance. *Rathbone v. Warren*, on appeal, 10 J. R. 587.

1040. Where commissioners appointed under the authority of an act of the legislature to drain a swamp, exceed their authority, to the injury of the plaintiff, a perpetual injunction will be granted, though there has been no trial at law, the plaintiff's right to the land being undisputed. *Belknap v. Belknap*, 2 J. C. R. 463.

1041. Where the plaintiff, and those under whom he claimed, had been in the quiet and uninterrupted possession of land for above twenty-five years, an injunction to restrain the defendants from entering and digging down the ground so possessed by the plaintiff, was granted, and made perpetual, or until the defendants shall have established, by due course of law, their right to the ground in question. *Farick v. The Corporation of New-York*, 4 J. C. R. 53.

1042. Where, on a sale of land, &c., in possession of the defendants, under an execution against them, the sheriff's deed, by mistake, did not include the whole premises advertised and sold, though all the parties supposed it contained the whole, and the purchaser had bid and paid accordingly; decreed, that the defendants be perpetually enjoined from prosecuting any ejectment suits at law, brought by them, to recover the parcels of land not included in the sheriff's deed to the purchaser; and that they execute a release to the purchaser of all their right and title to the same. *De Riemer v. Cantillon*, 4 J. C. R. 85.

1043. Where a deed was ordered to be cancelled, as fraudulent and void, the defendants, and all persons claiming under it, were perpetually enjoined from using it, or the record of it, in evidence of title. *Busknell v. Hartford*, 4 J. C. R. 301. See *Livingston v. Hubbs*, 2 J. C. R. 612.

*1044. Where the plaintiff entered into a contract with the defendant, by which, among other

things, he engaged to pay the defendant an annual sum for twenty years, and the contract was founded on mistake and misrepresentation, the defendant was perpetually enjoined from bringing any suit against the plaintiff, to recover the annuity so agreed to be paid to him. *Dale v. Roosevelt*, 5 J. C. R. 174.

1045. Where a person has a grant of a ferry, bridge, or road, with the exclusive right of taking toll, and another ferry, bridge, or road, is erected so near it, as to create a competition injurious to such franchise, it is, in that respect, a private nuisance, and the Court will grant a perpetual injunction, to secure the enjoyment of the statute franchise, and prevent the use of the rival establishment. *Newburgh Turnpike Company v. Miller*, 5 J. C. R. 101. *Croton Turnpike Company v. Ryder*, 1 J. C. R. 611. *Ogden v. Gibbons*, 4 J. C. R. 150. *Livingston v. Ogden*, 4 J. C. R. 48.

XXXIV. INTEREST.

A. On what debts and in what cases interest is payable.

B. When compound interest will be allowed.

C. When foreign interest is allowed.

D. Of simple or statute interest; mode of computation where partial payments are made; and of usury.

A. On what debts and in what cases interest is payable.

1046. Before the act, sess. 36. c. 203. s. 50. interest could not be levied on execution on a judgment. *Mason v. Sudam*, 2 J. C. R. 172.

1047. A legacy, payable at a future day, does not carry interest until after it is payable, unless it is given to a child, and the parent has made no other provision by will for its maintenance. *Lupton v. Lupton*, 2 J. C. R. 614. But this exception does not extend to grandchildren. *Ibid.*

1048. On a bond conditioned to pay six per cent., for the security of which a mortgage was given, the obligee, after a forfeiture of the bond, is not entitled to seven per cent. or the lawful interest; but the interest is to be paid according to the contract, until it ceases to operate by being merged in the decree of foreclosure, &c. *Miller v. Burroughs*, 4 J. C. R. 436.

1049. Unsettled accounts do not bear interest. *Consequa v. Fanning*, 3 J. C. R. 587.

1050. Where a balance of account is paid without any charge of interest, interest cannot, afterwards, be demanded. *Ibid.*

*1051. A trustee who mixes the trust moneys with his own, and [*288] uses it in his trade, the profits of which are not known, must pay interest. *Brown v. Rickets*, 4 J. C. R. 303.

1052. An agent of the administrators, who assumed to act as guardian for the infant heirs, and received the rents and profits of the real

estate, is chargeable with interest. *Mason v. Roosevelt*, 5 J. C. R. 534.

1053. Where M., being the owner of a contiguous tenement, was bound to contribute to the expense of a new party wall; *held*, that he must pay interest on the amount of his contribution, which was a *lien* on the wall, from the time it was demanded of him and refused. *Campbell v. Mesier*, 6 J. C. R. 21.

1054. Where land is devised, charged with the payment of a legacy, the devisee, if he accepts the devise, becomes personally liable, and is chargeable with interest on the legacy, from the time it was payable, though not demanded. *Glen v. Fisher*, 6 J. C. R. 33.

1055. If a legatee is compelled to sue for a legacy, he is entitled to interest and costs. *Ibid*.

1056. An attorney or agent authorized to collect money, &c., is not chargeable with interest on the moneys of his principal, unless he is in default, or has employed the money for the purpose of gain to himself. *Williams v. Storrs*, 6 J. C. R. 353.

1057. Where there is a general reservation in a decree of all questions not disposed of by the Court, and nothing said as to interest, it may be allowed on the final decree. *Campbell v. Mesier*, 6 J. C. R. 21.

1058. Where the plaintiff had offered to pay one of two parties, claiming the moneys in his hands, on being indemnified, which was refused, and a bill of interpleader filed, he was not charged with interest. *Richards v. Satter*, 6 J. C. R. 445.

1059. Where money is lent, to be paid at or on a certain day specified, with interest in the mean time, at stated periods, the borrower cannot, by tendering the debt or principal before the day stipulated for payment, stop the interest; for the time of payment, in such case, is part of the contract, and for the mutual benefit and convenience of the parties. *Ellis v. Craig*, 7 J. C. R. 7.

B. When compound interest will be allowed.

1060. Interest upon interest, or compound interest, is not allowed, except in special cases, as, where there is a settlement of accounts between parties, after interest has become due, or there has been an agreement for that purpose, subsequent to the original contract, or a master's report, computing the amount of principal and interest, has been confirmed. *State of Connecticut v. Jackson*, 1 J. C. R. 13. *Barrow v. Rhineland*, 1 J. C. R. 550.

1061. An agreement, made at the time of the original contract, to allow interest upon interest, as it should become due, cannot be supported. *Ibid*. *S. P. Van Benschooten v. Lawson*, 6 J. C. R. 313.

*1062. Where an administrator [*284] employed the moneys belonging to his intestate's estate in trade, for his own benefit, of the profits of which trade he refused to give any account, the master, in stating the account, after allowing a reasonable time for the settlement of the estate, charged compound interest, making *annual rests* in the

account for that purpose, which report was confirmed by the Court. *Schiffel v. Stewart*, 1 J. C. R. 620.

1063. A partner, who draws out money from the copartnership fund, is not chargeable with compound interest, but with simple interest only; unless it appears that he has traded or speculated with the money, and made a profit on it, which he refuses to disclose. *Stoughton v. Lynch*, 2 J. C. R. 209.

1064. Compound interest is not allowed in favor of a trustee, though it is sometimes permitted against him, when he refuses to disclose the profits he has made out of the trust property. *Everton v. Tappen*, 5 J. C. R. 407.

1065. Compound interest is not allowed, unless on a special agreement in writing, after the lawful interest has become due. The agreement, to be valid, must be prospective, so that the interest then due shall carry interest thereafter. *Van Benschooten v. Lawson*, 6 J. C. R. 313.

C. When foreign interest is allowed.

1066. Interest is payable according to the laws of the country where the contract is made; but if, by the terms or nature of the contract, it appears that it is to be executed in another country, or that the parties had reference to the laws of another country, then it is to be governed by the laws of the country where it is to be performed. *Fanning v. Consequa*, on appeal, 17 J. R. 511. *S. C.* 3 J. C. R. 587.

1067. Where a Chinese merchant, residing at Canton, consigned goods to a merchant in New-York, and which were delivered to his agent at Canton to be sold, and the net proceeds to be remitted to the consignor at Canton; *held*, that the consignor was entitled only to interest according to the law of New-York, and not according to the law or usage of Canton. *S. C.* 17 J. R. 511. *Contra*, *S. C.* 3 J. C. R. 587.

D. Of simple or statute interest; the mode of computing it where partial payments are made; and of usury.

1068. The policy and utility of statutes against usury are discussed and defended by the chancellor, in the case of *Thompson v. Berry*, 3 J. C. R. 395.

1069. The rule for casting interest, when partial payments have been made, is to apply the payment, in the first instance, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal; and the subsequent interest is to be computed on the balance of principal remaining

*due. If the payment be less [*285] than the interest, the surplus interest must not be added to the principal; but the interest continues on the former principal, until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and the interest afterwards com-

puted on the balance of principal. *State of Connecticut v. Jackson*, 1 J. C. R. 13. S. P. *Sloughton v. Lynch*, 2 J. C. R. 209.

1070. Whether the practice prevailing among merchants, in settling their accounts, of stating an interest account, in which interest is charged on each item of principal, on the debit side, and credited on each item of the credit side of the account, and a balance of interest struck, and added to the balance of the principal, is to be adopted in the settlement of accounts between merchant and merchant? *Quære. Ibid.*

1071. But where a master, under an order of reference, in stating the account between the parties, who were partners in trade, adopted such mercantile usage, the amount was allowed to stand, there being evidence before him, from the books of account or otherwise, that the parties themselves had followed that usage, and the calculation was so made by an eminent merchant, to whom the accounts were referred, with the consent of the parties, who did not question the statement before the master. *Ibid.*

1072. To render a transaction usurious, there must be an unlawful or corrupt intention conceived or proved. *Nourse v. Prime*, 7 J. C. R. 69.

1073. If, on an application for a loan of money, the sale of shares in an insurance company, *at par*, is made a condition of the loan, when the shares are in fact below par, the transaction is usurious. *Eagleson v. Shotwell*, 1 J. C. R. 536. And if it be impossible to ascertain the cash value of the shares, the company having failed, the sale will be rescinded, and the mortgage taken by the lender ordered to stand as security only for the cash lent and the interest thereon. *Ibid.*

1074. So, if, on a loan of money, the lender imposes on the borrower, as a condition of the loan, property taken in part of the sum lent, at a higher value than it is worth, it is usury. *Stuart v. The Mechanics' Bank*, on appeal, 19 J. R. 496.

1075. But where goods, or the notes of a bank or of a third person, constitute part of the loan, and the value of the goods is uncertain, and the borrower, of his own accord, offers to take them at a certain price, or notes made by a person in credit, at par, it seems, that the loan is not usurious. *Ibid.*

1076. A lender is not allowed to make it the condition of the loan, that he shall receive a compensation for his services in procuring the money, as the allowing of such a demand would tend to usury and oppression, if it be not usury in itself. *Hine v. Handy*, 1 J. C. R. 6.

1077. An injunction will not be granted against a judgment at law, on a charge of usury, where the party seeks a discovery of the usury, and a return of the excess beyond the legal interest; for the usury would have been a good defence at law, and no reason was given why the defendant did not seek the discovery while the suit at law was *pending. *Lan-*

[*296] *sing v. Eddy*, 1 J. C. R. 49. [*And*

see Thompson v. Berry, 3 J. C. R. 395. S. C. 17 J. R. 436.]

1078. On a bill of discovery, on a charge of usury, an injunction to stay proceedings at law on the contract will not be granted, unless the plaintiff tenders, or brings into Court, the money actually lent, and the lawful interest thereon. *Rogers v. Rathbun*, 1 J. C. R. 367. S. P. *Tupper v. Powell*, 1 J. C. R. 439. [*And see Fanning v. Dunham*, 5 J. C. R. 122.]

1079. Chancery will order a defendant to account for moneys overpaid to him, beyond the legal interest, pursuant to a usurious contract. *Dey v. Dunham*, 2 J. C. R. 182.

1080. Where the defendant advanced his notes to the plaintiff, for the plaintiff's notes for the same sums, payable at or near the same periods, for which exchange of notes, the defendant received a commission of two and a half per cent. on the amount; and the notes, when they became due, were renewed, and new notes given in exchange, and this renewal and exchange were many times repeated, and the defendant, on each renewal and exchange, received a commission of two and a half per cent., but which was less than the lawful interest on the amount of the notes, for each time they had to run; *held*, that the transaction was not usurious, it being a compensation only for a loan of credit and risk. *Ibid.*

1081. But where D. lent F. his promissory notes, and received the notes of F. for the same amount in exchange, and also a commission of two and a half per cent., which exceeded the legal interest for the time the notes had to run; *held*, that the transaction was usurious, and the notes and other securities given by F. void. *Fanning v. Dunham*, 5 J. C. R. 122. [*And see Dunham v. Gould*, in error, 16 J. R. 367.]

1082. The charge of a commission of a half per cent. by a stock and exchange broker, in addition to the lawful interest on advances made on a deposit of stocks, as a compensation for transacting the business, is not usurious. *Nourse v. Prime*, 7 J. C. R. 69.

1083. Where the plaintiff was sued at law upon notes alleged by him to be usurious, and suffered a verdict and judgment to be taken against him, without making any defence, or applying to Chancery for a bill of discovery; *held*, that he was concluded, and not entitled to relief in this Court. *Thompson v. Berry*, 3 J. C. R. 395. S. C. on appeal, 17 J. R. 436. [*And see Lansing v. Eddy*, 1 J. C. R. 49.]

1084. An assignment of a debt, usurious in its inception, to a third person, who has knowledge of the original transaction, will not cover it from the scrutiny of the Court. *Ibid.* And sufficient ground appearing to support the charge of usury, a reference to a master to take an account, &c. was ordered. *Ibid.*

1085. If the lender of money on a usurious contract, seeks to enforce his securities in Chancery, and the borrower sets up usury as a defence, and proves it, the securities will be declared void, and ordered to be delivered up and cancelled. *Fanning v. Dunham*, 5 J. C. R. 122.

1086. But where the lender has proceeded

at law, and recovered judgment on a bond and warrant of attorney, or is proceeding to foreclose *a mortgage, by virtue of a power of sale, under the statute, without the aid of the Court, and the borrower files his bill for relief against the judgment or other legal securities, on the ground of usury, he must, before he can be entitled to relief, pay, or offer to pay, the principal and interest lawfully due; and that whether the usury be established by proof, or be admitted in the defendant's answer. *Ibid.* History of the practice of Courts of law, in interfering to set aside judgment by confession on bonds and warrants of attorney, on the ground of usury. *Ibid.*

1087. Where a party to a judgment entered up on a warrant of attorney, voluntarily waives his defence, on the ground of usury or fraud, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the transaction between the original parties. *French v. Shotwell*, 5 J. C. R. 555.

1088. As, where a party against whom a judgment had been entered up, on a bond and warrant of attorney, founded on a usurious consideration, filed a bill for relief against the judgment, on the ground of usury, and afterwards voluntarily dismissed the bill, with costs; held, that a subsequent purchaser of the land on which the judgment was a lien, could not impeach it on the ground of usury or fraud. *Ibid.*

1089. The act for the prevention of usury, (Sess. 10. c. 13.) contains no limitation to a suit, at the instance of the party aggrieved, to compel the lender to discover and refund the usurious excess of interest paid; provided no *qui tam* or popular action has been commenced by a third person under the act, previous to filing the plaintiff's bill. *Palmer v. Lord*, 6 J. C. R. 95.

1090. A plea, therefore, in bar of the suit, that the plaintiff did not file his bill within one year, after the usurious interest was paid, is bad. *Ibid.*

1091. Before the statute, the party aggrieved had a right of action at common law, to recover back the surplus beyond the principal and legal interest. The second section of the statute, therefore, does not give a new right of action, though it omits the penalties and forfeitures contained in the English statute. *Ibid.*

1092. The right of the party aggrieved to bring the action, after one year, may be lost by the interposition of the popular action given by the statute; but until such popular action has been commenced, and a right has attached in a third person, it seems, that the party aggrieved may bring his action, and his right to the surplus of interest paid will be thereby fixed, so that a popular action brought afterwards cannot be sustained, though within the second year; and if no such popular action is brought within the second year, the right of action continues in the party aggrieved, subject only to the general limitation of actions at law. *Ibid.*

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*XXXV. JUDGMENT. [*288]

A. Priority and lien of judgments and executions.
B. When a judgment may be impeached or inquired into.

A. Priority and lien of judgments and executions.

1093. A judgment at law is not a lien on a mere equitable interest, as that of an assignee of a contract for the purchase of land, partly executed; and the execution under it will not pass an interest which a Court of law cannot protect and enforce. *Bogart v. Perry*, 1 J. C. R. 52.

1094. A sale under a second or junior judgment is not, of itself, a waiver of the plaintiff's rights under a first or elder judgment. *Shotwell v. Murray*, 1 J. C. R. 512.

1095. Where a person purchased under a junior judgment, with notice of the prior judgment, supposing, erroneously, that the former judgment was extinguished by the sale under the second judgment; held, that he took the land subject to the lien of the former judgment, and that as he was bound to know the law, and there was no mistake as to fact, there was no ground for relief. *Ibid.*

1096. A mere equitable interest of a debtor in personal property, assigned by him as security, cannot be reached by process of law, or be bound by execution. *Hendricks v. Robinson*, 2 J. C. R. 284.

1097. Suing out execution merely, does not create a lien on goods and chattels; but there must be an actual levy of the execution, in order to bar a subsequent *bona fide* sale; for the property of the debtor in goods and chattels is not changed, until execution executed. *Ibid.*

1098. A judgment fraudulently obtained, creates no lien in the hands of a *bona fide* assignee. *Livingston v. Hubbs*, 2 J. C. R. 512.

B. When a judgment may be impeached or inquired into.

1099. A judgment of a Court of competent jurisdiction cannot be impeached collaterally in another Court. *Hawley v. Mancius*, 7 J. C. R. 174.

1100. Where a cause has been argued in a Court of law, on a case settled, and judgment rendered, Chancery will not interfere to have the case amended and re-argued. *Holmes v. Remsen*, 7 J. C. R. 286.

1101. Though a judgment at law may be impeached in Chancery, for fraud, yet that Court will never interfere with the judgment on the ground of irregularity; but the record of the judgment and execution, and title under them, are a conclusive bar in equity; for it belongs exclusively to the Court of law to inquire into the regularity of the judgment. *Shottensirk v. Wheeler*, 3 J. C. R. 275. S. P.

*De Riemer v. Cantillon, 4 J. C. R. [*289] 85. S. P. *Hawley v. Mancius*, 7 J. C. R. 174.

1102. A judgment, after it has been fully paid and satisfied, cannot be kept on foot, to

cover new demands of the plaintiff. *Troup v. Wood*, 4 J. R. 228.

1103. Where the sheriff seizes sufficient property under an execution, the debtor is discharged from the judgment, and the plaintiff must look to the sheriff for his money. *Ibid.*

1104. A judgment cannot be impeached, except for fraud, nor can its consideration be inquired into. *French v. Shotwell*, 6 J. C. R. 255.

XXXVI. JURISDICTION OF THE STATE.

1105. By the declaration of the statute passed April 6th, 1808, sess. 31. c. 135. as well as by immemorial usage, the whole of the *Hudson River* southward of the boundary of the city of *New-York*, and the whole of the *Bay* between *Staten Island* and *Long or Nassau Island*, are within the jurisdiction of the state. *Livingston v. Ogden*, 4 J. C. R. 48.

1106. Therefore, a legislative grant of the exclusive privilege of navigation with *steam-boats*, "in all creeks, rivers, and bays whatsoever, within the territory or jurisdiction of the state," comprehends all the waters lying between *Staten Island* and *Powles Hook*, and the *Jersey shore*, as being part of *Hudson River* or the *Bay*. *Ibid.*

1107. The waters between *Staten Island* and the *Whitehall Landing* in the city of *New-York*, are part of the *Bay of New-York*. *Ibid.*

XXXVII. JURISDICTION OF CHANCERY.

1108. When Chancery gains jurisdiction of a cause for one purpose, it may retain the bill generally. *Rathbone v. Warren*, on appeal, 10 J. R. 587.

1109. So, Chancery once having had jurisdiction, will retain it, though the original ground of jurisdiction, to wit, the inability to recover at law, no longer exists. *King v. Baldwin*, on appeal, 17 J. R. 384.

1110. If there be a doubt whether a defence be available at law, and there is no doubt of the jurisdiction of the Court of Chancery, and the defendant omits to make his defence at law, or if it is overruled on the ground that it cannot be made at law, Chancery may afford relief, notwithstanding a trial at law. *Ibid.*

*1111. Where the remedy at law is doubtful, Chancery will relieve. *Rathbone v. Warren*, 10 J. R. 587. *S. P. Ludlow v. Simond*, 2 C. C. E. 1.

1112. Chancery has concurrent jurisdiction with the Courts of common law in all matters of account. *Ludlow v. Simond*, 2 C. C. E. 1. *S. P. Post v. Kimberly*, 9 J. R. 470.

1113. It has no exclusive jurisdiction in matters of account as between copartners. *Duncan v. Lyon*, 3 J. C. R. 351.

1114. And the plaintiff may come into Chancery, not only to compel the defendant

to account, but to have his own account allowed. *Ibid.*

1115. Chancery has concurrent jurisdiction with Courts of law in a case of private nuisance, by diverting or obstructing an ancient water-course, and may issue an injunction to prevent the interruption, though the plaintiff has not established his title at law. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162.

1116. Chancery is ancillary to Courts at law, in compelling a discovery of facts, to aid a party in defending or prosecuting his rights at law; but it will not compel a defendant to discover that which, if answered, would subject him to a punishment, or render him infamous, or expose him to a penalty. *M'Intyre v. Mancius*, on appeal, 16 J. R. 592.

1117. Chancery will not take cognizance of a cause where the amount in controversy does not exceed the sum of fifty dollars, nor grant an injunction to stay an execution on a judgment in a justice's Court. *Moore v. Lytle*, 4 J. C. R. 183. *Fullerton v. Jackson*, 5 J. C. R. 276.

1118. The power of Chancery to apply the remedy in the case, is co-extensive with its jurisdiction over the subject matter. *Kershaw v. Thompson*, 4 J. C. R. 609.

1119. Chancery possesses an exclusive jurisdiction over cases of *lunacy* and *matrimonial* causes; and will sustain a suit instituted to pronounce the nullity of a marriage with a lunatic. *Wightman v. Wightman*, 4 J. C. R. 343.

1120. Chancery has no jurisdiction over offences against a public statute; or to restrain persons from carrying on the business of *banking*, in violation of a statute. *A. G. v. Utica Insurance Company*, 2 J. C. R. 371.

1121. It has no jurisdiction of offences against the public, or of criminal matters. *Ibid.*

1122. Whether it has jurisdiction over *corporations*, in respect to breaches of trust, unless in the case of a charitable institution? *Quære. Ibid.*

1123. But the persons who exercise the corporate powers may, in their character of trustees, be made accountable in Chancery for a fraudulent breach of trust. *Ibid.*

1124. Where an unconscientious advantage has been taken of the situation of a person, although the circumstances do not amount to fraud, in the contemplation of a Court of law, Chancery will relieve. *Lyon v. Tallmadge*, on appeal, 14 J. R. 501.

*1125. Courts are bound to de- [*291] cide upon the justice and law of the case, and not merely on the points raised by the counsel. *Ibid.*

1126. A. obtained a judgment against C., a sheriff, for an *escape*, and C. obtained judgment against D. and E., the sureties for the liberties of the gaol. D. afterwards prosecuted a writ of error, in the name of C., to reverse the judgment obtained by A. against C.; and during the pendency of the suit in error, C. assigned the judgment which he had obtained against D. and E. to A., with the assent of D., and released all errors in the judgment of A. against C.—D. then filed a bill in Chancery to

set aside the assignment and release, and to be permitted to prosecute the writ of error, in the name of C.; *held*, that the assent of D. to the assignment was obtained, by taking an undue advantage of his situation and necessities, and, therefore, it was no obstacle to the relief sought; that, admitting the assent of D. to the assignment was duly obtained, yet, as it did not appear that he assented to the release of errors, the assignment could not affect his right to bring a writ of error, nor was his right affected by the release; for the sureties of a sheriff have a perfect right to use his name, in prosecuting a writ of error, a recovery against the sheriff being, in effect, a recovery against them. *Ibid*.

1127. Where the defendant puts in an answer, instead of demurring to the bill, and the cause comes on to be heard upon the merits, it is too late to object to the jurisdiction of the Court, on the ground that the plaintiff has an adequate remedy at law, which he might have pursued. *Underhill v. Van Cortlandt*, 2 J. C. R. 339.

1128. Where a party, on being sued at law, made his defence, which was overruled as insufficient, he cannot, on the same facts alone, obtain relief in equity. *King v. Baldwin*, 2 J. C. R. 554.

1129. Where a cause depends, simply and entirely, on the solution of a legal question, a Court of law is the proper forum for its determination. *Ibid*.

1130. *It seems*, that where a statute gives to certain persons a discretion in a particular case, and for a special purpose, a mistake of judgment in that case cannot be reviewed and corrected in Chancery. *Haight v. Day*, 1 J. C. R. 18.

1131. But their discretion may be controlled, if exercised in bad faith and against conscience. *Ibid*.

1132. After a trial at law, or a report of referees, a party cannot have the aid of Chancery, unless he can impeach the justice of the verdict or report, by facts, or on grounds of which he could not have availed himself before, or was prevented by fraud or accident, or by the act of the opposite party, without any fault or negligence on his part. *Duncan v. Lyon*, 3 J. C. R. 351.

1133. Nor will the Court relieve against a judgment at law, on the ground of its being against equity, unless the defendant was ignorant of the fact in question, or it could not be received as a defence at law, or unless he was prevented by fraud, accident, or the act of the opposite party, from making the defence. *Foster v. Wood*, 6 J. C. R. 87.

1134. Chancery has original jurisdiction, to be exercised in sound discretion, to try all questions of fact without the aid of a jury. *Smith v. Carr*, 5 J. C. R. 118.

*1135. And it is not bound, except in cases of bills for divorce, for adultery, or where there is an issue of *devisavit vel non*, to send a matter of fact to be tried by a jury, if it can decide of itself, to its own satisfaction, on the evidence. *Ibid*.

1136. M. and T., being owners, in certain proportions, of goods lying at *Cadiz*, M. consigned the whole to T. of P. for sale, on their joint account, according to their respective interests; T. put the goods with the invoice and bill of lading into the hands of B. and C., partners in trade at *New-York* to sell; *held*, that B. & C. could not retain the proceeds in their hands, to satisfy a demand of B. against M.; and that, having received the goods as agents of T., with full knowledge of his rights, and of the capacity in which he acted, they were not entitled to the aid of this Court in defending a suit at law, brought by T. against them. *Murray v. Toland and Meade*, 3 J. C. R. 569.

1137. Where the plaintiff, having an exclusive right, under an act of the legislature of this state, granted to the defendant the exclusive right of navigating with steam-boats, for a certain time, between *New-York* and *Staten Island*; and it was provided, that if the legislature of *New-Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with steam-boats the waters of that state, that from thenceforth the grant should cease, &c.; *held*, that though the *casus fœderis* may have occurred, Chancery could not interfere to restrain the defendant from continuing to exercise his right under the grant to him, until the plaintiff had established the fact *at law*, and his right to resume the grant. *Livingston v. Tompkins*, 4 J. C. R. 415.

1138. Chancery will not interpose to amend a written instrument, as a policy of insurance, on the ground of mistake, without the clearest and most satisfactory proof of the mistake, and of the real agreement between the parties. *Lyman v. United Insurance Company*, 2 J. C. R. 630. S. C. on appeal, 17 J. R. 373.

1139. Where the intention is manifest, Chancery will always relieve against mistakes in agreements, and that in the case of a surety, as well as in any other case. *Wiser v. Blachly*, 1 J. C. R. 607.

1140. Chancery does not relieve parties from their acts and deeds fairly done, on a full knowledge of the facts, though under a mistake of the law. *Lyon v. Richmond*, 2 J. C. R. 51.

1141. Where a bill is filed to correct an alleged mistake in a contract or agreement, the evidence of the mistake must be clear and certain. *Executors of Getman v. Beardsley*, 2 J. C. R. 274.

1142. Where a bill is filed solely for the purpose of correcting a mistake, it will not be retained, on the ground that there is money due from the defendant on the contract. *Ibid*.

1143. Equity relieves against a mistake, as well as against fraud, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, whether the plaintiff seeks relief affirmatively on the ground of the mistake, or where the defendant sets it up as a defence, to rebut an equity. *Gillespie v. Moon*, 2 J. C. R. 585.

1144. Where there is neither accident nor mistake, misrepresentation nor fraud, Chancery has no jurisdiction to afford [*293] relief to a party, *on the ground that he has lost his remedy at law, through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence or inquiry, or by a bill of discovery. *Penny v. Martin*, 4 J. C. R. 566.

1145. Chancery will not aid or enforce a mere voluntary agreement, not valid at law, especially against a legal claim for a just debt, and where there is no consideration, accident or fraud. *Minturn v. Seymour*, 4 J. C. R. 497.

1146. Chancery has no power to interfere with or set aside an assessment on the proprietors and occupants of lots made by commissioners under the direction of the corporation of the city of *New-York*, under an act of the legislature, to defray the expense of a common sewer, on the ground merely of a mistake in judgment of the commissioners, and where there is no allegation of partiality or unfairness. *Le Roy v. Corporation of New-York*, 4 J. C. R. 352.

1147. Where there is a devise in trust for the payment of debts, and to distribute the residue; the assets are placed under the jurisdiction of Chancery; and it will, therefore, enjoin a suit by one creditor against the executors and trustees, brought for the purpose of gaining a preference. *Benson v. Le Roy*, 4 J. C. R. 651.

1148. Chancery has power to assist a judgment creditor to discover and reach the property of a debtor, placed by him beyond the reach of an execution at law. *MDermutt v. Strong*, 4 J. C. R. 687. *Williams v. Brown*, 4 J. C. R. 682. *Brinkerhoff v. Brown*, 4 J. C. R. 671. *Spader v. Davis*, 5 J. C. R. 280. *S. C.* on appeal, 20 J. R. 554.

1149. On a bill filed by the overseers of the poor of the town of *S.*, against the overseers of the town of *B.*, for relief, on the ground of fraud alleged to have been committed by a former overseer of *B.*, in the apportionment of the poor, under an act for the division of that town, Chancery cannot give relief against the parties in their individual capacities; but the remedy, if any, between the two towns, is at law. *Gregory and others v. Reeve and others*, 5 J. C. R. 230.

1150. Chancery will not sustain a bill, the object of which is to obtain a review of the judgment of the Supreme Court, on the construction of the statute (Sess. 41. c. 250. s. 8.) relative to judgments by confession, as to the priority of *lien* between two judgments. *Brinkerhoff v. Marvin*, 5 J. C. R. 320.

1151. It has no jurisdiction to grant an injunction to restrain the collection of sums allowed by the supervisors of a town, under acts of the legislature, as bounties for the destruction of wolves; there being no charge of fraud or corruption in the board of supervisors. *Moore v. Smedley*, 6 J. C. R. 28.

1152. The review and correction of all errors, mistakes, and abuses, in the exercise of the powers of inferior jurisdiction, and in the

official acts of public officers, belongs exclusively to the Supreme Court. *Ibid.*

1153. The jurisdiction of Chancery is concurrent as to legal, and exclusive as to equitable bars; and a collateral satisfaction will constitute, in equity, a good bar to a freehold right. *Jones v. Powell*, 6 J. C. R. 194.

1154. As, where a widow, entitled to dower in land of which *her [*294] husband died seized, accepts an equivalent in other land, or in money, she will be barred from asserting her claim for dower. *Ibid.*

1155. The jurisdiction of Chancery over trials at law, by compelling the party, who has gained a verdict, to submit to a new trial, or be forever enjoined from proceeding on his verdict, is now very rarely exercised; and never, except in a very clear case of fraud or injustice, or upon newly discovered evidence, which could not possibly have been produced at the first trial. *Floyd v. Jayne*, 6 J. C. R. 479.

1156. Chancery does not now interfere in granting new trials. Per *Spencer, Ch. J.* *Simson v. Hart*, on appeal, 14 J. R. 63.

1157. But where, after verdict in a Court of Common Pleas, that Court, under the statute, has no power to grant a new trial, it seems, that Chancery will grant relief, on the ground of newly discovered evidence, unless the sum be too small to bear the expense of the remedy. *Floyd v. Jayne*, 6 J. C. R. 479.

1158. But if the party has not used diligence, or all the means in his power to establish, at the trial, the fact which he seeks to prove on a new trial, the Court will not interfere. *Ibid.*

1159. Persons incompetent to protect themselves, from old age, weakness of mind, or some delusion or fanaticism, are entitled to the protection of the Court. *Malin v. Malin*, 2 J. C. R. 238. *Matter of Barker*, 2 J. C. R. 232.

1160. The proper remedy for the creditor of a lunatic is in Chancery, which has the sole custody of the estates of lunatics. *Executors of Brasher v. Cortlandt*, 2 J. C. R. 400.

1161. The peculiar state of the property, and the oppressive nature of the litigation, as to the title, afford a proper ground for the equitable jurisdiction of the Court. *Nicoll v. The Trustees of Huntington*, 1 J. C. R. 166.

1162. And the party may either come into Chancery first, to have his title tried at law, under its superintendence, or he may have the title established at law before he comes to the Court; and where the title is once established to the satisfaction of the Court, either upon its own view of the testimony, or by a verdict on one or more issues awarded at its discretion, it will declare in whom the right exists, by a decree, and protect that right by a perpetual injunction. *Ibid.*

1163. But, if the plaintiff, from his own case, does not show enough, or fails to make out a title by evidence, his bill will be dismissed, without awarding an issue. *Ibid.*

1164. A bill of peace, to prevent litigation at law, is allowed only in case the plaintiff has

satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue under the direction of Chancery, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits. *Eldridge v. Hill*, 2 J. C. R. 281.

1165. Chancery has power to order a bond or other instrument to be delivered up to be cancelled, whether such instrument is, or is not void at law, or whether it be void on the face of it, or by matter shown by the proofs in the cause; but the exercise of this power rests in the sound discretion of the Court, and is regulated by the circumstances of each particular case. *Hamilton v. Cummings*, 1 J. C. R. 517.

*1166. Where a bond, good on [*295] the face of it, had been held by the defendant for twenty-seven years, and he admitted that it had been given upon a trust, which he ought not to disclose, and depended on a contingency which had not happened, though it might possibly happen, the Court ordered the bond to be delivered up and cancelled. *Ibid.*

1167. So, where a bond conditioned to pay a certain sum, and good on the face of it, and on which a suit at law was pending; and the obligor had a good defence in equity, arising from matter *dehors* the bond, it was ordered to be delivered up. *Ibid.*

1168. Chancery has jurisdiction to prevent a tenant in common from committing waste. *Howley v. Clowes*, 2 J. C. R. 122.

1169. It has concurrent jurisdiction with Courts of law in cases of private nuisance. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162. *Van Bergen v. Van Bergen*, 2 J. C. R. 272.

1170. But the Court does not interfere to prevent or remove a private nuisance, unless it has been created to the annoyance of the right of another, long previously enjoyed. *Van Bergen v. Van Bergen*, 3 J. C. R. 282.

1171. And it must be a case of strong and imperious necessity, or the right be previously established at law, before the party is entitled to the aid of the Court. *Ibid.*

1172. The jurisdiction of Chancery in awarding partition, is well established. *Wilkin v. Wilkin*, 1 J. C. R. 111. [It is recognized by the 16th section of the act relative to the partition of lands. 1 N. R. L. 507. Sess. 36. c. 100 s. 14, 16, 17.]

1173. Chancery gives relief against a penalty or forfeiture, where the case admits of certain compensation; but not where sums covenanted to be paid are in the nature of stipulated damages; but it will not interfere, unless the party can be clearly and fully indemnified, and placed in the same situation as if nothing had happened. *Skinner v. Dayton*, 2 J. C. R. 526. S. C. on appeal, 17 J. R. 357.

1174. It does not assist the recovery of a penalty or forfeiture, or any thing in the nature of a forfeiture. *Livingston v. Tompkins*, 4 J. C. R. 415.

1175. It does not lend its aid to divest an estate for the breach of a subsequent condition. *Ibid.*

1176. It will only interfere to protect the property from waste and destruction, or prevent its removal out of the jurisdiction of the Court, pending an action at law to recover the possession. *Ibid.*

1177. It does not, unless under very special circumstances, sustain a bill for a compensation in damages, for breach of an agreement. *Hatch v. Cobb*, 4 J. C. R. 559. S. P. *Kempshall v. Stone*, 5 J. C. R. 193.

1178. As where the defendant, who had entered into an agreement with the plaintiff, for the sale and conveyance of a lot of land, after the time of performance had elapsed, sold and conveyed the land to a third person, for a valuable consideration, without notice of the agreement; held, that a specific performance could not be decreed, but the party's remedy, if any, was at law. *Kempshall v. Stone*, 5 J. C. R. 193.

*1179. A party has no remedy [*296] in Chancery, on the mere ground of a failure of title, if he has taken no covenant to secure the title, and there is no fraud in the case. *Chesterman v. Gardner*, 5 J. C. R. 29.

1180. But that Court may decree a specific performance of a general covenant of indemnity, though it sounds only in damages. *Champion v. Brown*, 6 J. C. R. 398.

XXXVIII. LACHES, LENGTH OF TIME, AND POSSESSION.

1181. Where an executor put bonds and notes, due to his testator, into the hands of an attorney to collect, and, after the death of the testator, the attorney collected the money, and applied it to his own use, and became insolvent; held, that the estate of the executor was not chargeable with the loss, especially after the lapse of more than six years. *Rayner v. Pearsall*, 3 J. C. R. 578.

1182. Where the defendant, a *bona fide* purchaser, without notice, and those under whom he claimed, had been in possession of land above twenty-six years before the plaintiffs filed their bill to enforce their claim founded on an implied trust, the bill was dismissed, but without costs. *Shawer v. Radley*, 4 J. C. R. 310.

1183. C. purchased of V. a military lot, and although the whole estate was intended to be transferred, the assignment, for want of words of inheritance, conveyed only an estate for life; and C. entered and continued in possession of the land until his death, having made valuable improvements upon it; and V. stood by during thirteen years after the death of C., seeing his heirs in possession, who claimed to be owners in fee under C., and dealing with the land as absolute owners, without disclosing any claim to the reversion, or any pretension of right or title; held, that V., and all persons under him, were estopped, by his silence for such a length of time, from asserting his legal title. *Higinbotham v. Burnett*, 5 J. C. R. 184.

1184. Where an agent had suffered *thirty* years after his agency had ceased, and sixteen years before the death of his principal, to elapse, without rendering any account, or filing a bill; *held*, that the staleness of the demand was a bar to its admission. *Mooers v. White*, 6 J. C. R. 360.

1185. Where there is fraud or collusion between the executor and debtor, or insolvency, lapse of time is not ground of demurrer to a bill; but is matter of evidence, not an absolute bar, and may be set up in the answer of the defendant. *McDowl v. Charles*, 6 J. C. R. 132.

1186. The owner of land through which a stream of water has run from time immemorial, is entitled to its use, of which he cannot be deprived without his consent, or a just compensation. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162.

1187. Whether the yearly quit rent, in lieu of all other rents, reserved *in a [297] grant or lease in fee of land, and which have not been demanded for more than sixty years, will not be presumed to have become extinguished by lapse of time. *Ten Broeck v. Livingston*, 1 J. C. R. 337.

See Account. Evidence. Legacy. Limitations, Statute of.

XXXIX. LEASE.

1188. A surrender of a lease by the lessee to the lessor, is, *it seems*, an extinguishment of the growing rent. *Shepard v. Merrill*, 2 J. C. R. 276.

1189. Rent may be recovered in equity, where the remedy has become difficult or doubtful at law, or where there is a perplexity or uncertainty as to the title, or the extent of the tenant's responsibility. *Livingston v. Livingston*, 4 J. C. R. 287.

1190. A covenant to renew a lease does not, necessarily, imply that another lease is to be given, not only for the same term and rent, but also, with all the covenants contained in the former lease; such covenants being accidental, and not essential parts of the lease. *Rutgers v. Hunter*, 6 J. C. R. 215.

1191. As, where, in a building lease for twenty-one years, at a certain annual rent, it was covenanted, that at the expiration of the term, the buildings erected and improvements made by the lessee, should be valued in the manner specified in the lease; and if the lessor should not abide by and pay the amount of such valuation, he should "renew the lease, or redemise the lot, at such rents, and upon such terms as might be agreed on between the parties:" At the end of the lease, the lessee refused to accept a redemise of the lot, upon any terms, and insisted upon being paid for his buildings and improvements, according to the valuation thereof, made pursuant to the covenant in the lease; and the lessor tendered a renewal of the lease, for the same term and for the same

rent, but without any covenant as to the buildings, or paying for buildings and improvements; *held*, that the lessee was bound to accept the renewal of the former lease so tendered, or to give up all claim to be paid for buildings and improvements. *Ibid*.

*XL. LEGACY. [298]

- A. Who take as legatees, what passes by the bequest, and by what words; and where the legacy is specific, pecuniary, or general.
- B. Payment of legacies; and of marshalling assets for that purpose.
- C. When liable to abate or refund.
- D. Ademption of a legacy.
- E. Action for a legacy.

- A. Who take as legatees, what passes by the bequest, and by what words; and where the legacy is specific, pecuniary, or general.

1192. Though the name of the legatee is entirely mistaken by the testator, as *Cornelia Thompson*, for *Caroline Thomas*, yet the bequest is good; and the intention of the testator and the mistake in the name being satisfactorily proved, the legacy was ordered to be paid to the person intended. *Thomas v. Stevens*, 4 J. C. R. 607.

1193. A testator, by his will, gave to his daughter, during her separation from W. C., her husband, one thousand dollars a year, which he charged on his real estate; and the daughter was, in fact, living separate from her husband when the will was executed, but she and her husband afterwards lived together, and were cohabiting together at the time of the testator's death; and about three months after his death they again separated, and continued to live separate for a year; *held*, that the legacy, depending on a separation which existed at the time of the execution of the will, and with a view to that fact, was lawful and proper; and, the separation having ceased when the will took effect by the death of the testator, there was an end of the legacy; and a voluntary separation of the parties, afterwards, would not entitle the wife to it. *Cooper v. Remsen*, 5 J. C. R. 459. S. C. 3 J. C. R. 382. 521.

1194. To ascertain the character of a legacy, the intention of a testator is an essential inquiry. *Walton v. Walton*, 7 J. C. R. 258.

1195. A bequest of all the testator's right, interest and property in shares of the *Bank of the United States*, is a specific legacy. *Ibid*. See D.

1196. A legacy of a sum of money to a town, for the purpose of erecting a town house, for the transaction of public business, is valid as a charitable bequest. *Coggeshall v. Pelton*, 7 J. C. R. 292.

- B. Payment of legacies, and of marshalling assets for that purpose.

1197. Since the statute gives a remedy as

law to recover legacies and distributive shares, the statute of limitations may be pleaded in bar to the payment of a legacy. *Kane v. Bloodgood*, 7 J. C. R. 90.

1198. But if there was no remedy at law, Chancery, in regard to *very stale [*299] demands, would adopt the provisions of the statute. *Executors of Arden v. Arden's Executors*, 1 J. C. R. 313.

1199. A legatee may compel an executor to bring into Court money in his hands, or to give security, where the legacy is payable at a future day. *Lupton v. Lupton*, 2 J. C. R. 614.

1200. A legacy payable at a future day, does not carry interest until after it is payable, unless given to a child, and the parent by his will, has made no other provision for its maintenance. *Ibid.* But this exception does not, it seems, extend to grandchildren. *Ibid.*

1201. If a residuary legatee might come in and take the land itself, instead of its proceeds; yet, after a sale by executors under the will, it is too late for him to make his election. *Osgood v. Franklin*, 2 J. C. R. 1. 21.

1202. A devisee of land charged with the payment of a legacy, who accepts the devise, is personally liable for the legacy, and must pay interest upon it, from the time it was payable, though it was not demanded by the legatee. *Glen v. Fisher*, 6 J. C. R. 33.

1203. And where a devisee said, that if the legacy had been demanded, he would not have paid it, and admitted a sufficiency of assets, he was decreed to pay costs. *Ibid.*

1204. And where such devisee dies, his personal representatives are bound to pay the legacy as a personal debt of the intestate. *Ibid.* See C.

C. When liable to abate or refund.

1205. If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. *Lupton v. Lupton*, 2 J. C. R. 614.

1206. But if the deficiency of assets has been occasioned by the waste of the executor, the legatee, who has been paid may retain the advantage he has gained by his legal diligence, as against the other legatees, but not against a creditor. *Ibid.*

1207. Where land is devised, charged with the payment of a legacy, and the devisee accepts of the devise, he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets to pay debts, &c. *Glen v. Fisher*, 6 J. C. R. 33.

1208. It is only when the suit for a legacy is against executors or administrators, as such, that the legatee is bound to give security to refund; not where the suit is against the executor or administrator of the devisee, who has accepted the devise of the land, charged with the payment; for the legacy is then considered as his personal debt, and the legatee as a creditor. *Ibid.*

D. Ademption of a legacy.

1209. Where a debt or specific chattel is
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bequeathed, the specific legacy is adeemed, or extinguished, in the life-time of the testator, by *the payment of the [*300] debt, or the sale or conversion of the chattel. *Wallon v. Walton*, 7 J. C. R. 258.

1210. But a pecuniary or demonstrative legacy, which is general in its nature, though payable out of a particular fund, is not adeemed or extinguished by the extinguishment of the fund designated for the payment of it. *Ibid.*

1211. A legacy of shares in a bank is not extinguished or destroyed by a variation of the testator's interest produced by operation of law. *Ibid.*

1212. As where a testator bequeathed all his interest in 30 shares in the *Bank of the United States*, and, before his death, the charter of the bank expired, and all its property and funds were conveyed to trustees, who divided the funds received by them, from time to time, among the stockholders, and the testator received dividends on the shares, but did not sell or dispose of them; held, that this was an ademption of the legacy *pro tanto* only; and that the legatee was entitled to the dividends payable after the testator's death. *Ibid.*

1213. So where two shares in the *Western Inland Lock Navigation Company* were bequeathed to the plaintiff, and the shares in the life-time of the testator were, by some arrangement, increased to the number of six, and the stock, under an act of the legislature, became vested in the state, and a certain sum paid to the stockholders, as a compensation for its value; held, that the legacy was not adeemed or extinguished. *Ibid.*

E. Action for a legacy.

1214. Where there are several legacies given, which are to be increased or diminished as the estate should increase or diminish, one legatee may file his bill, in behalf of himself and the other legatees who may choose to come in against the executors, for an account and payment. *Brown v. Ricketts*, 3 J. C. R. 553. *S. P. Davoue v. Fanning*, 4 J. C. R. 199.

1215. But where the bill is for the residue of the estate, all the residuary legatees must be parties to the bill. *Ibid.*

1216. Where the plaintiff, in his bill, sets up a claim, independent of the will, to part of the property devised in trust to pay the legacies, he must elect to waive his claim, or wait until it be determined, before he can call for an account, or payment of part of his legacy. *Ibid.*

1217. Where husband and wife sue for the wife's legacy, the Court will direct a suitable provision to be made out of it, for the maintenance of her and her children, before decreeing payment of the legacy to the husband. *Ibid.*

*XLI. LIMITATIONS, STATUTE OF. [*301]

1218. The statute receives the same construction and application, in analogous cases,

in equity, as at law. *Kane v. Bloodgood*, 7 J. C. R. 90.

1219. The statute of limitations is a good plea in bar, in equity, as well as at law. *Kane v. Bloodgood*, 7 J. C. R. 90.

1220. And where to a suit at law on a note, the defendant pleaded the statute, and the plaintiff filed a bill of discovery, with a view to enable him to prove a promise within six years; *held*, that the defendant was not bound to discover any thing that would destroy the effect of his plea at law. *Lansing v. Starr*, 2 J. C. R. 150.

1221. The limitation in the statute against usury, must be pleaded or insisted upon in the answer, otherwise the defendant cannot have the benefit of it, at the hearing. *Dey v. Dunham*, 2 J. C. R. 182.

1222. A prescription of twenty years will bar a claim to a right of common. *Denton v. Jackson*, 2 J. C. R. 320.

1223. Twenty years' possession by a mortgagee, without any account or acknowledgment of a subsisting mortgage, is a bar to all equity of redemption; unless the mortgagor can bring himself within the *proviso* in the statute of limitations, the construction of which is the same in equity as at law. *Demarest v. Wynkoop*, 3 J. C. R. 129.

1224. The disability that entitles the party to the benefit of the *proviso*, must be existing at the time the right first accrues; so that, if during the ten years allowed to an infant, a subsequent disability, as coverture, arises, the time continues to run, notwithstanding such second disability. *Ibid*.

1225. Successive or cumulative disabilities are not within the policy, or the settled and sound construction, of the statute. *Ibid*.

1226. The right to redeem in equity, and the right of entry at law, are analogous. *Ibid*.

1227. No lapse of time is a bar to a direct trust, as between trustee and *cestui que trust*. *Decouche v. Savetier*, 3 J. C. R. 190. *S. P.* *Goodrich v. Pendleton*, 3 J. C. R. 384. *S. P.* *Coster v. Murray*, 5 J. C. R. 522.

1228. But these cases must be understood as referring to such trusts only as are mere creatures of a Court of equity, or strict technical trusts, and not to those which are also within the cognizance of a Court of law; for in regard to all those trusts which are the ground of an action at law, and where there is a concurrent jurisdiction in the Courts of law and equity, the rule is the same, and the statute of limitations may be pleaded with the same effect, in a Court of equity, as at law. *Kane v. Bloodgood*, 7 J. C. R. 90—127. [*And see Roosevelt v. Mark*, 6 J. C. R. 266. *Murray v. Coster*, on appeal, 20 J. R. 576.]

1229. In cases of trusts peculiarly and exclusively of equity jurisdiction, as long as there is a continuing and subsisting trust acknowledged and acted upon between the parties, the statute does not apply; but if the trustee denies the right of the *cestui que trust*, and the possession *of the property becomes adverse, lapse of time, from that period, may constitute a bar in equity. *Ibid*.

1230. Where a person takes possession of property in his own right, and is, afterwards, by evidence or construction, changed into a trustee, he may plead the limitation, or lapse of time, in bar. *Decouche v. Savetier*, 3 J. C. R. 190.

1231. Where there is a joint purchase of goods, and one of the purchasers takes the whole goods, and agrees to account to the other for his share of them, or of the net proceeds, and to charge no commission in case of sale, this is not "a trade of merchandise between merchant and merchant, their factors or servants," within the meaning of the exception in the statute of limitations. And where a bill in equity was filed for an account against a party, who had so received and sold goods, after a lapse of six years, the statute of limitations was *held* to be a good plea; for it is not the case of a technical trust of which Chancery has peculiar and exclusive jurisdiction; nor is the party, in that sense, to be considered as a trustee, for there was a perfect remedy at law against him. *Murray v. Coster*, on appeal, 20 J. R. 576. *Contra*, *S. C.* 5 J. C. R. 522. decided on the ground that the party was a trustee, depository, agent or factor, and therefore, the statute, did not apply. *But see Kane v. Bloodgood*, 7 J. C. R. 90 *ante*, pl. 1227, 1228.

1232. The statute, in such case, begins to run from the time the plaintiff demanded his share of the goods, or the proceeds; and the defendant having rendered an account of sales, the right was then perfect. *S. C.* on appeal, 20 J. R. 576.

1233. But where the defendant in his answer accompanying the plea of the statute of limitations, admitted that he had not been called upon to pay to the plaintiff his proportion of the proceeds, during six years prior to the suit, and that, to avoid litigation, he had, through his counsel, offered to pay the plaintiff his share of the proceeds, without interest; but, at the same time, insisting that he was discharged, by length of time, from all liability, and expressly reserving his right to avail himself of the statute of limitations, in case the offer of settlement was refused; *held*, that this was such an acknowledgment and admission of the debt, as defeated the operation of the statute. *Ibid*.

1234. If part of an open current account be within six years, it draws after it items beyond six years, so as to protect them from the statute. *S. C.* 5 J. C. R. 522.

1235. Where all the items are on one side, the last item, though within six years, does not draw after it those of longer standing. To bring the case within the exception, there must be mutual accounts. *Ibid*.

1236. Whether the exception in the statute applies to other persons than merchants? *Quære. Ibid*.

1237. Whether open accounts, even between merchants, where the last item is above six years' standing, are not within the statute? *Quære. Ibid*.

1238. An executor, being a trustee, cannot plead the statute of limitations in bar to a suit by a legatee, though he may against a creditor. *Ibid*.

1239. But Chancery, in regard to very stale demands, will, in the *exercise of [*303] its discretion, adopt the provisions of the statute. *Arden v. Arden*, 1 J. C. R. 313.

1240. And since a remedy at law is given by statute here, to recover legacies or distributive shares, the statute will be a bar to a suit for a legacy in equity as well as at law. *Kane v. Bloodgood*, 7 J. C. R. 90—127. [The chancellor, in *Decouche v. Savetier*, and *Arden v. Arden*, seems not sufficiently to have regarded the fact of the remedy at law, and that Chancery here has only a concurrent jurisdiction, while in *England* it has the proper and exclusive jurisdiction to enforce the payment of legacies and distributive shares; and it was in reference to the *English* decisions which he was examining, that the observation was made in the cases above referred to, that the statute was not a legal bar to a suit for a legacy. *Ibid.* 126, 127.]

1241. The time of limitation of actions depends on the *lex fori*, not on the *lex loci contractus*. *Decouche v. Savetier*, 3 J. C. R. 190.

1242. Where the statute begins to run, it continues to run, without being impeded by any subsequent event. *Mooers v. White*, 6 J. C. R. 360.

1243. If a demand on a simple contract can be enforced in equity, as well as at law, and the creditor files a bill in Chancery, the defendant will be allowed the benefit of the statute of limitations, if it would have been a good plea in bar to an action at law. *Roosevelt v. Mark* 6 J. C. R. 266.

1244. An acknowledgment, to take a case out of the statute, must be of a present subsisting debt, unqualified, and made by the party himself. *Ibid.*

1245. Any payment or act of his assignees or trustees, who are not parties to the contract, nor under any personal obligation to pay or contribute, is not sufficient to create a constructive acknowledgment of the original debt. *Ibid.*

1246. A devise of real and personal estate, for the payment of all debts, does not revive a debt barred by the statute of limitations. *Ibid.*

1247. An acknowledgment or admission by an executor or administrator, will not bind the real assets in the hands of the heir or devisee, or of the people, by escheat, or affect the right of either to plead the statute of limitations. *Mooers v. White*, 6 J. C. R. 360.

1248. There is no statute of limitations to a charge on real estate; for an action at law does not lie in such a case, or where there is no personal undertaking. *Kane v. Bloodgood*, 7 J. C. R. 90.

1249. The statute is a bar to any demand of one tenant in common against another, for an account further back than six years. *Ibid.*

1250. Corporations, as well as private persons, may plead the statute. *Ibid.*

1251. So, directors of a corporation, who are, on its dissolution, made trustees by statute, with power to settle the concerns of the corporation, may plead the statute. *Ibid.*

1252. Where a plaintiff is entitled to dividends on shares of an incorporated company, and for which he has a clear remedy at law, it is not such a direct and express trust, as will take the case out of the statute. *Ibid.*

*1253. A pure plea of the statute is no bar, where there are circumstances, as, an offer to account, acknowledgment, promise to pay, &c., to take the case out of the statute, unless there be averments sufficient to destroy the force of these circumstances. *Ibid.*

XLII. LOAN OFFICERS.

1254. Though by the act, *authorizing the loan of money*, &c. (Sess. 31. c. 216.) the mortgagor, after a default of payment, loses all equity of redemption, and the commissioners become seized of an absolute estate in the premises; yet the commissioners are trustees for the people, to the amount of the mortgage debt and interest, and for the mortgagor, in respect to the surplus; and the mortgagor, as well as the people, has a right to demand of the commissioners a faithful execution of their trust. *Denning v. Smith*, 3 J. C. R. 332.

1255. The notice of sale, according to the true construction of the act, authorizing the loan of money, &c., must *continue* to be fixed up at three public places, and be advertised in a public newspaper of the county in which the land lies, from eight days after the fourth *Tuesday of May*, or the third *Tuesday of September*, or day of sale. *Ibid.*

1256. Where, on default of the mortgagor, the commissioners caused the mortgaged premises to be sold, without giving due public notice of the sale, pursuant to the act, and under circumstances denoting fraud and collusion on the part of one of the commissioners, the sale was set aside, and the deed executed by the commissioners ordered to be delivered up to be cancelled, and proceedings in an action of ejectment brought by the purchaser to be perpetually stayed. *Ibid.*

1257. By notice of sale to be fixed up in three public places, is meant that the notice should be put up in places best calculated to bring home the notice of sale to the mortgagor, and all persons most likely to attend as purchasers. *Ibid.*

1258. Three weeks' notice is not sufficient. *Ibid.*

1259. The notice must contain the name of the mortgagor, and an accurate description of the quantity and situation of the land. *Ibid.*

1260. If the commissioners abuse their trust, Chancery will afford relief, either by setting aside the sale, and letting in the mortgagor to redeem, or by directing the commissioners to account for the difference between the sum for which the land was sold, and its real value at the time. *Ibid.*

1261. The loan officers are bound to pursue the directions of the statute strictly. If, therefore, there be a defect in the advertisement, in describing the quantity and situation of the

land, the sale is irregular and void; and the purchaser under such sale was decreed to release all his title to the owners of the equity of redemption; and a note given by him to the loan officers, for the surplus money, was ordered to be delivered up and cancelled; but the defendant being an *innocent [*305] and bona fide purchaser, was not subjected to the payment of costs. *Sherman v. Dodge*, 6 J. C. R. 107.

1262. Where a mortgage, taken by two loan office commissioners of Essex county, had become forfeited, and the land regularly sold, pursuant to the act, except that one of the commissioners was not present when the order for the advertisement of sale was made, nor at the time of sale; held, that the assent of the absent commissioner was to be presumed, as no dissent was expressed by him, afterwards, and he joined in the deed to the purchaser; and though it is the duty of both of the commissioners to be present at the sale, yet the absence of one of them, from necessity or just cause, which was to be presumed in this case, would not affect the validity of a sale, otherwise regular and fair; and though the commissioners neglected to make all the proper minutes or entries in a book of their proceedings, according to the directions of the act, yet an omission on their part, in this respect, will not vitiate or defeat the sale itself, as against a bona fide purchaser. *King v. Stow*, 6 J. C. R. 323.

1263. Where the advertisement of sale was affixed up by the commissioners, at the Court House, and two public taverns in the village of E., being the three most public places in that village, which is the place of the greatest public resort in the county; held, that this was sufficient, as the act did not expressly require that the advertisements should be put up in three distinct villages or towns; and the practice of the commissioners of Essex had been uniformly otherwise. *Ibid.*

1264. But, admitting that the commissioners erred in their construction of the act, in this respect; yet a mere error of judgment, where there was no fraud, or pretence for imputing fraud, will not vitiate a sale as against a bona fide purchaser, without notice of any irregularity or omission on the part of the commissioners. *Ibid.*

XLIII. LUNATICS AND IDIOTS.

A. Of lunatics and idiots.

B. Jurisdiction of Chancery, and its course of proceeding in regard to lunatics and idiots; commission and inquisition of lunacy; traverse of the inquisition.

C. Committee or curator of the person and estate of the lunatic; his power and duty; and herein of the sale of the lunatic's estate for his maintenance, and the payment of his debts; account and allowances.

A. Of lunatics and idiots.

1265. A person deaf and dumb from his nature. I.

tivity, is not, therefore, an idiot, or non compos mentis; though such, perhaps, may be the legal *presumption, until his [*306] mental capacity is proved, on inquiry and examination for that purpose. *Brower v. Fisher*, 4 J. C. R. 441.

B. Jurisdiction of Chancery, and its course of proceeding in regard to lunatics and idiots; commission and inquisition of lunacy, and traverse of the inquisition.

1266. Chancery, having the whole jurisdiction in regard to lunatics and idiots, will direct the course of proceeding on the traverse of the inquisition returned, in such a manner as may be most useful and expedient, so as best to inform its conscience, and afford the safest conclusion as to the fact of lunacy. *Matter of Wendell*, 1 J. C. R. 600.

1267. The lunatic may be brought into Court, after the inquisition is returned, and an inquiry be made by inspection, as to the fact of his lunacy, or an issue may be awarded to ascertain, by a verdict at law, the existence or continuance of his lunacy. *Ibid.*

1268. The most usual and proper course is, to have the issue made up and prepared for trial, under the direction of the Court, instead of delivering over the record and traverse, after the attorney general has joined issue thereon, as practised in England, under the statute 2 and 3 Edw. VI. which has not been re-enacted or adopted here. *Ibid.*

1269. At the time of directing the issue at law, the Court will, if necessary, make a provisional order for the care of the lunatic's estate, until the question of lunacy is determined. *Ibid.*

1270. An inquisition of lunacy taken abroad, or in another state, is not sufficient to authorize a sale of the lunatic's estate for his maintenance; but it is enough to warrant the issuing of a new commission here, and may perhaps be sufficient ground or evidence to warrant an inquisition here on such new commission. *Matter of Perkins*, 2 J. C. R. 124.

1271. A commission of lunacy may issue against a person resident abroad. *Ibid.*

1272. Where a person, from old age, disease, or other cause, becomes so incapacitated in mind, as to be unable to manage his affairs, a commission in the nature of a writ de lunatico inquirendo may be awarded. *Matter of Barker*, 2 J. C. R. 232.

1273. And where the inquisition on such a writ found the party, who was eighty-five years of age, to be of "unsound mind, and mentally incapable of managing his affairs," a committee of his estate was appointed. *Ibid.*

1274. On the petition of a lunatic to supersede the commission, and to be restored to his estate, on his recovery, the Court will either order it to be referred to a master, to take proof as to the allegations in the bill, and to examine the lunatic, if he thinks fit, and report the proof of his opinion thereon, or direct the lunatic himself to attend in Court, to be examined by the chancellor. *Matter of Hanks*, 3 J. C. R. 567.

1275. Where, on the petition of a relation of a lunatic, who had received from him a deed of a farm, a few days before the finding of the inquisition, an issue was awarded to try the fact of lunacy, and the party, by [*307] the verdict, was found to have been a lunatic for several years preceding, the party traversing the inquisition was ordered to pay costs. *Matter of Folger*, 4 J. C. R. 169.

1276. The prosecutor of a charge of lunacy is not, of course, ordered to pay costs, where the party is found by the inquisition to be of sound mind, if the prosecution has been in good faith, and upon probable grounds. *Brower v. Fisher*, 4 J. C. R. 441.

1277. On the petition of a lunatic, for the discharge of his committee, on the ground of a returned sanity, it is in the sound discretion of the Court to allow him to traverse the inquisition, or to try the question by a feigned issue. *Matter of M'Clean*, 6 J. C. R. 440.

1278. Where the lunacy was satisfactorily established, in the first instance, and the opinion of the Court, after repeated applications for a discharge of the committee, remained unchanged, the trial of the question was directed to be at the expense of the lunatic or his friends, and not at the charge of his estate, which consisted of personal property only, acquired by the skill and industry of his wife, and barely sufficient for the maintenance of herself and children and husband. *Ibid.*

C. Committee or curator of the person and estate of the lunatic; his power and duty; and herein of the sale of the lunatic's estate for his maintenance, or for the payment of debts; account and allowances.

1279. The custody of a lunatic's person and estate, real and personal, may be committed to his next of kin, though heir at law. *Matter of Livingston*, 1 J. C. R. 436.

1280. The proper remedy for the creditor of a lunatic is in Chancery, not by an action at law. *Executors of Brasher v. Cortlandt*, 2 J. C. R. 400.

1281. The real estate of a lunatic may be sold for the payment of his debts, on a bill filed by a creditor for that purpose, without a petition of the committee of the lunatic, under the act concerning idiots and lunatics, &c. Sess. 24. c. 30.; but the sale is to be conducted, under the directions of the Court, by a master, and the committee of the lunatic; and the terms of sale, &c. must be reported to the Court, for its approbation, before any conveyance is executed. *Ibid.* S. C. 2 J. C. R. 242.

1282. A creditor of a lunatic may file a bill for the payment of his debt against the committee of the lunatic, without making the lunatic himself a party. *Ibid.*

1283. Where a creditor wishes to obtain payment of his debt out of a lunatic's estate, and no inventory of the estate has been filed by the committee of the lunatic, according to the statute, the proper course is to cause the committee, by citation or otherwise, to file an inventory, and to present a petition to the Court,

stating the amount of the estate, debts, &c. *Ibid.*

1284. The usual course to obtain payment of a debt owing from a lunatic, is by petition to the Court. *Ibid.*

1285. Where it appeared that all the estate of a lunatic had been expended in his necessary maintenance, the [*308] Court, on petition of his committee, ordered the lunatic to be delivered over to the overseer of the poor of the town. *Matter of M'Farlan*, 2 J. C. R. 440.

1286. In the management of a lunatic's estate, the interest of the lunatic is more to be regarded, than the contingent interest of those who may be entitled to the succession; and the Court, if it be for the interest of the lunatic, will direct timber on the land of the lunatic to be sold. *Matter of Salisbury*, 3 J. C. R. 347.

1287. So, the real estate may be converted into personal, or personal into real, for the benefit of the lunatic. *Ibid.*

1288. A committee of a lunatic is entitled to an allowance, by way of compensation for his services in receiving and paying moneys, &c. within the equity of the statute, Sess. 40. c. 25. authorizing the Court to make a reasonable allowance to guardians, executors, and administrators, for their services. *Matter of Roberts*, 3 J. C. R. 43.

1289. On the petition of the committee of a lunatic, without a bill filed, the Court may make an order to restrain waste on the real estate of the lunatic; and for a breach of such order, an attachment will be granted, on motion of the committee. *Matter of Hallock*, 7 J. C. R. 24.

1290. A lunatic is not a necessary party plaintiff with his committee, in a bill to set aside an act done by the lunatic, under mental imbecility. *Ibid.*

XLIV. MORTGAGE.

- A. What constitutes a mortgage; and its nature.
- B. Registry of mortgages; priority of encumbrances, and tacking.
- C. Estate and interest of the mortgagor and mortgagee; and when the equitable is merged in the legal estate.
- D. Equity of redemption; who may redeem; what length of time shall be allowed for that purpose; and what fund is liable for the redemption of the mortgage of a testator; and when payment or satisfaction of a mortgage will be presumed.
- E. Foreclosure and sale.
- F. Account between mortgagor and mortgagee.
- G. Power to sell in a mortgage, and of the sale under it.

A. What constitutes a mortgage; and its nature.

1291. An absolute deed and a defeasance subsequently executed by the grantee, amounts to a mortgage. *Dey v. Dunham*, 2 J. C. R. 182. S. C. on appeal, 15 J. R. 555.

1292. Parol evidence is admissible to show that a mortgage only, not an absolute sale, was

intended; and that the defendant had fraudulently attempted to convert a loan into a sale, and the plaintiff was, *therefore; [*309] entitled to redeem. *Strong v. Stewart*, 4 J. C. R. 167. *S. P. James v. Johnson*, 6 J. C. R. 417.

1283. A deed, absolute on the face of it, but intended by the parties as a security merely for a debt, though registered as a deed, is valid and effectual between the parties as a mortgage; but it is liable to be defeated by a subsequent mortgage duly registered. *James v. Johnson*, 6 J. C. R. 417. *S. P. Dunham v. Dey*, on appeal, 15 J. R. 555.

1284. Though the deed is absolute on the face of it, and the defeasance is by parol, it is valid as between the parties themselves. *Ibid.*

1295. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that the defeasance had been destroyed by fraud or mistake. *Marks v. Pell*, 1 J. C. R. 594.

1286. But where a bill was filed for an account and reconveyance, thirty years after the deed alleged to be a mortgage was given, during which time the defendant had been in possession, parol evidence of the mere confessions of the defendant, made seventeen years after the deed, that it was a security merely for a debt, was held insufficient. *Ibid.*

1297. A conveyance of real estate, intended merely as a security for a debt, though absolute on the face of it, is a mortgage; and any agreement, on a subsequent event, to change its nature, is void. *Henry v. Davis*, 7 J. C. R. 40.

1298. H., having a bond and mortgage executed to him by D., for 1065 dollars, assigned them over to C., for securing the sum of 225 dollars. The assignment was absolute, but C. gave H. a writing, promising to reassign the bond and mortgage to him, on his paying the 225 dollars, and interest, on a day specified. Notice of the assignment, and of its being intended as security merely, was given to D., and that he must pay no more to C. H., afterwards, settled and cancelled the mortgage, on D.'s paying part of the money, and giving C. a new security for the residue; held, that the cancelling of the mortgage was fraudulent, and C. was decreed to pay the balance, after deducting the 225 dollars, and interest, to H. *Ibid.*

1299. Where a mortgage had become forfeited, and a judgment was recovered on the bond, and execution issued, and the mortgage, to obtain time for payment, conveyed other property to the mortgagee, as further security, and the mortgagee gave a bond, by way of defeasance, that if the money was paid on a certain day, the conveyance should be void; held, that the conveyance partook of the quality of the original transaction, and was to be deemed a mortgage, and not a defeasible purchase. *Bloodgood v. Zeely*, 2 C. C. E. 124.

1300. An assignment of a debt passes the equitable, if not the legal interest in a mortgage given for securing payment of the debt. *Johnson v. Hart*, on appeal, 3 J. C. 322.

1301. The debt, in equity, is considered as the principal, and the mortgage or security as the incident. *Green v. Hart*, on appeal, 1 J. R. 580; and the assignment of the principal draws after it the incident. *Ibid.*

1302. And Courts of law take notice of this rule. *Jackson, ex dem. Norton, v. Willard*, 4 J. R. 41. As, where a mortgage had been given *to secure the pay- [*310] ment of a negotiable note, if the holder endorses the note over to a third person, and, at the same time, delivers the mortgage to the endorsee, without any written assignment of it, the written transfer of the note, and the delivery of the security, is a sufficient assignment of it. *Ibid.*

1303. A mortgage for a debt may be held as security for further loans, if there be no intervening right. *James v. Johnson*, 6 J. C. R. 417. 429.

1304. A mortgage, after describing the premises, contained an exception of such village lots, as had been or might be laid out by the mortgagor within certain limits, so that the whole of such lots did not exceed 50 acres. The mortgage was recorded October 13, 1817, and on the 20th of April, 1820, the mortgagor released to the mortgagee his right in the exception, being ten acres in extent, or any buildings erected thereon. On a bill of foreclosure, a creditor, who had recovered a judgment against the mortgagor, on the 25th of April, 1820, claimed the whole 50 acres; held, that the 50 acres were included in the mortgage, subject to the election and appropriation of the mortgagor, who was bound to make his election in a reasonable time; and if his right of election was not exercised before the commencement of the suit, that he be deemed to have waived the exception in his favor. *Albany Insurance Company v. Lansing*, 7 J. C. R. 142.

1305. And the master, in such case, was directed to ascertain what village lots had been laid out by the mortgagor, before the commencement of the suit, and to exempt them from the sale under the mortgage, provided that they did not include more than ten acres, or any buildings, &c. *Ibid.*

1306. The expenses of making the security are to be paid by the mortgagor. *Hine v. Handy*, 1 J. C. R. 7.

B. Registry of mortgages; priority of encumbrances, and tacking.

1307. The registry of a mortgage is notice to subsequent purchasers. *Frost v. Beekman*, 1 J. C. R. 288. *Parkist v. Alexander*, 1 J. C. R. 394. *Johnson v. Stagg*, 2 J. R. 510.

1308. But the registry is notice only to the extent of the sum specified in the registry. *Ibid.* *S. P. Beekman v. Frost*, on appeal, 18 J. R. 544.

1309. As, where a mortgage given to secure three thousand dollars, was, by mistake of the clerk, registered as a security for three hundred dollars; held, that this was notice only of a mortgage for 300 dollars. *Ibid.*

1310. The mortgagee is not bound to in

spect the record, and see that the registry is correct; that is the duty of the clerk. *Ibid.*

1311. An unauthorized registry of a mortgage, or a mortgage registered without any proof or acknowledgment, is not, it seems, notice to a subsequent purchaser. *Ibid.*

1312. Equity gives no assistance against a purchaser for a valuable consideration without notice. *Ibid.*

1313. But when actual notice of the true sum in the mortgage is brought home to the purchaser, he is, from that time, so

[*311] far as the purchase is left incomplete, either as to the deed on the one hand, or as to the payments on the other, bound by the prior equitable lien; and all subsequent payments are made by him in his own wrong, so far as the rights of the mortgage are concerned. *Ibid.*

1314. The notice of an encumbrance stops all further proceedings towards the completion of the purchase or payment of the money. *Ibid.*

1315. It seems, that the registry of a mere equitable mortgage, or encumbrance, is notice to the subsequent purchaser of the legal estate, so as to entitle such mortgage to a preference. *Parkist v. Alexander*, 1 J. C. R. 394.

1316. A lease assigned by way of mortgage, must be registered, in order to secure the mortgage against a subsequent registered mortgage. *Johansen v. Slagg*, on appeal, 2 J. R. 510.

1317. The statute concerning the registry of mortgages applies to mortgages of leasehold, as well as of freehold estates. *Ibid.* *S. P. Berry v. Mutual Insurance Company*, 2 J. C. R. 603.

1318. Where a demise is made by way of mortgage of leasehold property, it is not necessary to deliver the lease itself to the mortgagee; and leaving it in the hands of the mortgagor, is no evidence of fraud; for the statute requiring the registry of the mortgage, effectually secures subsequent purchasers, or mortgagees, against fraud or imposition. *Ibid.*

1319. Such registry is equivalent to notice, and subsequent mortgagees or purchasers must look to the registry, at their peril. *Ibid.*

1320. Nothing but actual fraud can divest the prior mortgagee, whose mortgage is recorded, of his security. *Ibid.*

1321. Subsequent mortgagees or purchasers are so affected by the constructive notice arising from the registry of a prior mortgage, that they are subject to all the equity existing between the prior mortgagee and mortgagor. *Ibid.*

1322. Where the mortgagee executes and delivers to the mortgagor a defeasance, conditioned that the bond and mortgage shall be delivered up and cancelled, on the performance of certain acts by the mortgagor, such defeasance need not be recorded. *Clute v. Robison*, on appeal, 2 J. R. 595.

1323. Where a deed, absolute on the face of it, is recorded as a deed, and afterwards the grantee executes a defeasance, it is connected with the first deed, and considered as a mortgage, and must be recorded, in order to have

priority over a subsequent deed to a bona fide purchaser. *Dey v. Dunham*, 2 J. C. R. 182. [S. C. on appeal, 15 J. R. 555.]

1324. The record of the absolute deed, as such, is no notice to the subsequent purchaser. *Ibid.*

1325. It must be such a notice as, with attending circumstances, will affect the subsequent purchaser with actual fraud. *Ibid.*

1326. A notice, merely sufficient to put a party on inquiry, is not sufficient to break in on the registry act. *Ibid.*

1327. But where a person conveyed all his property, real and personal, without any particular description of it, in the body of the deed, but in a schedule annexed to the deed, certain lots previously conveyed to D. D. were described as "lots of ground in Stuart-street, the title to which is in D. D., as collateral security to pay certain notes; *held, that this was sufficient notice to the

[*312] grantee of the prior mortgage to D. D., which had never been recorded; and that therefore, the grantee could not, by having his deed first recorded, obtain a priority, or defeat such mortgage. S. C. on appeal, 15 J. R. 555.

1328. Priority of registry is of no avail against actual previous notice of an unregistered mortgage. *Berry v. Mutual Insurance Company*, 2 J. C. R. 603.

1329. Where several equitable interests, affecting an estate, are otherwise equal, they will attach according to priority of time. *Ibid.*

1330. A second mortgagee, who has neglected to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless he shows, from non-delivery of possession, or other circumstances, that imposition has been, or might be, practised upon him, by or with the concurrence of the first mortgagee, which could not be detected, or guarded against, by the exercise of ordinary diligence. *Ibid.*

1331. The mere circumstance of leaving the title deeds with the mortgagor, is not, of itself, sufficient evidence of fraud, so as to postpone the first mortgagee, to a second mortgagee who has taken the title deeds without notice of the prior mortgage. There must be fraud, or gross negligence, equivalent to fraud, on the part of the first mortgagee. *Ibid.*

1332. The registry of a mortgage is a substitute for the deposit of the title deeds. *Ibid.*

1333. A subsequent bona fide purchaser is expressly protected by the statute against prior unregistered mortgages; but a mortgagee is not a purchaser within the meaning of the statute. *Ibid.*

1334. He may, however, protect himself by a registry, against a prior unregistered mortgage without notice. *Ibid.*

1335. A person who takes a conveyance of land with notice of a prior unregistered mortgage, is not, within the meaning of the registry act, a bona fide purchaser, who can gain priority by having his deed first recorded. *Dunham v. Dey*, on appeal, 15 J. R. 555.

1336. Where a prior mortgagee or encumbrancer witnesses a subsequent conveyance or mortgage, knowing its contents, without dis

closing his own encumbrance, he will be postponed or barred. *Brinckerhoff v. Lansing*, 4 J. C. R. 65.

1337. This rule, however, does not apply; where the prior mortgage is duly registered; for then the subsequent mortgagee is charged with notice. *Ibid.*

1338. To affect the right of such prior mortgage, mere silence is not sufficient; there must be actual fraud charged and proved, such as false representations, or denial on inquiry, or artful assurance of good title, or deceptive silence when information is asked. *Ibid.* And the burden of proving such fraud lies on the subsequent purchaser or mortgagee. *Ibid.*

1339. A mortgage given to secure a certain sum, according to the condition of a certain bond of the same date, which was conditioned to pay that sum, or to indemnify the mortgagee against a note for the same sum, made by the mortgagor, and endorsed by the mortgagee, and discounted at a bank, for the accommodation of the mortgagor, [*313] *will continue as a subsisting valid security, as long as such note is run or kept alive in the bank, in whole or in part, by renewals thereof, from time to time, according to the customary course of such transactions with the bank; such mortgage, with reference to the bond, being sufficient to apprise a subsequent purchaser or mortgagee of the nature of the debt secured. *Ibid.*

1340. Where a mortgage is given as security for the payment of promissory notes, which are from time to time renewed, the renewal is not to be deemed an extinguishment of the original debt, so as to affect the mortgage security. *Dunham v. Dey*, on appeal, 15 J. R. 555.

1341. The registry of the assignment of a mortgage is not notice to a mortgagor, so as to render payments by him to the mortgagee, in his own wrong; but it is effectual notice to a subsequent purchaser. *James v. Johnson*, 6 J. C. R. 417.

1342. All dealings with a mortgagee, before notice of an assignment by him, are valid. *Ibid.*

1343. A prior mortgagee is not allowed to enlarge his demand beyond what appears on the record, in consequence of a separate agreement between him and the mortgagor, to the prejudice of a second mortgagee, who had no notice or information, at the time he took his mortgage, of such agreement between the first mortgagee and mortgagor, by which the former claimed interest, when, on the face of the bond and mortgage, no interest was payable. *St. Andrew's Church v. Tompkins*, 7 J. C. R. 14.

1344. The statute does not make the registry of a mortgage indispensable. The omission to register only exposes the mortgagee to the hazard of losing his lien, in case of a subsequent bona fide purchaser, or to the postponement of it to a subsequent mortgage first registered. *Berry v. The Mutual Insurance Company*, 2 J. C. R. 603.

1345. Registered mortgages are to be paid

according to the time of their registry, and the doctrine of tacking does not apply to them. *Grant v. Bissett*, 1 C. C. E. 112.

C. Of the estate and interest of the mortgagor and mortgagee; and when the equitable is merged in the legal estate.

1346. A feme covert may mortgage her separate property for her husband's debts. *Demarest v. Wynkoop*, 3 J. C. R. 129.

1347. So, she may execute a valid power to sell the property so mortgaged, in case of default of payment, pursuant to the statute. *Ibid.*

1348. In a mortgage, by husband and wife, of the wife's separate estate, the equity of redemption may be reserved to the husband alone, who may sell it. *Ibid.*

1349. A mortgage interest, before foreclosure, is a chattel, and is personal assets belonging to the executor. *Ibid.*

1350. The Courts of law have decided, that a mortgagor in possession of land mortgaged in fee, before foreclosure, or entry by the mortgagee, has, in regard to all the rest of the world, except the [*314] mortgagee, the legal seisin, and that his equity of redemption might be sold in execution; and that, in case of his death, while in possession, and before foreclosure, his widow was entitled to her dower in the land mortgaged, of which she could not be deprived by a purchaser of the equity of redemption of her husband; (*Jackson v. Willard*, 4 J. R. 41. *Hitchcock v. Harrington*, 6 J. R. 290. *Collins v. Torry*, 7 J. R. 278. *Runyan v. Mersereau*, 11 J. R. 534.) and Chancery follows the doctrine of the Courts of law, and allows the widow her dower out of the proceeds of the sale of the mortgaged premises, on a bill for foreclosure and sale. *Titus v. Neilson*, 5 J. C. R. 452.

1351. As, where the wife of a mortgagor joined in a mortgage in fee, and the mortgagor, afterwards, executed a second mortgage of the same premises, in which she did not join; and after a decree for sale, on a bill filed by the first mortgagee, but before the sale, the mortgagor died; held, that the widow was entitled to her dower out of the surplus proceeds remaining after the mortgage debt was satisfied. *Ibid.*

1352. A secret assignment of a mortgage, by a mortgagee who had purchased the equity of redemption, will not affect a bona fide purchaser. *James v. Johnson*, 6 J. C. R. 417.

1353. Mortgage creditors are bona fide purchasers, within the meaning of the act of the 21st of April, 1818, (Sess. 41. c. 259.) relative to judgments entered by confession on warrants of attorney. *Ibid.*

1354. A mortgagee, who has assigned the bond and mortgage, and guaranteed the payment of the debt, may take additional security from the mortgagor, in his own name, which will accrue to the benefit of his assignee, though he was ignorant of its being taken; and the mortgagee may avail himself of such additional security, until he is indemnified against his guaranty. *Evertson v. Booth*, on appeal, 19 J. R. 486.

1355. Where one of several mortgagors assigns his interest to a third person, who is accepted by the mortgagee, as a substitute of such mortgagor, to the extent of his interest, and an endorsement to that effect is made on the bond and mortgage, the land will be exonerated from the proportion of the debt of such mortgagor, on the assignee paying to the mortgagee the amount of such proportion; and if the assignee has given bonds to the mortgagee for a balance of an account between them, including the amount of such proportion, the satisfaction of those bonds will be regarded as payment, notwithstanding such satisfaction was by a settlement made after cancelling the original bonds, by giving other securities, and at the time of giving the same the assignee has notice of an assignment of the bond and mortgage, made by the mortgagors, between the first and second settlements. *Leake v. Woolsey*, 1 C. C. E. 73.

1356. A mortgage interest passes under the general words of the will of the mortgagee as to his real estate. *Jackson, ex dem. Livingston, v. Delancy*, 13 J. R. 537.

1357. Where the equitable and legal estates are united in the same person, the former is merged in the latter; as, where the owner of an equity of redemption pays off a subsisting mortgage, and takes an assignment *of it, it will be intended that he does it to exonerate his estate from the encumbrance, and that the mortgage is extinguished, unless it is made to appear that he has some beneficial interest in keeping the legal and equitable estates distinct. *Gardner v. Astor*, 3 J. C. R. 53. *James v. Johnson*, 6 J. C. R. 417. *S. P. Starr v. Ellis*, 6 J. C. R. 393.

1358. So, where a mortgagor executes an absolute deed to the mortgagee for the same land, with full covenants, the legal and equitable titles being united in the same person, the latter is merged in the former. *Burnet v. Denniston*, 5 J. C. R. 35. *S. P. Mills v. Comstock*, 5 J. C. R. 214. *Starr v. Ellis*, 6 J. C. R. 393. *James v. Johnson*, 6 J. C. R. 417.

1359. Chancery will keep an encumbrance alive, or consider it extinguished, as may best serve the purposes of justice and the just intent of the parties. *Starr v. Ellis*, 6 J. C. R. 393.

1360. In special cases, as where an infant is entitled to the estate, the charge may be preserved for his benefit. *James v. Johnson*, 6 J. C. R. 417.

1361. Though a mortgagee may, by way of extinguishment, release all his interest to the mortgagor, yet he cannot convey it as a subsisting interest absolutely, or by way of mortgage to secure a debt to a third person; especially when the mortgage has not become absolute, and there has been no foreclosure; for the debt cannot reside in one person and the mortgage in another. *Aymar v. Bill*, 5 J. C. R. 570.

1362. P. gave a mortgage of land, the title to which was in S., who was in possession thereof with P., and S. treated it, afterwards, as a valid and subsisting mortgage, and volun-

tarily paid part of the money due on it; held, in a suit by the mortgagee against P. and S. for a foreclosure and sale, that S. was estopped from setting up his title to the premises, in avoidance of the mortgage. *Lee v. Porter and Stiles*, 5 J. C. R. 268.

1363. A mortgage was given, in 1814, by P., one of the occupiers of a lot of land, for a ratable proportion of the money due on a former mortgage, covering the whole lot, of which the premises in question were only a part, which former mortgage was given to B. in 1799, in renewal of a prior mortgage of the lot, in 1794, to R., who had assigned it to B.; held, that though R. claimed title under the grantee of the patentee, whose title to the land had become forfeited to the state, by his attainder, and, therefore, the mortgage by P. might be said to be without consideration; yet P., being fully apprized of the state of the title, when he gave the mortgage, could not set that up as a defence against the plaintiff, a *bona fide* purchaser of the mortgage; especially, as he, with the other occupiers of the lot, had, in a petition to the legislature, stated that he had satisfied the mortgage. *Ibid.*

1364. It seems, that Chancery will not relieve against a mortgage, on the ground of an outstanding claim, which the mortgagor had bought in for greater security, without any judicial investigation or decision on such claim. *Ibid.*

1365. A deed from the state, pursuant to an act of the legislature, reciting that the title to certain lands were vested in the state by the attainder of J. W., and that such title had been perfected by the removal *of encumbrances, and directing the [*316] surveyor general to convey the land, &c., cannot be set up as a defence to defeat a *bona fide* mortgage on the land; for such an act cannot divest the title of persons holding adversely, without a regular eviction in the ordinary course of law. *Ibid.*

D. *Equity of redemption; who may redeem, and what time shall be allowed for that purpose; what fund is liable for the redemption of a mortgage of a testator; and when payment or satisfaction of the mortgage will be presumed.*

1366. No person can come into the Court of Chancery for a redemption of a mortgage, unless he is entitled to the estate of the mortgagor, or claims a subsisting interest under it. *Grant v. Duane*, on appeal, 9 J. R. 591.

1367. Possession by the mortgagee, for a period short of twenty years, will not bar the equity of redemption; the possession must be an actual, quiet, and undisturbed possession for twenty years, or a period sufficient to toll the right of entry at law. *Moore v. Cable*, 1 J. C. R. 385.

1368. A mortgage is no evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid for twenty years. *Giles v. Baremore*, 5 J. C. R. 545.

1369. Where the plaintiff assigned the lease of a farm, to secure the payment of a debt

due to the defendant; and the parties, afterwards, entered into an agreement, by which the plaintiff, in consideration of a sum of money expressed, but not, in fact, paid, agreed to give up to the defendant one half of the farm; and the defendant entered into possession of the premises, surrendered the lease to the landlord, and took a new lease for an extended term of years; *held*, that the plaintiff was entitled to redeem the whole premises, and, on such redemption, to have the entire benefit of the new lease. *Holridge v. Gillespie*, 2 J. C. R. 30.

1370. Chancery regards with jealousy contracts made with the mortgagor to impair or embarrass the right of redemption. *Ibid.*

1371. Where a subsequent judgment or mortgage creditor offers to redeem a prior mortgage, the mortgagee cannot make it a condition, that another debt due to him, not covered by the mortgage in question, or any debt which is not a charge on the premises sought to be redeemed, or of which such subsequent judgment or mortgage creditor was not bound to take notice, shall also be paid. *Burnet v. Denniston*, 5 J. C. R. 35.

1372. An encumbrancer, *pendente lite*, is not entitled to redeem, and, therefore, need not be made a party to a bill of foreclosure, unless under special circumstances. *Cook v. Mancius*, 5 J. C. R. 89.

1373. A party cannot obtain relief in Chancery against a mortgage given to secure an unsecured debt, without offering to redeem, by paying the principal and legal interest. *Dunham v. Dey*, on appeal, 15 J. R. 555.

1374. A sale or lease of part of the premises, by a mortgagee, before foreclosure, does not prejudice or affect the right of redemption *of the mortgagor; nor does it deprive the mortgagee of his right of foreclosure. *Wilson v. Troup*, 7 J. C. R. 25.

1375. A mortgagee, before foreclosure, can do no act to bind the mortgagor when he offers to redeem. *Ibid.*

1376. No length of time is a bar to a right of redemption of a mortgage, where there is fraud in the transaction, or where, by the agreement of the parties, the mortgagee is to enter and keep possession of the premises until he is paid out of the profits. *Marks v. Pell*, 1 J. C. R. 54.

1377. On a bill to redeem, further time is not usually given for the payment of the money. *Bruckerhoff v. Lansing*, 4 J. C. R. 65.

1378. The time allowed for the redemption is not fixed and certain, but rests in the sound discretion of the Court, to be regulated by circumstances. *Perine v. Dunn*, 4 J. C. R. 140.

1379. The usual time is six months from the liquidation of the debt by the master's report; and it seems, that when this time has been allowed, it will not be afterwards enlarged. *Ibid.*

1380. On a bill for foreclosure, the time may be enlarged from six months to six months, or from three months to three months, upon equitable terms, and according to the circumstances of the case. *Ibid.*

1381. But this rule applies only to bills for

foreclosure, strictly so called, where the equity of redemption is barred by the decree, and a complete title vested in the mortgagee; and not to cases of decrees for the sale of the premises, according to the usual practice of the Court. *Ibid.*

1382. Where a party fails to redeem within the time allowed, on a bill to redeem, it is usual to dismiss the bill, which amounts to a bar of the equity of redemption. *Ibid.* For where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter. *Ibid.*

1383. Where a bill was not simply to redeem, but to set aside a mortgage, three months only were allowed to the mortgagor. *Ibid.*

1384. Where a mortgagee has been detained from his remedy on the mortgage for many years, by a long and tedious litigation, payment may be required in a much shorter time, as thirty days after the final decision of the cause. *Ibid.*

1385. When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is merely collateral security for the personal obligation. *Duke of Cumberland v. Codrington*, 3 J. C. R. 220.

1386. And the personal estate, in such case, is the primary fund to pay off the mortgage debt of the testator or intestate. *Ibid.*

1387. But if he purchases or becomes the devisee of land, incumbered by a mortgage, he becomes a debtor only in respect to the land; and as far as relates to the marshalling of assets between his representatives, the land is the primary fund for the payment of the mortgage debt; and it is so, even though the purchaser or devisee covenants to pay the debt, for it is still a debt of the ancestor. *Ibid.*

1388. The purchaser, by express directions in his will, or by dispositions and language equivalent to an express direction, may throw the encumbrance upon his personal assets. *Ibid.*

*1389. Where a mortgage had [*318] been executed forty years, and thirty-five years had elapsed from the time the state was supposed to have acquired an interest in it, by the attainder of the mortgagee, and there had been no interest paid or demanded, payment of the mortgage debt was presumed. *Giles v. Baremore*, 5 J. C. R. 545.

E. Of the foreclosure and sale, and execution of the decree.

1390. Real estate mortgaged cannot be sold by the mortgagee, on default of the mortgagor, without a bill for foreclosure, and a decree for a sale. *Hart v. Ten Eyck*, 2 J. C. R. 62.

1391. To a bill of foreclosure and sale, all encumbrancers, or persons having an interest existing at the commencement of the suit, subsequent or prior in date to the plaintiff's mortgage, must be made parties to the bill, otherwise they will not be bound by the decree. *Haines v. Beach*, 3 J. C. R. 459.

1392. A bill to foreclose the equity of re-

demption of a mortgage, is a proceeding *in rem*, and possession follows the decree, and will be enforced by the Court. *Kershaw v. Thompson*, 4 J. C. R. 609.

1393. Where a mortgage is given to secure a sum, payable in instalments, with interest, and, on default in payment of the first instalment, a bill is filed by the mortgagee, the defendant will not be allowed to stay proceedings, on bringing into Court the principal and interest due, with the costs, unless he also put in an answer, confessing the debt, &c., or consenting to a decree of foreclosure and sale, to remain subject to the further order of the Court, upon a subsequent default. *Lansing v. Capron*, 1 J. C. R. 617. And, in such case, if the subsequent instalments are punctually paid, the defendant will not be charged with costs. *Ibid.*

1394. A sale of mortgaged premises under a decree, will not be postponed, merely on account of the existence of a war; that, as a general calamity, not being sufficient to justify the Court in interrupting the regular administration of justice, and the collection of debts. *Astor v. Romaine*, 1 J. C. R. 310.

1395. But if it should be made satisfactorily to appear, that there was an immediate or impending calamity over the city or place where the mortgaged premises were situated, which would cause a suspension of all civil business, the Court would interfere, and postpone the sale. *Ibid.*

1396. A sale of mortgaged premises was postponed for six weeks, to give the mortgagor an opportunity to comply with the proposal of the mortgagee; such delay being equally beneficial to both parties. *Ibid.*

1397. If the mortgagee sells the equity of redemption, by execution at law, to satisfy the mortgaged debt, and then proceeds by execution at law against the person or other property of the debtor, to obtain the residue of his debt remaining unsatisfied by the sale of the equity of redemption, or if the whole debt has been satisfied by such sale, he must assign over the bond and mortgage to the mortgagor, to enable him to compel the purchaser of the equity of redemption to refund to *him the
[*319] debt out of the land mortgaged.
Tice v. Annin, 2 J. C. R. 125.

1398. But if the mortgagee, by assigning the whole debt and mortgage to the purchaser of the equity of redemption, has put it out of his power to assign them to the mortgagor, the debt shall be extinguished in the hands of the purchaser of the equity of redemption. *Ibid.*

1399. The mortgagor, however, in such a case, will not be entitled to receive the purchase money; for the purchaser will be considered as having bought the land for the price paid, subject to all the residue of the debt, secured by the mortgage, beyond what was extinguished by the purchase money. *Ibid.*

1400. Chancery will restrain a mortgagee from proceeding at law to sell the equity of redemption, or put him to his election, either to proceed directly on his mortgage, or to seek other property, (where the rights of creditors

do not interfere,) or the person of the debtor, for the satisfaction of his debt. *Ibid.*

1401. And if the mortgagee, instead of resorting to a bill of foreclosure, seeks to collect his money by execution, out of other property of the mortgagor, his proceeding at law will be stayed, or he be compelled to assign the bond and mortgage to the mortgagor. *Ibid.*

1402. A mortgagee may sue, at the same time, on his bond at law, and in Chancery, on the mortgage. *Jones v. Conde*, 6 J. C. R. 77. *S. P. Dunkley v. Van Buren*, 3 J. C. R. 330.

1403. It is not a matter of course, on a bill for foreclosure and sale, to order the whole premises to be sold. *Delabigarre v. Bush*, on appeal, 2 J. R. 490.

1404. If the property mortgaged exceed the debt, and can be separated, no more ought to be sold than is sufficient to pay the principal, interest, and costs. *Ibid.* And see *Campbell v. Maccomb*, 4 J. C. R. 534.

1405. Where the interest on a mortgage is payable annually, and the principal at a future period, on a bill for foreclosure and sale, for the non-payment of the interest, the whole, or a part of the mortgaged premises will be sold, as the Court may deem just and necessary, on a special report of the master as to the situation of the premises, and the best mode of sale; and an order may be obtained, from time to time, as the interest or principal becomes due, for a future sale, on the foot of the decree, and on obtaining a master's report of the amount due, &c. *Brinckerhoff v. Thalhimer*, 2 J. C. R. 486. *S. P. Lyman v. Sale*, p. 487. And see *Campbell v. Maccomb*, 4 J. C. R. 534.

1406. All sales of mortgaged premises, under a decree of the Court, must be made by a master, or under his direction. *Heyer v. Deaves*, 2 J. C. R. 154.

1407. A sale by a person deputed by a master, in his absence, is irregular, and will be set aside. *Ibid.*

1408. Where, on a bill for foreclosure and sale, there was an order of reference to a master, to ascertain the amount due on the mortgage, the cause, on the coming in of the report, must be set down for hearing on the requisite notice. *Dean v. Coddington*, 2 J. C. R. 201.

1409. If a decree for the sale be entered immediately on filing the master's report, it will be set aside for irregularity. *Ibid.*

*1410. Where, on a sale of mort- [*320] gaged premises, under a decree of foreclosure and sale, the bond is fully paid, the mortgagor is entitled to have the bond and mortgage delivered up to him and cancelled. *Matter of Coster*, 2 J. C. R. 503.

1411. The mortgagee, or purchaser of the premises, is not entitled to retain them in his hands, for his own convenience, or for greater security of his title under the decree, without the assent of the obligor. *Ibid.*

1412. But a third person who pays off mortgaged debts for his security, without any decree, may be substituted in the place of the mortgagor, and may retain the bond and mortgage. *Ibid.*

1413. Where, on a bill for foreclosure, a subsequent mortgagee or judgment creditor,

who is made a party defendant, answers, and disclaims, he is entitled to costs against the plaintiff, to be paid out of the fund, if that is sufficient, and if not, to be paid by the plaintiff himself; he not having applied to such defendant, before the suit was brought, to release, or otherwise disclaim. *Callin v. Harned*, 3 J. C. R. 61.

1414. The practice of the *English* Chancery, of opening biddings at a master's sale, has not been adopted here. *Williamson v. Dale*, 3 J. C. R. 290.

1415. But where the *executors* of a mortgagee were innocently misled, and induced to believe that the sale would not take place on the day appointed, there being no culpable negligence on their part, the Court, under the circumstances of the case, ordered the sale to be set aside on the ground of surprise, on the defendant's paying the purchaser all his costs and expenses, and the costs of the application, though the sale was perfectly fair, and no unfairness was imputed to the mortgagee or his solicitor. *Ibid.*

1416. A decree taken *pro confesso*, on a bill for a foreclosure and sale, will not, after a sale has taken place, and a delay of six months, be set aside, unless under very special circumstances. *Lansing v. M'Pherson*, 3 J. C. R. 424.

1417. But the defendant, who was bound to make good the deficiency in the sale, offering fifty per cent. more for the property than was bid for it, the sale was opened, on condition of his depositing that advance with the register, in eight days, and paying the expenses of the former sale. *Ibid.*

1418. On a bill for foreclosure and sale, the mortgagee is confined to his remedy on the mortgage. *Dunkley v. Van Buren*, 3 J. C. R. 330.

1419. The suit cannot be extended to other property, or the person of the mortgagor, in case the mortgaged premises prove insufficient to satisfy the debt. The further remedy of the mortgagee is *at law*, where he may, at the same time, sue on his bond, or on the covenant to pay the money; and after a foreclosure and sale, in equity, he may sue at law, on the bond to recover the deficiency. *Ibid.*

1420. But if *seems*, that a suit at law, brought to recover the residue of the debt, unsatisfied by the sale of the mortgaged premises, does not open the foreclosure, or revive the equity of redemption. *Ibid.*

*1421. A prior mortgagee, who [321] had also a judgment against the mortgagor, subsequent to the second mortgage, and had purchased the equity of redemption, on a sale of the premises by execution under the judgment, cannot, on a bill filed against the second mortgagee, compel him to pay the judgment, as well as the first mortgage, or be foreclosed; but the encumbrances are to be paid in the order of time in which their respective *liens* attached. *Haines v. Beach*, 3 J. C. 459. *M'Kinstry v. Mervin*, 3 J. C. R. 466.

1422. A purchaser, under a sale by virtue of a decree of foreclosure and sale, will only take a title as against the parties to the suit;

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and he cannot set it up against the subsisting equity of those encumbrancers who are not parties. *Ibid.*

1423. There can be no valid decree for foreclosure, against an *infant heir* of the mortgagor; but if instead of seeking a foreclosure merely, there is a decree for the sale of mortgaged premises, it will bind the infant. *Mills v. Dennis*, 3 J. C. R. 367.

1424. A sale is the most usual course of the Court, as being most beneficial for both parties. *Ibid.*

1425. But before a decree for the sale, there must be a special report of the master, of the proof of the debt before him, and of the amount due, and of what part less than the whole of the premises a sale will be sufficient to raise the debt, and also most beneficial to the infant heir. *Ibid.*

1426. Where a mortgagee was compelled, for his own security, to satisfy an execution on a prior judgment in favor of another, he was held, by right of substitution, to stand in the place of the judgment creditor, and entitled, on a sale of the mortgaged premises, to receive out of the fund the amount of the judgment as well as the mortgage debt. *Silver Lake Bank v. North*, 4 J. C. R. 370.

1427. If the mortgaged premises are incapable of being sold in parcels, or of being divided, without injury, the whole may be sold, though the whole debt is not due; and the proceeds applied to pay the interest and costs, and the surplus to the principal of the debt. *Campbell v. Macomb*, 4 J. C. R. 534.

1428. Where, in such a case, the bond having become forfeited at law, for the non-payment of the interest, the whole mortgaged premises are decreed to be sold, and the mortgagor, or owner of the equity of redemption, before the day of sale, pays the interest and costs, the sale will be stayed; but the decree of sale and foreclosure will stand as further security, to enforce the payment of the future interest, and the instalments of the principal, as they respectively become due. *Ibid.* [See *Lyman v. Sale*, 2 J. C. R. 487.]

1429. Though the mortgagees be not only a trustee, but a surety for the debt, and though the mortgaged premises be in a state of ruin and decay, and the security thereby impaired and rendered precarious, he is not, therefore, entitled to have the property sold before the debt is due, or the debtor is in default. *Ibid.*

1430. Nor will the Court, where the mortgaged premises, being a dam and bridge, were injured by storms, compel the mortgagor in possession to repair them at his own expense. *Ibid.*

1431. On a sale of mortgaged premises, it was represented that the "property was free from all other encumbrances; but after the sale and master's report, it was discovered that the property was subject to a city assessment and tax; and the purchaser refused to complete the purchase, until this encumbrance was removed. The Court directed the master to discharge the encumbrance out of the proceeds of the sale. *Laurence v. Cornell*, 4 J. C. R. 542.

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1432. The act, passed April 12, 1820, (Sess. 43. c. 184.) directing the sheriff, or other officer, where lands are sold by virtue of an execution, to delay giving a deed to the purchaser, so as to give the debtor time to redeem within one year, on certain terms, does not apply to the case of a sale by a master of mortgaged premises under a decree. *Tenbrook v. Lansing*, 4 J. C. R. 601.

1433. A mortgagor, where the equity of redemption has been sold by a sheriff under an execution at law, has, by the act of the 12th of April, 1820, (Sess. 43. c. 184.) one year to redeem the land from the purchaser; and, therefore, where a bill is filed during the year for a foreclosure and sale, he ought to be made a party. *Hollock v. Smith*, 4 J. C. R. 649.

1434. Where, after a foreclosure and sale of mortgaged premises, the mortgagor or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the Court, on motion for that purpose, will order the possession to be delivered up to the purchaser, and not drive him to an action of ejectment at law, though the delivery of possession is not made part of the decree. *Kershaw v. Thompson*, 4 J. C. R. 609.

1435. And in case of disobedience to such order, an injunction issues; and on proof of its service, and of the refusal of the party to obey it, a writ of assistance issues, of course, to the sheriff. *Ibid.* But where the delivery of possession is made part of the decree, a writ of execution is the proper remedy, in case of disobedience. *Ibid.*

1436. An encumbrancer, *pendente lite*, not being entitled to redeem, need not be made a party to a bill for foreclosure, unless under special circumstances; as where he became a judgment creditor after the commencement of the suit, but before the decree, and the purchaser at the master's sale had previous notice of the judgment, and by a previous agreement with the mortgagor, obtained from him an order for the surplus moneys, which was accepted by the purchaser. *Cook v. Mancius*, 5 J. C. R. 89.

1437. Where a bill for a foreclosure was filed by a second mortgagee, and the first and third mortgagees were made parties, but the latter did not disclaim or offer to release; held, that the third mortgagee was not entitled to have his costs paid, until after the plaintiff was paid his debt and costs. *Titus v. Velie*, 6 J. C. R. 435.

1438. L., a mortgagee, filed a bill against S. and others for the foreclosure and sale of the mortgaged premises, and to which suit M., who had purchased a judgment against the mortgagor, was a party. After a decree for a sale had been entered, by consent of the solicitor of the parties, M. sued out an execution on the judgment against S., under which his interest in the premises was sold by the sheriff, to M., as the highest bidder; and M., having thus [*323] purchased the equity of redemption, offered, before the day of sale fixed by the decree, to pay to the solicitor of L.

the principal and interest due on the mortgage, if S. would assign the same to him, which L. refused to do. M. the next day, paid L. the amount due on the mortgage, and took a receipt for it, without expressing it to be in satisfaction of the mortgage; and there was parol evidence that it was made as a deposit, and not for the redemption of the mortgage. M., afterwards, obtained an order to stay the sale; but the master, not having notice of the order, proceeded and sold the premises at auction under the decree, and executed conveyances to the purchasers; held, that the master's sale was valid and effectual, and that the rights of bona fide purchasers could not be affected by the order staying the sale. *Monell v. Lawrence*, on appeal, 12 J. R. 521.

1439. In consequence of the direction of the statute, (Sess. 36. c. 95. s. 11.) relative to the sales of mortgaged premises by a master, under a decree in Chancery, it is not necessary that the report of the master, as to the sale, should be confirmed before deeds are executed to the purchasers; and the rule of the English Chancery, on this subject, does not, therefore, apply. *Ibid.*

1440. A subsequent creditor, who is desirous to compel the mortgagee, or his assignee, who had taken other security in addition, to resort to the mortgage alone for payment of the debt, must make the assignee a party to a bill for that purpose; for a sale of the mortgaged premises, in order to ascertain the sufficiency of the mortgage security, cannot be decreed until the assignee is made a party. *Everton v. Booth*, on appeal, 19 J. R. 486.

1441. On a bill for foreclosure, by the assignee of a mortgagee, it is not necessary to make the mortgagee a party, he having parted with all his interest by an absolute assignment. *Whitney v. M^r Kinney*, 7 J. C. R. 144.

1442. Nor does the circumstance that the mortgagee took possession of the premises, and received the rents and profits before the assignment, render it necessary to make him a party. *Ibid.*

1443. Nor is it necessary, where the mortgage is absolutely assigned, to make the mortgagee a party to a bill filed by the mortgagor to redeem. *Ibid.*

F. Account between the mortgagor and mortgagee.

1444. A mortgagee, or assignee of a mortgagee in possession, is not to be allowed for his improvements in clearing wild land, but only for necessary reparations, &c., and must account for the rents and profits received by him, except such as have arisen exclusively from his own improvements. *Moore v. Cable*, 1 J. C. R. 385.

G. Power to sell in a mortgage, and of the sale under it.

1445. A power to sell, contained in a mortgage, is an authority coupled with an interest, and is not revoked by [*324] the death of the mortgagor. *Ber-gen v. Bennet* 1 C. C. E. 1.

1446. If the power is recorded in the book for the registry of mortgages, it is a sufficient compliance with the statute. *Ibid*.

1447. Recording the mere power at length is sufficient. *Ibid*.

1448. But if the power has not been recorded before a sale by the mortgagee under it, the mortgagor cannot object to the validity of the sale; for the recording of the power is for the benefit of the purchaser. *Ibid*.

1449. After a mortgagor, or his heir, has lain by sixteen years, he shall not be allowed to question the regularity of a notice of sale under a power. *Ibid*. [See also, *Demarest v. Wynkoop*, 3 J. C. R. 129, 145, 146.]

1450. Nor, after such a lapse of time, will the mortgagor be permitted to redeem, on the ground that the mortgagee has purchased the property at the sale under the power. *Ibid*.

1451. A power of sale contained in a mortgage of land in this state to a person residing in another state, may be lawfully executed by an administrator appointed in another state, where the mortgagee died; it being a special authority derived from the mortgagor, not from the Court of another state. *Doolittle v. Lewis*, 7 J. C. R. 45. [See *Power*.]

1452. Where the statute directs the advertisement for the sale of mortgaged premises, under a power, to be published "once a week for six successive months," *lunar*, not calendar months, are intended. *Stackhouse v. Halsey*, 3 J. C. R. 74.

1453. A sale of mortgaged premises at public auction, by a surviving executor of a mortgage, under a power pursuant to the statute is a complete bar to the equity of redemption. *Demarest v. Wynkoop*, 3 J. C. R. 129. *S. P. Doolittle v. Lewis*, 7 J. C. R. 45.

1454. A deed executed to the purchaser, at such sale, *nineteen* years after the sale, was held to be good, by relation, there being no intervening right. *Ibid*.

1455. And the Court will, after a lapse of so many years, presume that a deed was given at the time of sale, when it ought to have been done, and was lost, and that the deed produced was afterwards given for greater caution. *Ibid*.

1456. Where the statute makes no exception, the Court will make none, in favor of infants, but their equity of redemption is barred by a regular sale under the power. *Ibid*.

1457. Where a second mortgagee was proceeding to sell the mortgaged premises, under a power of sale, the Court, as the rights of an infant were concerned, and it appearing to be for the interest of all parties, ordered the sale to be stayed, and that it should be under the direction of a *master*, associated with the mortgagee, on giving a further notice of the sale for six weeks; and that no more of the premises should be sold than would be sufficient to pay the amount due on the mortgage, to be computed by the master; provided that the sale of a part could be made without prejudice. *Van Bogen v. Demarest*, 4 J. C. R. 37.

*1458. Proceedings of the mortgagee under a power to sell, will not be suspended or delayed, until the several owners of the equity of redemption,

in different proportions, have settled the *ratable* proportion which each is to contribute towards the redemption. *Brinckerhoff v. Lansing*, 4 J. C. R. 65.

1459. But if they pay into Court the mortgaged debt, interest, and costs, the suit may be retained for a reasonable time, to enable them to proceed against one of the defendants, who had an interest in the equity of the redemption, to compel him to contribute his proportion of such debt and interest. *Ibid*.

1460. On a bill charging usury, an injunction was granted to stay the proceedings under a power of sale, on payment of the costs, and the plaintiff paying into Court the amount reported by a master to be due on the mortgage. *Hine v. Handy*, 1 J. C. R. 6.

1461. Where the advertisement of a sale under a power contained in a mortgage states a false assertion, as, that the premises are to be sold for default as to *three* mortgages, when there are only *two*, the third mortgage being on other land, by which the public may be misled, or purchasers deterred from bidding, the sale will be irregular and void. *Burnet v. Denniston*, 5 J. C. R. 35.

1462. So, if no *place* of sale is designated in the advertisement, or if the mortgagor was not twenty-five years of age when he executed the mortgage, a sale under a *power* will create no bar to the equity of redemption. *Ibid*.

1463. Where a subsequent mortgage or judgment creditor tenders to the prior mortgagee the full amount of his debt and interest, with costs and charges, which such mortgagee refuses to accept, unless another debt due to him from the mortgagor, but not charged on the premises, is also paid; and proceeds to sell the premises mortgaged, under a *power* of sale, the sale is irregular and void. *Ibid*.

[In *Jackson v. Henry*, 10 J. R. 185. the Supreme Court said, that a sale under a power was equivalent to a foreclosure and sale under a decree of Chancery, and could not be defeated to the prejudice of a *bona fide* purchaser; although the mortgage was given to secure a usurious debt.]

[As to mortgages by commissioners of loans, see *Loan Officers*. Mortgage of chattels; see *Pledge*.]

XLV. NE EXEAT REPUBLICA.

1464. A writ of *ne exeat republica* will not be granted for a debt due and recoverable by suit at law. It is applicable only to equitable demands. *Seymour v. Hazard*, 1 J. C. R. 1.

1465. And it must be not only an equitable demand, but one in the nature of a debt actually due. *Ibid*. See *Porter v. Spencer*, 2 J. C. R. 169.

1466. A writ of *ne exeat* will not be granted where the plaintiff's demand is purely legal, or where the defendant is an executor or administrator, and there is no affidavit that *assets* have come to his hands. *Smedberg v. Mark*, 6 J. C. R. 138.

1467. Where a wife filed a bill for *alimony*,
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&c. against her husband, and it appeared, that he had abandoned her, without any support, and threatened to leave the state, the Court, on the petition of the wife, granted a writ of *ne exeat* against the husband. *Denton v. Denton*, 1 J. C. R. 364.

1468. On such an application, the affidavit of the wife is admissible, the proceeding being *ex parte*, and the wife, in that respect, considered as independent of her husband. S. C. 1 J. C. R. 441.

1469. And the writ may be granted prior to the decree for alimony. *Ibid.*

1470. The Court, in marking a writ of *ne exeat*, for *bail*, will exercise a sound discretion, under the circumstances of the case, having regard to the rank and situation of the parties, and the property of the husband. *Ibid.*

1471. In a matter of *account* of which Chancery has jurisdiction, a writ of *ne exeat* may issue, though the plaintiff has sued the defendant at law, and held him to bail; and where a defendant, who had been sued at law, and held to bail was about to depart the state *with his bail*, who had sold his property, the Court, from the necessity of the case, and to prevent a failure of justice, granted the writ. *Porter v. Spencer*, 2 J. C. R. 169.

1472. To entitle a party to a writ of *ne exeat*, his debt or demand must be satisfactorily ascertained; a mere declaration of belief of the existence and amount of his claim, is not sufficient; there must, also, be a positive affidavit of a threat or purpose of the party against whom the writ is prayed, of going abroad; and that the debt would be lost, or, at least, in danger, by his departure from the state. *Mattocks v. Tremain*, 3 J. C. R. 75.

1473. And the affidavit must be positive, though it be a matter of account, as to the indebtedness of the party; though the plaintiff need not swear to a precise sum, but only according to his belief as to the amount. *Thorne v. Halsey*, 7 J. C. R. 189.

1474. And if an answer, in such case, is put into the bill, though before the time for filing the exceptions to it has expired, the answer may be read on a motion to discharge the writ. *Ibid.*

1475. It seems, that a writ of *ne exeat* is not granted, on *petition* and motion only, without a bill previously filed. *Mattocks v. Tremain*, 3 J. C. R. 75.

1476. A writ of *ne exeat* may issue against a foreigner, or citizen of another state, and on demands arising abroad; but the writ will be discharged, on the defendant's giving security to abide the decree. *Woodward v. Schatzell*, 3 J. C. R. 412.

1477. To sustain the application of a writ for *ne exeat*, sufficient equity must appear on the face of the bill: mere apprehension that the defendant will misapply funds in his hands, or abuse his trust, is not sufficient. *Ibid.*

[*327] *XLVI. NEW TRIAL.

1478. Where a Court of law has refused a *trial*, the party will not be relieved in
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Chancery, at least, upon the same merits already discussed, and fully within the jurisdiction of the Court of law. *Simpson v. Hart*, 1 J. C. R. 97.

1479. A new trial will not be granted, merely to give a party, who has gone voluntarily to trial, an opportunity to impeach the testimony of witnesses, of the object of whose testimony he was apprized beforehand. *Woodworth v. Van Buskerk*, 1 J. C. R. 432.

1480. The party must show, at least, that he has since discovered testimony of which he had no knowledge before the trial. *Ibid.*

1481. Where the defendant, in an action at law, had not used due diligence in making his defence, or in applying to the Court for a discovery, if necessary to aid him in his defence at law, he cannot, after a verdict against him, obtain the aid of Chancery to have a new trial. *Barker v. Elkins*, 1 J. C. R. 465. S. P. *Dodge v. Strong*, 2 J. C. R. 228. *Foster v. Wood*, 6 J. C. R. 87. *Floyd v. Jayne*, 6 J. C. R. 479.

XLVII. NUISANCE.

1482. Chancery has jurisdiction in the case of a *private* nuisance. *Van Bergen v. Van Bergen*, 2 J. C. R. 272. S. P. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162.

1483. But it will not give an order to abate the nuisance, until the opposite party has been heard. *Ibid.*

1484. Nor will the Court interfere to prevent or remove a private nuisance, unless it has been erected to the annoyance of the right of another long previously enjoyed. *Van Bergen v. Van Bergen*, 3 J. C. R. 282.

1485. It must be a case of strong and impetuous necessity, or the right previously established at law, before the Court will lend its aid. *Ibid.* [See *Corning v. Louerre*, 6 J. C. R. 439.]

1486. Though a person has a right to erect a mill on his own ground, yet he must so exercise that right as not to interfere with the existing rights of others. *Ibid.* [See *Newburgh Turnpike Company v. Miller*, 5 J. C. R. 101.]

1487. If A. erects a mill in such a place, or so near the mill of B., that an artificial dam, before erected by B., causes the water to flow back on A.'s mill, and obstructs its movement, A. has no right to complain of the dam of B. as a nuisance. *Ibid.*

See *Injunction*.

*XLVIII. PARENT AND CHILD. [*328]

1488. Maintenance will be allowed out of the capital of the infant's estate, where the principal is small; otherwise it must be out of the interest. *Matter of Bostwick*, 4 J. C. R. 100.

1489. Application for maintenance may be by *petition*, without bill. *Ibid.*

1490. A parent may be allowed to be reim-

bursed out of the infant's estate, for *past* maintenance. *Ibid*.

1491. A father is not entitled, in that relation, or as guardian by *nature*, to demand the money of the infant in the hands of an executor or administrator. *Genet v. Tallmadge*, 1 J. C. R. 3561. *Williams v. Storrs*, 6 J. C. R. 353.

1492. Where the fund was clear, and the rights of the respective parties ascertained, the Court directed, pending an account, a part of the moneys to be paid to the solicitor of the infant plaintiffs, towards further defraying the past and future expenses of the suit, and the interest of the residue of the portion coming to the infants, to be paid to their mother, for their necessary maintenance and education. *Methodist Episcopal Church v. Jaques*, 3 J. C. R. 1.

XLIX. PARTITION.

1493. Chancery will not sustain a bill for a partition, where the title is denied, or is not clearly established; but the bill will be retained to give the plaintiff an opportunity to establish his title at law. *Wilkin v. Wilkin*, 1 J. C. R. 111.

1494. The owners of an equity of redemption, as well as tenants in common, for life, or for years, may have partition of their interest, as between themselves. *Wotten v. Copeland*, 7 J. C. R. 140.

1495. But mortgage and judgment creditors cannot be compelled to join in a bill for a partition, nor can relief be prayed against them, nor can their rights be affected by the partition. *Ibid*.

1496. Under the act for the partition of lands, where the proceedings are in *Chancery*, it is not necessary for the parties to execute mutual releases to each other, according to the partition; but the final decree of the Court, that such "partition shall remain firm and effectual for ever," &c. is sufficient. *Young v. Cooper*, 3 J. C. R. 295.

1497. If any doubt arises on a bill for partition, as to the extent of the undivided rights and interests of the parties, the usual course is to direct a reference to a master, to inquire and report on them; for the estate and interest of the parties must be ascertained before a commission is awarded to make partition. *Phelps v. Green*, 3 J. C. R. 302.

*1498. But where title is doubtful, or litigated, it must first be established at law, before Chancery will interfere. *Ibid*. *S. P. Coze v. Smith*, 4 J. C. R. 271.

1499. But where the question arises upon an equitable title set up by the defendants, Chancery must decide on the title. *Ibid*.

1500. Where the plaintiff's right to one undivided moiety was admitted by all the defendants claiming the other moiety, but they differed among themselves as to their titles and interests, some of the defendants claiming the whole moiety in fee, and the others claiming and enjoying separate portions of it, and asserting a freehold estate therein; the Court ordered partition to

be made between the plaintiff and all the defendants aggregately; dividing the premises into two equal moieties, so as to give one moiety to the plaintiff in severalty, leaving the other moiety to the defendants to be divided between them, on a further application to the Court, when their conflicting rights shall have been established at law; the plaintiff, in the mean time, to pay his own costs of suit, and the expenses of the commission, reserving the question as to the defendants' proportion of costs until such further application. *Ibid*.

1501. Costs of partition in Chancery are charged upon the parties respectively, in proportion to the value of their respective rights. *Ibid*.

1502. On a bill for partition, the Court of Chancery, being authorized by the statute to decree a sale where a Court of law are authorized, or where the ends of justice require it, may decide on the necessity of a sale, upon the report of a *master*, as well as of *commissioners*; and where the master reports that a sale is necessary, commissioners will be appointed to sell and convey. *Thompson v. Hardman*, 6 J. C. R. 436.

L. PARTNERSHIP.

1503. The acts of a majority of the partners bind the firm. *Kirk v. Hodgson and others*, 3 J. C. R. 400.

1504. The interest of each partner in the partnership property, is his share in the *surplus*, after a settlement of the partnership accounts. *Nicoll v. Mumford*, 4 J. C. R. 522.

1505. And that interest alone is liable to the separate creditors of each partner. *Ibid*. S. C. on appeal, 20 J. R. 611.

1506. The assignees of a bankrupt partner, under a separate commission, are *tenants in common* with the solvent partner; and if they get possession of the partnership property, the solvent partner cannot call it out of their hands. *Murray v. Murray*, 5 J. C. R. 60.

1507. The solvent partner, as against his co-partner, is entitled only to his share of the *surplus*, after the debts are paid. *Ibid*.

1508. The solvent partner and the assignees of the bankrupt partner must join in a suit at law. *Ibid*.

*1509. A solvent partner is bound [*330] and concluded by a decree, in a suit brought by the assignees of the bankrupt partner, against trustees, he having been made a party to the suit, and though he objected to the funds being paid to the assignees. *Ibid*.

1510. Where a creditor has separate judgments against each of two partners, the partnership property will be bound in the same manner as if the amount of both judgments had been included in a joint judgment against both. *Brinkerhoff v. Marvin*, 5 J. C. R. 320.

1511. The interest of one partner in the partnership property may be taken and sold under an execution at law, on a judgment against him for his separate debt. *Moody v. Paine*, 2 J. C. R. 549

1512. Where, by the articles of co-partnership, the *capital* and *profits* were to remain during the co-partnership, each partner being at liberty to withdraw so much as was necessary for his private expenses; *held*, that neither had a right to withdraw from the fund money to purchase plate, carriages, horses, &c., but only for his family expenses, and education of his children, &c. *Sloughton v. Lynch*, 1 J. C. R. 467.

1513. Nor can a partner, living in his own house, charge the concern with the rent. *Ibid.*

1514. A partner withdrawing or using the joint fund, for his private trade or speculations, must account for it, not only with interest, but for the *profits* he has made. *Ibid.*

1515. The stockholders of the *North River Steam-Boat Company* are not a co-partnership, but are *tenants in common* of the property and franchises of the company. *Livingston v. Lynch*, 4 J. C. R. 573.

1516. Though the part owners of a *ship*, generally speaking, are *tenants in common*, and not partners or joint tenants, yet, it seems, there may be a *special* partnership in the ship, as well as the cargo, in regard to a particular adventure, and the proceeds arising from the sale of them, and the profits of the adventure. *Mumford v. Nicoll*, on appeal, 20 J. R. 611, *Contra*, S. C. 4 J. C. R. 522.

1517. Owners of *freight* and *cargo* are partners. *Ibid.* [See *Ships and Shipowners*.]

1518. Partners are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement to that effect. *Franklin v. Robinson*, 1 J. C. R. 158. *S. P. Bradford v. Kimberly*, 3 J. C. R. 431.

1519. But if one partner or part owner is appointed an agent for a special purpose, in relation to their joint concern, he is entitled to all the rights and privileges of a factor or agent in relation to the subject of such agency. *Ibid.*

1520. A partner who goes abroad on his own private affairs, is not entitled to charge his expenses to the co-partnership. *Mumford v. Murray*, 6 J. C. R. 1.

1521. Where one partner wrongfully kept his co-partner ignorant of his rights to moneys recovered in the partnership's name abroad, he was *held* accountable for the whole amount of the interest of his co-partner, who, being ignorant of the facts, had joined in a release of a co-trustee, into whose hands a part of the money had been suffered to pass. *Ibid.*

*1522. Chancery gives relief [***331**] against the representatives of a deceased partner, who has left *assets*, if the surviving partner is insolvent; and the defendants cannot object to a want of diligence in the creditor, in not prosecuting the surviving partner before his insolvency. *Hamersley v. Lambert*, 2 J. C. R. 508. For the debt being joint and several, the *assets* of the deceased partner remain liable until the debt is paid. *Ibid.*

1523. Co-partners are not chargeable, as against each other, with compound interest,

unless where one of them speculates with partnership money for his own profit, and refuses to disclose the profits. *Sloughton v. Lynch*, 2 J. C. R. 209.

1524. In stating an account between partners, the true dates, as furnished by the books themselves, ought to be assumed. *Ibid.*

1525. And the period of the dissolution of the partnership is the proper time to make a rest and adjust the balance of the account, and the partner against whom it is found is chargeable with interest on such balance. *Ibid.*

1526. An action of *account* lies at law by one partner against his co-partner. *Duncan v. Lyon*, 3 J. C. R. 351.

1527. So, *covenant* lies where the articles contain a covenant to account. *Ibid.*

1528. An *assumpsit* will lie on a promise in writing, by one partner, to take part of the goods bought, in which they were to be equally concerned as to profit and loss. *Ibid.*

1529. Chancery may appoint a person to carry on the trade of an *infant* partner. *Thompson v. Brown*, 4 J. C. R. 619.

1530. Where a creditor recovers judgment at law against partners, and afterwards discovers that there was a secret or dormant partner, Chancery has no jurisdiction to afford him relief against such *dormant* partner. *Penny v. Martin*, 4 J. C. R. 566.

1531. Where two persons are joint owners or proprietors of a *patent* right or privilege, one of them is not, on that ground merely, responsible for any special contract entered into by the other, not connected with the enjoyment and exercise of their common right or privilege. *Laurence v. Dale*, 3 J. C. R. 23. S. C. on appeal, 17 J. R. 437.

1532. A *bona fide* assignment by one of several partners, of all his interest in the co-partnership stock, &c., *ipso facto* dissolves the co-partnership, though one of the articles expressly provided that the co-partnership was to continue until two of the contracting parties should demand a dissolution, and the other partners were desirous to have it continue, notwithstanding the assignment. *Marquand v. The New-York Manufacturing Company*, on appeal, 17 J. R. 525.

1533. The *assignee* of the partner, in such case, is entitled to an account of the profits of the concern, and to the share of the assignor. *Ibid.*

1534. And where an *inventory* had been taken of the co-partnership stock, by mutual consent, six months after the assignment, and the other partners refused to deliver the share claimed by the assignee of their co-partner, the inventory was taken as the true valuation, though if the stock had been sold at public or private sale, the value might

*have been less, and the value of [***332**] such stock had, in fact, fallen between the time of taking the inventory, and taking the account before the master. *Ibid.*

1535. One partner or member of an association cannot execute a deed or writing under seal, so as to bind the others, without an express authority for that purpose; and if he does so, he makes himself personally responsible; but

such authority may be by *parol*, and if shown, or if the other partners or associates have, by their subsequent acts, ratified the contract, they will be equally responsible, and bound to contribute ratably to any damages which may be recovered at law against the partner or associate who executed the contract. *Skinner v. Dayton*, on appeal, 19 J. R. 513. S. C. 2 J. C. R. 526. 13 J. R. 307. 5 J. C. R. 351. 17 J. R. 357.

1536. And an injunction against proceeding in the suit at law against the individual partner, on such contract, was continued, until the amount of such contribution was ascertained; and the deficiency only, after the proceeds of the clear estate of the company had been applied towards the payment of the damages, should be levied under the judgment and execution at law. S. C. on appeal, 19 J. R. 513.

See further, *Agreement, Account, Bankrupt, Execution, Interest, Judgment, Jurisdiction, Ships and Ship Owners.*

LI. PLEADINGS.

- A. Of pleadings in Chancery, generally.
- B. Of the parties.
- C. Bill.
- D. Demurrer.
- E. Plea.
- F. Answer and disclaimer.
- G. Replication and issue.

A. Pleadings generally.

1537. Pleadings should consist of averments or allegations of facts, stated with as much brevity and precision as possible, not of inference or argument. *Hood v. Inman*, 4 J. C. R. 437.

1538. Impertinence in pleading consists in setting forth what is not necessary to be set forth; as stuffing the pleadings with useless recitals, and long digressions about immaterial matters. *Ibid.*

1539. Generally, the bill and answer ought not to set forth deeds *in hac verba*, but so much of them only, as is material to the point in question; nor ought they to be argumentative or rhetorical. *Ibid.*

[*333] *B. Parties.

1540. All persons materially interested must be made parties to the suit. *Hickock v. Scribner*, on appeal, 3 J. C. 311.

1541. The general rule requiring all persons interested to be made parties to the suit, is confined to the parties to the interest involved in the issue, and who must necessarily be affected by the decree. It is a rule of convenience merely, and may be dispensed with when it becomes extremely difficult or inconvenient. *Wendell v. Van Rensselaer*, 1 J. C. R. 344. S. P. *Wiser v. Blachly*, 1 J. C. R. 437. S.

P. Executors of Brasher v. Van Cortlandt, 2 J. C. R. 242—247.

1542. A person against whom process is not prayed, is not a party to a bill. *Brasher's Executors v. Van Cortlandt*, 2 J. C. R. 242.

1543. A creditor, filing a bill against an executor, cannot make a debtor of the testator a party, except where the executor is insolvent, or there is collusion between the executor and debtor, or in some other special case. *Long v. Majestre*, 1 J. C. R. 305.

1544. The assignees of an insolvent who had obtained his discharge, must be made parties to a bill filed to enforce the execution of an agreement or trust, relative to his estate, existing prior to his assignment. *Moran v. Hays*, 1 J. C. R. 339. See also, *Sells v. Administrators of Hubbel*, 2 J. C. R. 394.

1545. Where a party becomes insolvent pending the suit, his assignees must be made parties before the cause can be heard. *Deas v. Thorne*, on appeal, 3 J. R. 543.

1546. Where some of the plaintiffs became insolvent, on a bill of revivor, their assignees were made defendants, and it was objected, at the hearing, that they ought to have been made plaintiffs; *held*, that they could not be made plaintiffs against their consent; and having answered as defendants, the Court might infer their refusal to be plaintiffs, and being before the Court as parties, it was sufficient. *Osgood v. Franklin*, 2 J. C. R. 1.

1547. An encumbrancer *pendente lite*, need not be made a party to a suit to foreclose a mortgage. *Cook v. Mancius*, 5 J. C. R. 89. For the Court does not take notice of a purchaser of the subject matter, pending the suit. *Ibid.*

1548. Individual members of a corporation may be called upon to answer to a bill of discovery, under oath; but in such case, the individuals must be named as defendants in the bill. *Brumby v. West-Chester Manufacturing Society*, 1 J. C. R. 366.

1549. But where a bill was filed against a corporation generally, who put in an answer, under their corporate seal, the Court refused, on motion, to order certain officers of the corporation to make oath to such answer. *Ibid.*

1550. A creditor or legatee of the personal estate, need only make the *personal* representatives of the debtor parties to the suit; and, in many cases, where it would be attended with extreme difficulty, or very great inconvenience, the general rule may be dispensed with. *Wiser v. Blachly*, 1 J. C. R. 437.

1551. But on a bill against the executors of a guardian, for a breach of trust, the testator having, by his will, [*334] made the timber on his land *assets* for the payment of his debts; *held*, that the *devisee* of the real estate ought to be made a party, as the whole estate might become responsible to the plaintiff. *Ibid.*

1552. The parties can be known only in the characters in which they are brought before the Court; therefore, if a bill of revivor states the plaintiffs to be heirs and devisees of the party deceased, though some of them, in fact, are executors, they can only be taken notice

of as heirs or devisees, not as executors. *Travis v. Waters*, 1 J. C. R. 85.

1553. Where real estate had been purchased by a joint fund, raised by subscription of above 250 shares, or subscribers, and the property conveyed to A., B. and C., as trustees; on a bill for the foreclosure and sale of the property under a mortgage made by the trustees, it is not necessary that the subscribers or stockholders should be made parties; the trustees sufficiently representing all the interests concerned for that purpose. *Van Vechten v. Terry*, 2 J. C. R. 197.

1554. A mere nominal trustee cannot bring a suit in his own name; but the *cestui que trust* must be joined. *Malin v. Malin*, 2 J. C. R. 238. And the objection may be taken at the hearing. *Ibid*.

1555. If a person has religious scruples against being a party to a suit, he may, it seems, sue by his *prochein amy*. *Ibid*.

1556. A lunatic himself need not be made a party to a suit by a creditor against his committee, for the payment of a debt. *Brasher's Executors v. Van Cortlandt*, 2 J. C. R. 242. 400.

1557. Nor need he be a party to a bill filed by his committee to set aside an act done by him, under mental imbecility. *Ortley v. Messere*, 7 J. C. R. 139.

1558. One creditor may file a bill in behalf of himself and all the other creditors. *Hendricks v. Robinson*, 2 J. C. R. 283.

1559. Where one judgment creditor filed a bill for himself alone, it was sustained, it not appearing that there were any other creditors, or if there were, there was reason to believe that their judgments were satisfied; or, if not satisfied, that they had not taken any steps at law to enforce payment by execution; and, at any rate, all parties concerned in such judgment were before the Court. *Ibid*.

1560. On a bill to redeem a mortgage, the assignees of the mortgagee, and purchasers under him, must be made parties. *Hickock v. Scribner*, on appeal, 3 J. C. R. 311.

1561. So, where A., as collateral security for a debt due B., endorsed to him the note of C., and delivered to him a mortgage given by C. to secure it; on a bill filed by B. against C. to foreclose, and for a sale of the mortgaged premises, A. ought to be made a party. *Johnson v. Hart*, on appeal, 3 J. C. R. 322.

1562. But where there is an *absolute* assignment of a mortgage, the mortgagee need not be a party, either to a bill for a foreclosure and sale, or to a bill by the mortgagor to redeem; for the assignee, standing in the place of the mortgagee, may be decreed to convey. *Whitney v. McKinney*, 7 J. C. R. 144.

1563. Nor does the circumstance that the mortgagee took possession *of the premises, and received the rents and profits, before the assignment, render it necessary to make him a party. *Ibid*.

1564. To a bill for the foreclosure and sale of mortgaged premises, all encumbrancers, or persons having an interest existing at the commencement of the suit, subsequent, as well as

prior in date to the plaintiff's mortgage, must be made parties, otherwise they will not be bound by the decree. *Haines v. Beach*, 3 J. C. R. 459. *S. P. Ensworth v. Lambert*, 4 J. C. R. 605.

1565. On a bill to foreclose a mortgage, the mortgagor, whose equity of redemption has been sold under an execution at law, must be made a party, as, by the statute, (secs. 43. c. 124.) he has one year after the sale, to redeem the land from the purchaser. *Hallock v. Smith*, 4 J. C. R. 649.

1566. On a bill for the foreclosure and sale of a mortgage, it appeared, that the defendants were owners of *two fifths* only of the premises, under the will of their father, and that there were legacies given to other persons charged on the mortgaged premises; *held*, that the legatees ought to be parties to the suit, for the security of the purchaser, and to prevent injury to the rights of the mortgagors. *McGown v. Yerks*, 6 J. C. R. 450.

1567. Creditors and legatees are exceptions to the general rule, that all persons interested in the fund, must be made parties. *Brown v. Ricketts*, 3 J. C. R. 553. For one creditor or legatee may sue in behalf of himself and the rest, and the others may come in under the decree. *Ibid*.

1568. As, where there are several legacies given, which are to be increased or diminished, as the estate should increase or diminish, one legatee may file a bill in behalf of himself and the others who may choose to come in; but if the bill is for a *residue* of the estate, all the *residuary legatees* must be made parties. *Ibid*. *S. P. Davoue v. Fanning*, 4 J. C. R. 199.

1569. A plaintiff cannot sue as administrator, without taking out letters of administration; it is not essential that it should be done before filing the bill, but letters of administration may be taken out at any time before the hearing, and the fact may be charged by way of supplement or amendment to the bill. *Goodrich v. Pendleton*, 4 J. C. R. 549.

1570. Where the objection of a want of parties is made out of season, the plaintiff, instead of amending the original bill, may file a *supplemental* bill merely to bring in the parties wanted; and the defendants in the original bill need not, in such case, be made parties to the supplemental bill. *Ensworth v. Lambert*, 4 J. C. R. 605. *S. P. McGown v. Yerks*, 6 J. C. R. 450.

1571. Where, to a bill against an administrator, charging *fraud*, the defendant, in his plea, alleged that all the acts done in relation to the estate of the intestate, were done by him and V., jointly, as co-administrators, to which there was no replication; *held*, that V., the co-administrator, ought to have been made a party. *Bregans v. Claus*, 4 J. C. R. 116.

1572. A foreign corporation, or incorporated bank of another state, may sue here in their corporate name, and file a bill for the sale *of land, under a mortgage [*336] given to it, to secure money lent.

Silver Lake Bank v. North, 4 J. C. R. 370.

1573. Where a trustee and his *cestui que*

trust file a bill as plaintiffs, and pending the suit, the *cestui que trust* assigns his interest to another, it is no objection, at the hearing, that the assignee was not made a party. *Cook v. Mancius*, 5 J. C. R. 89.

1574. In a suit by a husband for the wife's distributive share, the wife must be a party. *Schuyler v. Hoyle*, 5 J. C. R. 196.

1575. After a lapse of twenty years, a defendant, who was a *trustee* for himself and such other creditors of the assignor as should come in and execute the deed, cannot object, on a bill filed against him, for an account, that the other *cestui que trusts* were not made parties. *Mumford v. Murray*, 6 J. C. R. 1.

1576. Different judgment creditors may unite in one bill for discovery and account, the object of which is to set aside impediments to their remedies at law, created by the fraud of their common debtor; and to have his estate distributed among them, according to the priority of their respective liens, or ratably, as the case might be. *Brinkerhoff v. Brown*, 6 J. C. R. 139.

1577. A bill may be filed against several persons, relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were, more or less, concerned, though not jointly in each act. *Ibid.*

1578. Where the party in whom the fee resides is dead, a conveyance will not be directed, unless his heirs are made parties. *Dale v. Roosevelt*, 6 J. C. R. 255.

1579. The heirs of an intestate, who had made a contract for the purchase of land, which his administrators assigned to the defendants, are proper parties to a bill filed for the specific performance of the contract. *Champion v. Breton*, 6 J. C. R. 398.

1580. Where there are several owners of different parcels of land, on which a judgment is a *lien*, and one of them pays off the judgment, all the persons interested in the land bound by the judgment, must be made parties, before contribution will be decreed or enforced against them. *Avery v. Petten*, 7 J. C. R. 211.

C. Bill.

1581. The substance of a bill must contain ground for relief; and there must be equity in the case, when fully stated and correctly applied to the proper parties, sufficient to warrant a decree. *Lyon v. Tallmadge*, 1 J. C. R. 184.

1582. A bill by executors, stating that they had been sued at law, by the defendant, for a debt pretended to be due from the testator, of which they had no knowledge, and which they had strong ground to believe was unjust, and that they could not safely proceed to a trial without a discovery, and praying for an injunction and discovery, is what is called a *fishing bill*, and does not entitle the plaintiffs to an injunction or discovery. *Newkirk v. Willett*, 2 J. C. 413. S. C. 2 C. C. E. 296.

*1583. The general interrogatory [337] or requisition in the bill, "that the

defendant may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and he specially interrogated," &c. is sufficient, and entitles the plaintiff to a full disclosure of the whole subject matter of the bill, equally, as if he had specially interrogated the defendant to every fact stated in the bill. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 65.

1584. If a bill, besides the usual prayer for general relief, contains a prayer for *specific* relief, the plaintiff is entitled to other specific relief, so far as it is consistent with the case stated in the bill. *Wilkin v. Wilkin*, 1 J. C. R. 111.

1585. No relief can be granted under the general prayer which is of a nature distinct from and independent of the special relief prayed for. *Franklin v. Osgood*, on appeal, 14 J. R. 527.

1586. A bill of *discovery*, for matters material to the defence of the plaintiff in a suit at law against him, must state the nature of that defence. *M'Intyre v. Mancius*, 3 J. C. R. 45. S. C. on appeal, 16 J. R. 592.

1587. It ought to state enough to enable the Court to see that the ends of justice require its interposition; and the facts sought to be discovered should be so far stated as to show their pertinency and relevancy. *Ibid.*

1588. A bill *interpleader* may be filed, though the party has not been sued at law, or has been sued by one only of the conflicting claimants, or though the claim of one of the defendants is actionable at law, and that of the other in equity. *Richards v. Salter*, 6 J. C. R. 445.

1589. On a bill of interpleader, the right may be decided in favor of one defendant against the other; and if one defendant establishes a title, and the other makes default, Chancery will decree payment to the one, and award a perpetual injunction as to the other. *Ibid.*

1590. Where one of the defendants was entitled to the fund which had been paid into Court by the plaintiff, on obtaining an injunction against a suit at law, the other defendant, who, by setting up a groundless claim, had compelled the plaintiff to resort to a bill of interpleader, was ordered to pay the costs of the other defendant, whose claim was established; and also the costs of the plaintiff in Chancery. *Ibid.*

1591. And where the plaintiff had offered to pay the demand, on being indemnified, and that being refused, filed his bill of interpleader, with reasonable diligence, he was not charged with interest on the money. *Ibid.*

1592. After a verdict at law, the party comes too late with a bill for discovery. *Duncan v. Lyon*, 3 J. C. R. 351.

1593. A bill filed solely to correct a mistake in a contract, will not be retained, on the ground that there is money due on the contract. *Getman's Executors v. Beardsley*, 2 J. C. R. 274.

1594. If relief, as well as discovery, is prayed for, on the ground of a lost deed, there must be an affidavit of the loss. *Livingston v. Livingston*, 4 J. C. R. 294.

1595. If a bill for discovery and relief be good as to the discovery, a general demurrer to the whole is bad. *Ibid.*

[*338] *1596. If a bill seeks discovery in aid of the jurisdiction of a Court of law, it must appear that such aid is necessary, and the discovery material to the defence; for if the facts depend on the testimony of witnesses, and the Court of law can compel their attendance, Chancery will not interfere. *Gelston v. Hoyt*, 1 J. C. R. 543.

1597. *It seems*, that Chancery will not sustain a bill for discovery and injunction, merely to enable the party to procure such admissions by the adverse party as might be used in mitigation of damages in an action of trespass. *Ibid.*

1598. A bill for discovery, in aid of a cause before a *surrogate*, brought for an account and distribution of the intestate's estate, must charge certain facts, within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that Court, and that he has no means of showing the facts, without such discovery. *Seymour v. Seymour*, 4 J. C. R. 409.

1599. But, *it seems*, that where the bill is for discovery merely, and no injunction asked for, and there is a demurrer to the bill, the Court will not examine so nicely as to the materiality of the discovery. *Ibid.*

1600. Where a bill seeks to transfer to Chancery, a matter properly cognizable in a Court of law, it must be verified by oath. *Laight v. Morgan*, on appeal, 1 J. C. 429. S. C. 2 C. C. E. 344. *Lynch v. Willard*, 6 J. C. R. 342. 346.

1601. So, to a bill to perpetuate the testimony of witnesses who are aged or residing abroad, there must be an *affidavit*, stating, generally, the age, the infirmity, and place of residence of the witnesses. *Laight v. Morgan*, on appeal, 1 J. C. 429. S. C. 2 C. C. E. 344.

1602. So, a bill seeking to have a title established, and possession quieted, must be verified by oath. *Ibid.*

1603. But a bill for discovery merely does not require an affidavit. *Ibid.*

1604. An affidavit to an *injunction* bill, made by one of several plaintiffs, stating that he had been informed, and verily believed, and hoped to prove, that the deeds in question did exist, and were lost or destroyed in the manner mentioned in the bill, is sufficient. *Le Roy v. Veeder*, on appeal, 1 J. C. 417. S. C. 2 C. C. E. 175.

1605. In a bill for a divorce, the charges of *adultery* and of *cruel usage*, being distinct and independent, and leading to distinct issues and decrees, cannot be joined together in the same bill. *Johnson v. Johnson*, 6 J. C. R. 163.

1606. A *cross bill* must be filed before publication is passed in the original cause. *Sterry v. Arden*, 1 J. C. R. 62. Unless the plaintiff in the cross bill go to a hearing on the proofs already published. *Field v. Schieffelin*, 7 J. C. R. 250.

1607. And if a cross bill is filed after publication, testimony taken in the cross cause cannot be read or used. *Ibid.*

1608. The Court may at a hearing, direct a *cross bill* to be filed, when it appears that the first suit is insufficient to bring before the Court the rights of the parties, and the matters

necessary to a full and just determination of the cause. *Ibid.*

1609. *It seems*, that a *cross bill* may set up additional facts not alleged in the original bill, where they constitute [*339] part of the same defence, relative to the same subject matter. *Underhill v. Van Cortlandt*, 2 J. C. R. 339—355.

1610. Where one of several defendants dies, the plaintiff cannot file a *new original* bill against the representatives of the deceased party and others, but should file a *bill of revivor* only against such representatives. *Nicoll v. Roosevelt*, 3 J. C. R. 60.

1611. And, even if he might elect to file a new bill, he cannot do so, where an answer had been put in by the original party, since deceased. *Ibid.*

1612. L. and T., assignees of B., filed a bill to foreclose a mortgage against W., who put in his answer, and then filed a bill against L. and T. for relief against the mortgage, and also against a judgment and execution. W. died before any decree to account in the suit for a foreclosure; *held*, that the bill filed by W. partook of the nature of an *original* as well as a *cross bill*; and that his legal representatives might file a bill of *revivor* against L. and T., to which they must answer. *Woolsey v. Livingston & Thompson*, 5 J. C. R. 265.

1613. A bill of *revivor* and *supplement* is a compound of a supplemental bill and bill of *revivor*, and not only continues the suit, which has been abated by the death of the plaintiff, &c., but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. *Westcott v. Cady*, 5 J. C. R. 334.

1614. A bill of *review* is proper after a decree is enrolled, and a *supplemental* bill, in the nature of a bill of review, before the enrolment of the decree. *Wiser v. Blachly*, 2 J. C. R. 488.

1615. The party who asks for a bill of *review*, must show that he has performed the decree, especially as regards the payment of money, and that he has paid the costs. *Ibid.*

1616. But where the party is in execution for the non-payment of the money and costs, and which he is unable to pay, *it seems*, that leave to file a bill of review will not be denied on the mere ground of non-performance of the decree. *Livingston v. Hubbs*, 3 J. C. R. 124.

1617. A bill of *review* must be either for error in point of law, apparent on the face of the decree, or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before. *Wiser v. Blachly*, 2 J. C. R. 488.

1618. On a discovery of new evidence, after a decree, the application ought to be by a bill of *review*, not by a petition for a re-hearing. *Furman v. Coe*, on appeal, 1 C. C. E. 96.

1619. Where the objection is to the *competency* of the witnesses examined, the application should be by a bill of *review*; but where the objection is to their *credit* merely, by *articles*. *Ibid.*

1620. A bill of *review* on matter of fact, is not allowed to be filed, unless on oath of the

discovery of new matter or evidence which came to light since the decree, or, at least, since publication, and which could not possibly be had or used at the time publication passed. *Livingston v. Hubbs*, 3 J. C. R. 124.

1621. Newly discovered evidence, which goes to impeach the character *of [*340] witnesses examined in the original suit, or of cumulative evidence to a litigated fact, is not sufficient. *Ibid.*

1622. The matter of fact newly discovered must be relevant, and materially affecting the ground of the decree. *Ibid.*

1623. After publication has passed, and a cause has been set down for hearing, the plaintiff will not be allowed to amend his bill by adding new charges; but may file a supplemental bill, on payment of the costs accruing since publication. *Shepherd v. Merrill*, 3 J. C. R. 423.

D. Demurrer.

1624. A demurrer to a bill must be founded on some dry point of law, which goes to the absolute denial of the relief sought. *Verplank v. Caines*, 1 J. C. R. 57.

1625. If the subject matter of the bill be such as Chancery may take cognizance of, if the defendant does not demur to the jurisdiction, but answers, he cannot afterwards take advantage of the objection. *Ludlow v. Simond*, on appeal, 2 C. C. E. 1.

1626. Where a bill prays for the appointment of a receiver, that is no ground of demurrer, as the appointment of a receiver rests in the sound discretion of the Court. *Verplank v. Caines*, 1 J. C. R. 57.

1627. A bill filed to recover the amount of a total loss on a policy of insurance, on the ground that the policy had been assigned to the plaintiffs, by the assured, and that the assurers refused to pay, was dismissed, on demurrer, with costs, the plaintiffs having adequate remedy at law. *Carter v. United Insurance Company*, 1 J. C. R. 463.

1628. The defendant must take advantage of the objection, that the party has adequate remedy at law, by demurring to the bill; he cannot avail himself of the objection, after answer, at the hearing. *Underhill v. Van Cortlandt*, 2 J. C. R. 339, 369.

1629. Where a party demurred to a bill of discovery, alleging that it might subject him to penalties under the revenue laws of the United States, but without showing how, or for what cause, he should incur a penalty by a discovery, the Court overruled the demurrer; such a general allegation not being sufficient to bar the discovery, in the first instance. *Sharp v. Sharp*, 3 J. C. R. 407.

1630. So, where a bill charges, that the defendants claimed land by conveyance from persons out of possession, and prayed a discovery of that fact, a demurrer to the bill, because it would subject the defendants to the penalties of the act, against buying a pretended title, is bad, unless it appears, that the answer of the defendants would show that they knew of the vendors being out of possession, and of a subsisting adverse possession. *Le Roy v.*

Veeder, on appeal, 1 J. C. 417. S. P. 1 C. C. E. 111. S. C. 2 C. C. E. 175.

1631. A general demurrer to a bill for want of equity, or because the plaintiff has a fit and adequate remedy at law, is bad, unless the plaintiff's case is, from his own showing, such, that no discovery or proof can possibly make it a subject of equitable jurisdiction.

Le Roy v. Veeder, on appeal, 1 J. C. [*341] 417. *Laight v. Morgan*, on appeal, 1 J. C. 429. S. C. 2 C. C. E. 344.

1632. Where a bill is good in part, and bad in part, the whole bill will not be dismissed on a general demurrer. *Ibid.*

1633. Where there is a general demurrer to the whole bill filed for discovery and relief, and the plaintiff is entitled to an answer to any part of the bill, the demurrer will be overruled. *Kimberly v. Sells*, 3 J. C. R. 467. S. P. *Higinbotham v. Burnet*, 5 J. C. R. 184. As, if it be good as to the discovery, a general demurrer to the whole is bad. *Livingston v. Livingston*, 4 J. C. R. 294. S. P. *Le Roy v. Servis*, 1 C. C. E. iii.—VI.

1634. So, if a bill is for discovery only, and not for relief, a demurrer to the whole bill is bad. *Higinbotham v. Burnet*, 5 J. C. R. 184.

1635. Where the bill is for discovery and relief, the defendant should answer as to the discovery, and demur as to the relief. *Ibid.* See also, *Laight v. Morgan*, 1 J. C. 429. S. C. 2 C. C. E. 344.

1636. If a demurrer is bad in part, it is bad in toto. *Verplank v. Caines*, 1 J. C. R. 57.

1637. Where it appears on the face of the bill, that there has been a decree in a former suit between the same parties, the defendant may demur. *Davoue v. Fanning*, 4 J. C. R. 199.

1638. Where a bill blends together a demand by the plaintiff, as legatee, against the defendant, as executor, with a demand of the plaintiff, individually, against the defendant, in his individual character, it is a good cause for demurrer, and the bill will be dismissed with costs. *Ibid.*

1639. Causes of demurrer may be assigned *ore tenus* at the bar. *Brinkerhoff v. Brown*, 6 J. C. R. 139.

1640. A defendant cannot plead, or answer and demur, both to the whole or part of the bill. *Clark v. Phelps*, 6 J. C. R. 214.

1641. Fraud and collusion between the executor and the debtor, or insolvency, or lapse of time, is not ground of demurrer, but may be set up in the answer. *M'Dowl v. Charles*, 6 J. C. R. 132.

E. Plea.

1642. A plea must rest the defence on a single point, creating, of itself, a bar to the suit. *Goodrich v. Pendleton*, 3 J. C. R. 384.

1643. But though it be multifarious, yet, if it discloses facts which form a fatal objection to the bill, as, the names of necessary parties to it, the plea will be suffered to stand, with liberty to the plaintiff to amend his bill, by adding the parties, on payment of the costs of the plea, and subsequent proceedings, but not

of useless matter in the plea. *Cook v. Mancius*, 3 J. C. R. 427.

1644. A plea must be perfect in itself, so that, if true in fact, it will put an end to the cause. *Allen v. Randolph*, 4 J. C. R. 693.

1645. If circumstances of fraud are charged in the bill, they must be denied by a general averment, at least. *Ibid.*

1646. Where the bill charged misrepresentation, coercion, and fraud, in procuring the release of a debt, and the defendant put in a *plea and answer; and in his plea, insisted on the release in bar, without noticing the allegation of fraud, though in the answer it was fully met and denied; *held*, that the plea was bad. *Ibid.*

1647. A plea in bar, naming certain judgment creditors, not parties to the bill, without stating, affirmatively, that they ought to be made parties, is good; but if the plea simply states facts, from which it may be inferred that other parties are necessary, without naming them, or averring that they are necessary parties, it is informal and bad. *Cook v. Mancius*, 3 J. C. R. 427.

1648. A plea in bar of the statute of limitations, unless accompanied by an answer, supporting it by a particular denial of all those facts and circumstances charged in the bill, and which in equity may avoid the statute, is bad. *Goodrich v. Pendleton*, 3 J. C. R. 384.

1649. As, where a bill charged a defendant with fraud, and a breach of trust; and he pleaded the statute of limitations in bar; and for an answer in support of it, denied, in general terms, that he received the money mentioned in the bill, as trustee; *held*, that the plea was bad, and it was overruled with costs, and the defendant ordered to answer in six weeks, with liberty to insist on the benefit of the statute in his answer. *Ibid.*

1650. To a bill by several tenants in common of an estate, in the island of *Jamaica*, against their co-tenant, for an account of the profits, &c., it is not sufficient for the defendant to plead, that the title to the estate may be brought in question, and suggesting that he has an exclusive title to the whole, and ought not therefore to be sued in Chancery. He ought to set forth his title affirmatively, that the Court may determine whether the suit ought to be stayed until the title is established. *Livingston v. Livingston*, 3 J. C. R. 51.

1651. Where a bill is dismissed on the merits, without any direction that the dismissal shall be made without prejudice, it may be pleaded in bar to a new bill for the same matter. *Perine v. Dunn*, 4 J. C. R. 140. *S. P.* *Holmes v. Remsen*, 7 J. C. R. 286.

1652. But to make a decree of dismissal a bar, it must be an absolute decision upon the same point or matter, and the new bill must be brought by the same plaintiff who filed the original bill, or his representatives, against the same defendant and his representatives. If the defendant in the original suit, having since acquired a legal estate or legal advantage, files his bill against the former plaintiff, the cause is open on its merits. *Neafie v. Neafie*, 7 J. C.

1653. The issue, as to the truth of the plea, is to be referred to the state of facts at the time of filing the plea. *Cook v. Mancius*, 4 J. C. R. 166.

1654. Though a decree in a former suit, to which the plaintiff and defendant were parties, cannot be pleaded in bar, until it is signed and enrolled, it may be insisted on by way of answer. *Davoue v. Fanning*, 4 J. C. R. 199.

1655. Where a cause was brought to hearing on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled; *held*, that it was no bar to another suit for the same matter. *Rosce v. Rust*, 4 J. C. R. 300.

1656. Presumption of payment, from lapse of time, is matter of *evidence, and not, in most cases, *proprio jure*, matter of plea in bar. *Giles v. Baremore*, 5 J. C. R. 545. [*343]

1657. A plea may be good in part, and bad in part; and where a plea is more extensive than the subject matter to which it relates, it will be allowed to stand, as to so much of the bill to which it properly applies; and the defendant must answer to the residue. *French v. Shotwell*, 5 J. C. R. 555. *S. C.* on appeal, 20 J. R. 668.

1658. Where a plea is ordered to stand for an answer, it must be deemed sufficient, so far as it covers the bill; but the plaintiff may still except to the residue of the answer, though not without special leave for that purpose. *Kirby v. Taylor*, 6 J. C. R. 242.

1659. Leave to withdraw a plea was denied; but the defendant was allowed to answer as to the discovery and relief sought, but not to insist on the release which had been pleaded in his answer, so far as the same had been overruled by the plea. *Ibid.*

1660. A plea in bar of a former decree, must state so much of the bill and answer, as to show that the same point was in issue. *Lyon v. Tallmadge*, on appeal, 14 J. R. 501.

1661. A decree in one cause cannot be used as a defence in another cause, where the subject matter of the two suits is distinct and independent: and, therefore, a decree to set aside a sale on execution, as fraudulent on the part of the defendant in the execution, is not a defence to a bill filed by the defendant against his judgment creditor, to get rid of a fraudulent assignment of the judgment, before execution issued. *Ibid.*

1662. A former decree, to be a defence, must be pleaded or relied on in the answer, as a bar; it is not enough to produce and read it at the hearing. *Ibid.*

1663. Two distinct pleas in bar, different in their nature, as, a plea of the statute of limitations, and a discharge under the insolvent act, cannot be pleaded together, without the previous leave of the Court. *Saltus v. Tobias*, 7 J. C. R. 214.

1664. The defendant cannot plead double, but must reduce his defence to a single point; for he may put all the facts on which his whole defence rests, together in his answer. *Ibid.*

F. Answer.

1665. If the defendant submits to answer a bill of discovery, &c., he 'must answer fully, except in certain cases where the discovery may tend to criminate him, or where he is purchaser for a valuable consideration. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 65. *S. P. Phillips v. Prevost*, 4 J. C. R. 205. [See ante, C. pl. 1583.]

1666. But the general rule is subject to exception and modification, according to the circumstances of the case; as, where the defendant objects to a discovery, because the plaintiff has no title. *Phillips v. Prevost*, 4 J. C. R. 205.

1667. So, where a bill was filed by the executors of a creditor, claiming under a judgment of more than thirty-six years' standing, against the legal representatives of the debtor, above thirty years after *his death, [*344] without accounting for the delay, or showing any attempt to recover the debt at law, and seeking a discovery and account of *assets*: the defendants, after admitting the death of the original parties to the judgment, and the representative character of the defendants, may object to a discovery of *assets*, or the material objects of the bill, on the ground of the staleness of the demand. *Ibid.*

1668. If the defendant rests himself on a fact, as an objection to a further discovery, it ought to be such a fact as, if true, would at once be a clear, decided, and inevitable bar to the plaintiff's demand. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 65.

1669. A defendant, in his answer, is bound to admit or deny all the facts stated in the bill, with all their material circumstances, without any special interrogatories in the bill for that purpose. *Ibid.*

1670. He must answer specially to the specific charges in the bill, and give the best account he can, so as to enable the plaintiff, if he calls for an account, to possess materials for stating an account. *Ibid.*

1671. He must not answer generally, though the general answer may amount to a full denial. *Woods v. Morrell*, 1 J. C. R. 103.

1672. He must answer directly and precisely to every material allegation in the bill, and not by way of a negative pregnant. The charges are not to be answered literally; but the defendant must confess or traverse the substance of each charge positively. *Ibid.*

1673. If a fact is charged to be within the defendant's personal knowledge, he must answer positively, and not to his remembrance or belief; and as to facts not within his own knowledge, he must answer as to his information or belief, not as to information or hearsay, without stating his belief one way or the other. *Id.* *S. P. Frost v. Beckman*, 1 J. C. R. 288. *Morris v. Parker*, 3 J. C. R. 297. *Smith v. Lasher*, 5 J. C. R. 247.

1674. But when a defendant answers, that he has not any knowledge or belief of a fact charged in the plaintiff's bill, he is not bound to declare his belief one way or the other. *Morris v. Parker*, 3 J. C. R. 297.

1675. When certain documents are set forth historically, in the stating part of the bill, the defendant must answer to the fact of the *existence* of such documents, according to his knowledge, information, and belief. *Ibid.*

1676. He is not bound to answer to the facts contained or stated in such documents, unless particularly stated, distinctly from the documents. *Ibid.*

1677. Where a defendant answers, that he is "utterly and entirely ignorant" of the fact to which he is interrogated in the bill, it is sufficient. *Ibid.*

1678. It is not sufficient to answer to certain specific facts charged in the bill, "that they may be true, &c., but the defendant has no knowledge of, but is a stranger to the foregoing facts, and leaves the plaintiff to prove the same." *Smith v. Lasher*, 5 J. C. R. 247.

1679. Nor is it sufficient to say, "the defendant has not any knowledge of the foregoing facts, but from the statements in the bill;" but the defendant should answer to his information and belief, and admit or deny any information *dehors* the bill. *Ibid.*

1680. An answer ought not to go out of the way, to state what is *not [*345] material or relevant to the case stated in the bill. *Woods v. Morrell*, 1 J. C. R. 103.

1681. The best rule to ascertain whether matter be impertinent, is to see whether the subject of the allegation could be put in issue, or be given in evidence between the parties. *Ibid.*

1682. Long recitals, stories, conversations, and insinuations, tending to scandal, are impertinent. *Ibid.*

1683. So, facts not material to the decision are impertinent, and, if reproachful, are scandalous. *Ibid.*

1684. But if the plaintiff will put impertinent questions, he must take impertinent answers. It will depend, however, on the reason of the thing, and the nature of the case, how far a general inquiry will warrant an answer leading to particular details. *Ibid.*

1685. *Exceptions* to an answer for impertinence, as well as insufficiency, are made in writing, and are referred to the master, at the same time, to be disposed of together. (This is different from the practice of the *English Chancery*.) *Ibid.*

1686. A party claiming relief, as a *bona fide* purchaser, must positively and precisely deny all notice, though it be not charged. *Frost v. Beckman*, 1 J. C. R. 288. *S. P. Murray v. Ballou*, 1 J. C. R. 566. *Murray v. Finster*, 2 J. C. R. 155. *And see Heatley v. Finster*, 2 J. C. R. 158. *Denning v. Smith*, 3 J. C. R. 345.

1687. If a *feme covert*, who is defendant, puts in an answer separately from her husband, without leave, the Court, on motion, will quash it. *Perine v. Swaine*, 1 J. C. R. 24.

1688. A wife may put in a separate answer, where the plaintiff seeks relief out of her separate estate. *Ferguson v. Smith*, 2 J. C. R. 139.

1689. Where a bill was filed by an admin-

istrator, for the distribution of the intestate's estate, the answer of a person entitled as next of kin to a distributive share, signed by her attorney in fact, but not sworn to, was received, as the party resided out of the state, and the suit was merely for the security of the administrator. *Dunond v. Magee*, 2 J. C. R. 240.

1690. It seems, that a general power of attorney to act, relative to the management of an estate, does not authorize the attorney to put in an answer for his principal to a bill in Chancery; the answer requiring the oath of the party. *Rogers v. Kruger*, 7 J. R. 557.

1691. Where a bill is taken *pro confesso*, against a defendant absent from the state, he may come in after the decree, and answer, and defend the suit. *Davoue v. Fanning*, 4 J. C. R. 199.

1692. A defendant is not bound to answer, so as to subject himself to a penalty or forfeiture. *Livingston v. Tompkins*, 4 J. C. R. 415. 432.

1693. After a plea has been overruled, the same defence may be insisted on by way of answer. *Goodrich v. Pendleton*, 4 J. C. R. 549.

1694. After a plea of the statute of limitations to a bill for an account and discovery, with an accompanying answer, has been overruled, and the defendant ordered to put in a full and perfect answer, he is not allowed to repeat, in his second answer, the same matter contained *in the plea which had been overruled; but must make a full and perfect answer on the merits. [*346]

Coster v. Murray, 7 J. C. R. 167.

1695. Where the defendant in his answer does not directly insist on the presumption of payment, nor waive the benefit of it, but insists on his ignorance of the fact, necessarily arising from his being a stranger to the transaction, and upon the staleness of the demand, he may raise the objection of a presumption of payment at the hearing. *Giles v. Baremore*, 5 J. C. R. 545.

1696. A party in whose favor a judgment has been entered up, is not bound to answer any inquiries in a bill filed by a subsequent purchaser, which go to impeach the consideration or validity of the judgment. *French v. Shotwell*, 6 J. C. R. 235.

1697. A defendant cannot answer and demur to the whole or same part of a bill. *Clark v. Phelps*, 6 J. C. R. 214.

1698. Where A. and B. answer separately to a bill, and B. refers to, and adopts the answer of A. as his own, and a replication is filed to the answer of A., but not to the answer of B., and proofs are taken in the cause, this is not an admission that the answer of B. is true. *Lyon v. Tullmadge*, on appeal, 14 J. R. 501.

G. Replication and issue.

1699. Where the defendants pleaded certain outstanding judgments, and the Court gave the plaintiffs leave to amend their bill, by making the judgment creditors parties; and subsequent to the order for amendment, the judgments were satisfied and discharged; and the plaintiffs, instead of amending their bill, re-

plied, taking issue on the plea; the Court ordered the plaintiffs to pay the costs of the plea and subsequent proceedings in thirty days, or that the bill stand dismissed with costs; but if the costs were paid, then the defendants were to answer the bill in six weeks, or it would be taken *pro confesso*. *Cook and another v. Mancius*, 4 J. C. R. 166.

1700. Where an answer is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact by way of avoidance, he must prove the fact so insisted upon, in defence. *Hart v. Ten Eyck*, 2 J. C. R. 62. [But as to the latter point, see *ante*, Evidence, pl. 514.]

1701. Matters set up in an answer, by way of avoidance, and not necessarily drawn forth by the bill, must, after a general replication, be proved, or the defendant cannot avail himself of them. *Sinason v. Hart*, on appeal, 14 J. R. 63.

LII. PLEDGE.

1702. A bill may be filed in Chancery to redeem personal property pledged for the payment of a debt. *Hart v. Ten Eyck*, 2 J. C. R. 62.

*1703. But the creditor holding [*347] the goods or chattels in pledge, is not bound to wait after the time of payment has elapsed, until the debtor files a bill to redeem, but may, on giving reasonable notice to the debtor to redeem, sell the property. *Ibid*.

[See further on this subject, the opinion of KENT, J. in the case of *Cortelyou v. Lansing*, 2 C. C. E. 200.]

LIII. POWER.

1704. The Court, in considering the extent of powers, looks to the end and design of the parties, and to the substantial, rather than the literal execution of them. *Wilson v. Troup*, 7 J. C. R. 25.

1705. And to support such intention, a power limited in terms has been deemed a general power; and a power general in terms has been reduced to a particular purpose. *Ibid*.

1706. Where a person takes by execution of a power, he takes under the authority of the power, equally as if the power and the instrument executing the power had been incorporated in one instrument. *Doolittle v. Lewis*, 7 J. C. R. 45. 48.

1707. A naked power to executors to sell the real estate, does not, at common law, survive. *Osgood v. Franklin*, 2 J. C. R. 1. 19. S. C. on appeal, 14 J. R. 527.

1708. But if executors, having a power to sell, are vested with any interest, legal or equitable, in the estate, the power survives. *Ibid*.

1709. So, if the executors are charged with a trust relative to the estate, and depending on the power to sell, the power survives. *Ibid*.

1710. A devise to executors to sell land, not coupled with any interest, is a naked power, which must be executed by all the executors named in the will; and if one dies, the power does not survive. Where the power, *per se*, is merely a naked power, but there are, in other parts of the will, trusts and duties imposed on the executors, which require a sale to be made, in order to effectuate the intent of the testator, in such case the power survives. *S. C. on appeal*, 14 J. R. 527.

1711. In the construction of a will, as to the power given to executors to sell, the intention of the testator is much regarded. *Ibid. Osgood v. Franklin*, 2 J. C. R. 1.

1712. A power to executors, and to the major part of them, their heirs or executors, vests, it seems, solely in the last survivor, and his representatives. *Ibid.*

1713. As, where the testator devised to A., his wife, and to B., C. and D., each one eighth of the residuum of his real estate, and appointed A., B., C. and D. his executors, and empowered them *that might act, and the major part of them, their heirs or executors*, to sell and convey his real estate, not before disposed of; and the executors were also authorized to lease the land, and to distribute his [*348] *effects; and one eighth of his residuary estate he ordered to be put at interest, and the interest paid annually to his sister, and on her death the principal and interest to his daughter; and B. and C. took upon themselves the execution of the will, and after their deaths, A. qualified as executrix, and sold the land; *held*, that the power was coupled with the interest which the executors had in the residuary estate; and besides, being coupled with the performance of certain trusts and duties, and it being the intention of the testator, as collected from the will, that it might be executed under certain circumstances, by less than the whole number of acting executors, the power survived, and might be executed by A. without the concurrence of the heirs or executors of the deceased executors. *S. C.* 14 J. R. 527.

1714. As to the power of a sole acting executor, see *Davoue v. Fanning*, 2 J. C. R. 254.

1715. A power given to executors to sell, is a *personal trust and confidence*, and they cannot sell by attorney. *Berger v. Duff*, 4 J. C. R. 368.

1716. As, where A. authorized his executors, B. and C., to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent; and C. having gone abroad, sent a power of attorney to B., his co-executor, to sell the land, on such terms as he should deem expedient; *held*, that an agreement for the sale entered into by B., for himself and C., was not valid. *Ibid.*

1717. A power to mortgage, includes a power to execute a mortgage containing a power to the mortgagee to sell the premises, in default of payment; it being one of the usual remedies of a mortgagee known in law and regulated by statute. *Wilson v. Troup*, 7 J. C. R. 25.

1718. A letter of attorney to sign, seal, and

deliver a mortgage, &c., and to do and perform all things necessary and lawful, in obtaining a title to land, and securing the consideration for the same, gives authority to do every thing incident to a mortgage, which the party creating the power could himself do. *Ibid.*

1719. A power of sale in a mortgage of land in this state, may be lawfully executed by the administrator of the mortgagee, residing in another state, and appointed by a Court of another state; it being an authority derived from the mortgagor, not from the Court of another state. *Doolittle v. Lewis*, 7 J. C. R. 45.

1720. A probate of a will is not necessary to the due execution of a power contained in a will to sell land. *Ibid.*

[See *Executors and Administrators. Devise. Mortgage. Husband and Wife.*]

*LIV. PRACTICE. [*349]

- A. Filing bill; and process.
- B. Appearance.
- C. Removal of a cause into the Circuit Court of the United States.
- D. Motions, petitions and orders.
- E. Amending and dismissing bill.
- F. Taking the bill *pro confesso*, and opening the decree.
- G. Putting the plaintiff to his election.
- H. Amending the answer, or filing a supplemental answer.
- I. Exceptions to the answer.
- K. Taking testimony, feigned issue, and other intermediate proceedings.
- L. Hearing and rehearing.
- M. Reference to a master, report and exceptions.
- N. Decree.
- O. Execution of decree.
- P. Solicitors and agents.

A. Filing bill; and process.

1721. A cross bill must be filed before publication is passed in the original suit. *Gouverneur v. Elmendorf*, 4 J. C. R. 357.

1722. The service of a *subpœna* on the husband alone, on a bill against husband and wife, is good against them both, and he must answer for both. *Ferguson v. Smith*, 2 J. C. R. 139.

1723. But if the plaintiff seeks relief out of the separate estate of the wife, the service of the *subpœna* must be on the wife personally. *Ibid.*

1724. Orders for injunctions, and other process, must be entered with the register or assistant register, before the process issues. *Skinner v. Dayton*, 2 J. C. R. 226.

1725. And if the entry cannot be made before the process issues, without injurious delay, the party, or the clerk for him, ought to cause the order to be entered, with all reasonable speed, as of the day of its allowance. *Ibid.*

1726. Where a bill has been amended, by adding new defendants, the plaintiff may have

process of *subpoena* against them, in the usual course. *Beckman v. Waters*, 3 J. C. R. 410.

1727. Where an attachment is issued to enforce an appearance, or an answer, the body of the writ is general; but the suit and the cause of the attachment are endorsed thereon, or appear in a label annexed, so that the party may at once comply, without application to the Court. *Matter of Vanderbilt*, 4 J. C. R. 57.

1728. But where the attachment is issued for a contempt in disobeying an injunction, an endorsement or label, specifying the cause of action, is not necessary. *Ibid.*

1729. And on such an attachment, the party is not to be bailed by the sheriff, but must be brought before the Court, to answer specific charges; and he will then be ordered to be bailed, to appear from day to day, until the party complaining has prepared his interrogatories, on which he is to be examined before a master. *Ibid.*

B. Appearance.

1730. An *infant* must appear by guardian, or next friend; and cannot petition by his solicitor or counsel to be relieved from the necessity of depositing the sum required by the rules of the Court, on entering an *appeal*. *Bradwell v. Weeks*, 1 J. C. R. 325.

1731. Superannuated persons, on proof of imbecility, may appear and answer by guardian. *Matter of Barker*, 2 J. C. R. 232.

1732. A female defendant, unmarried, and above sixty years of age, and who had been deaf and dumb from infancy, was admitted to appear and defend by guardian. *Markle v. Markle*, 4 J. C. R. 168.

1733. If a person has religious scruples against being a party to a suit, he may, it seems, sue by his *prochein amy*, or next friend. *Malin v. Malin*, 2 J. C. R. 238.

1734. If a party who takes a copy of the bill filed against him, as the *committee of a lunatic*, enters his appearance, without the addition of committee, &c., he cannot, afterwards, and after suffering the plaintiff to go on to a final decree, object that the *subpoena* was against him individually, and not as a committee, &c. *Brasher's Executors v. Van Cortlandt*, 2 J. C. R. 242.

1735. The usual mode of appearing in Chancery, is by entering an appearance with one of the clerks of the Court. *Livingston v. Gibbons*, 4 J. C. R. 94.

1736. But, it seems, that a notice by the defendant's solicitor, of an appearance, to the plaintiff's solicitor, without any entry of the appearance on the clerk's minutes, will be binding on the party. *Ibid.*

1737. An appearance filed with the *register*, is an appearance on the records of the Court. *Ibid.*

1738. Where a defendant puts in an answer, which is read in Court, by the consent of the plaintiff's counsel, and ordered to be filed with the *register*, it is an appearance on the records of the Court. *Ibid.*

1739. Where the plaintiff's solicitor, at the request of the defendant's solicitor, sent him a

copy of the bill, and requested that an answer might be put in; held, that this amounted to an appearance, or a waiver of a formal entry of appearance; and that the defendant was, therefore, to be considered as in Court, and entitled to be served with a rule to answer, before the bill could be taken *pro confesso*. *Livingston v. Woolsey*, 4 J. C. R. 365.

C. Removal of a cause into the Circuit Court of the United States.

1740. If a defendant intends to remove a cause into the Circuit Court of the United States, he must file his petition, &c. for that purpose, at the time of entering his appearance in Chancery. *Livingston v. Gibbons*, 4 J. C. R. 94.

*1741. Where a defendant files [*351] his answer to an injunction bill, and is heard by his counsel, on the bill and answer, and the Court makes a decretal order in the cause, it is too late to petition for a removal of the cause. *Ibid.*

1742. Where one of two defendants is a citizen of another state, and there is no joint trust, interest, duty, or concern, in the subject matter of controversy, he may be allowed to appear and defend alone, so as to enable him to remove a cause. *Ibid.*

1743. If some of the parties, plaintiffs and defendants, respectively, are citizens of the same state, the cause cannot be removed. *North River Steam-Boat Company v. Hoffman*, 5 J. C. R. 300.

1744. Where a corporation are plaintiffs, it must appear that all persons, jointly interested, are entitled to sue in the Courts of the United States, in order to give a Circuit Court of the United States jurisdiction of the cause, or to entitle a defendant in a State Court, to remove the cause into the Circuit Court of the United States. *Ibid.*

D. Motions, petitions, and orders.

1745. The party who wishes to avail himself of an irregularity in the proceedings of his adversary, must make the objection the first opportunity after he has knowledge of it, or has sufficient information to put him on inquiry as to the fact. *Executors of Brasher v. Van Cortlandt*, 2 J. C. R. 242.

1746. An irregularity of practice, or defective notice, will be cured by neglect to complain of it in due season. *Skinner v. Dayton*, 5 J. C. R. 191.

1747. As, where a party who had not received due notice of the examination of witnesses before commissioners, suffered *ten months* to elapse, before applying to the Court; held, that he had, by his delay, waived all right to cross-examine the witnesses, or to object to the irregularity. *Ibid.*

1748. A motion by the plaintiff to have his name struck out of the bill, because it was inserted without his knowledge or consent, is too late, after publication passed, and when the plaintiff knew that his name had been used immediately after the bill was filed, and

suffered more than a year to elapse before he made his application. *Sears v. Powell*, 5 J. C. R. 259.

1749. Where a motion, on some interlocutory matter in a cause, has been once heard and decided on, it cannot be repeated, unless on a new ground. *Hoffman v. Livingston*, 1 J. C. R. 211.

1750. It is enough that additional evidence is offered, by affidavits, of the matter urged in support of the former motion; nor can affidavits be received on such motion to aid the answer of the defendant. *Ibid.*

1751. Affidavits, *ex parte*, cannot be read in opposition to a motion made, on the coming in of the answer, to dissolve an injunction, or in support of the allegations, in the bill. *Eastburn v. Kirk*, 1 J. C. R. 444.

1752. The admission of *ex parte* affidavits is an exception to the *general rule [*352] of the Court; and it is allowed, only in *waste*, or cases where irreparable mischief might ensue from delay. *Ibid.*

1753. A regular decree on the merits cannot be set aside on motion. *Radley v. Shaver*, 1 J. C. R. 200.

1754. An application to set aside a default, need not be by petition, but may be by motion, preceded by the service of notice, with copies of the affidavits on which it is founded. *Beckman v. Peck*, 3 J. C. R. 415.

1755. Orders for injunctions, as well as other special orders, must be entered with the register or assistant register, not with the clerk, before process issues. *Skinner v. Daylan*, 2 J. C. R. 226.

1756. Copies of affidavits, in support of a special motion or petition, must be served on the solicitor of the opposite party, with notice of the motion. *Brown v. Rickells*, 2 J. C. R. 425.

1757. Notice of a motion to prove exhibits at the hearing, must be served four days before the hearing. *Consequa v. Fanning*, 2 J. C. R. 481.

1758. Though an order dissolving an injunction, &c., may be discharged, by motion or petition, on proper grounds, yet, the most regular course is to discuss the merits of the order on the re-hearing. *Fanning v. Dunham*, 4 J. C. R. 35.

1759. Application for an allowance out of the capital of an infant's estate, for his maintenance, may be by petition, without a bill. *Matter of Bostwick*, 4 J. C. R. 100.

1760. Whether a party is entitled to relief by petition, or must apply by bill, depends on circumstances, and the sound discretion of the Court. *Codwise v. Gelston*, an appeal, 10 J. R. 507.

1761. Where it relates to some collateral matter, which has reference to a suit in the Court, the party may be relieved by petition. *Ibid.*

E. Amending and dismissing the bill.

1762. Where a bill is dismissed on demurrer, for want of equity, leave to amend
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the bill will not be granted. *Lyon v. Tullmadge*, 1 J. C. R. 184.

1763. Amendments are granted only where there is some defect as to parties, or some omission or mistake of a fact, or circumstance connected with the substance of the case, but not forming the substance itself, or where there is some defect in the prayer for relief. *Ibid.*

1764. The XIth rule, of June, 1806, allowing the plaintiff to amend his bill of course, at any time before answer, plea, or demurrer filed, does not apply to a bill sworn to by the plaintiff, or an injunction bill. *Parker v. Grant*, 1 J. C. R. 434.

1765. The name of a defendant cannot be struck out of a bill, on motion of a co-defendant, without his consent, or notice of the application. *Livingston v. Gibbons & Ogden*, 4 J. C. R. 94.

1766. Though a rule to amend a bill is of course, yet it must actually be entered with the register; for the clerk cannot allow the *records to be amended [*353] without a certified order for that purpose. *Luce v. Graham*, 4 J. C. R. 170.

1767. The amendments to a bill should be marked and distinguished, so that they may be easily seen by the defendant; and without being blended with or repeating the original bill. *Ibid.*

1768. After replication, the plaintiff will not be allowed to amend his bill until after he has obtained leave to withdraw his replication; and the materiality of the amendment, and the reason why it was not stated before, must be satisfactorily shown to the Court. *Thorn v. Germand*, 4 J. C. R. 363.

1769. But if a witness has been examined, the pleadings cannot be altered or amended, unless under very special circumstances, or in consequence of some subsequent event; except for the purpose merely of adding parties. *Ibid.*

1770. When a plaintiff cannot amend his bill, the proper course for him, is to apply for leave to file a supplemental bill. *Ibid.*

1771. A plaintiff will not be allowed to dismiss his bill without costs, unless it appears that he had reasonable ground for filing it. *Perine v. Swaim*, 2 J. C. R. 475.

1772. The plaintiff, on petition, after answer and exception to the answer, may amend his bill, by adding new charges and new parties, upon payment of costs, if a new or further answer be required; and the plaintiff must amend the office copy of the bill taken out by the defendant, who has appeared, and who is entitled to six weeks, within which to answer the amended bill. *Beckman v. Waters*, 3 J. C. R. 410.

1773. And in case defendants are added to the bill, the plaintiff may have process of *subpoena*, and proceed against them in the usual course. *Ibid.*

1774. After publication passed, and the cause set down for hearing, the plaintiff will not be allowed to amend his bill, by adding new charges; but may file a supplemental bill on payment of costs. *Shepherd v. Merrill*, 3 J. C. R. 423.

1775. A second amendment to a bill was refused, after an answer by one defendant; and a plea by another who was surety, and the plea allowed, and the bill as to him dismissed, and a motion for rehearing granted, after eighteen months had elapsed from the first amendment, and no new evidence since acquired; and the second amendment being substantially the same as the first, though more directly charging the defendants with fraud. *Kirby v. Thompson*, 6 J. C. R. 79.

1776. An injunction sworn to was allowed to be amended, after the answer had been excepted to as insufficient, by inserting additional charges and statements, without prejudice to the injunction, and without costs, as of course; but not by striking out, or altering, any part of the bill without due notice of the motion and affidavit, stating the precise amendments asked for. *Rensick v. Wilson*, 6 J. C. R. 81.

F. Taking the bill *pro confesso*; and opening the decree.

1777. If a defendant, after an appearance, will not answer, the bill will be taken *pro confesso*. *Caines v. Fisher*, 1 J. C. R. 8.

*1778. Where the bill is for relief [*354] only, and states sufficient ground, it is not necessary to prosecute the party to contempt and sequestration, before taking the bill *pro confesso*. *Ibid*. Otherwise, where an answer is essential, as in bills of discovery. *Ibid*.

1779. If, after appearance, no answer is put in, according to the rules of the Court, the defendant will be ordered to file his answer by the first day of the next term, or that, on proof of service of the order, the bill be taken *pro confesso*. *Ibid*.

1780. By a general rule of the Court, July 20, 1816, it was ordered, that whenever a defendant shall not cause his answer to be filed in due time, an application may be made to the Court, (without previous notice,) by petition, stating the circumstances, for an order, that the defendant answer the plaintiff's bill, in such time, after service of a copy of the order for that purpose, as the chancellor shall direct; or, in default thereof, the bill be taken *pro confesso*. 2 J. C. R. 153.

1781. And if the defendant does not answer, within the time limited by such order, a rule for taking the bill *pro confesso* may be entered, as of course, on filing an affidavit of the service of a copy of the order. *Ibid*. See also, *Brasher's Executors v. Van Cortlandt*, 2 J. C. R. 248.

1782. Where a bill is taken *pro confesso*, the plaintiff cannot thereupon enter a decree; but must set down the cause for hearing in term; but no notice of the hearing need be given to the defendant. *Ross v. Woodruff*, 4 J. C. R. 547.

1783. A defendant, who has suffered a bill to be taken *pro confesso*, and a decree against him, by default, may, under the special circumstances, be let in to a defence, upon terms; it resting in the sound discretion of the Court, to relieve the party, or not, from the conse-

quences of his default. *Wootter v. Woodhull*, 1 J. C. R. 539.

1784. But where there had been gross negligence on the part of the defendant, and the principal and most material witness of the plaintiff had died since the bill was filed, the Court refused to relieve the defendant, as opening the decree would produce irreparable injury to the plaintiff. *Ibid*.

1785. A decree fairly and regularly obtained, by default, for want of answer, will not be set aside to let in a defence founded on a fraudulent speculation. *Parker v. Grant*, 1 J. C. R. 630.

1786. The application to be let in to a defence, after a decree by default, is to the grace and favor of the Court, and the defendant must show that he is deserving of favor. *Ibid*.

1787. A decree taken *pro confesso*, on a bill to foreclose a mortgage, after a sale under the decree, and a delay of more than six months, will not be set aside, unless under very special circumstances. *Lansing v. McPherson*, 3 J. C. R. 424.

1788. A decree entered on default, and enrolled, was set aside, on motion, without a petition, on payment of costs, &c., the plaintiff having been served with notice of the motion and copies of the affidavits in support of it. *Beckman v. Peck*, 3 J. C. R. 415.

1789. Where a bill is filed against two defendants, jointly interested, and is taken *pro confesso* against one of them, and the other appears *and disproves [*355] the plaintiff's case, the bill will be dismissed as to both defendants. *Class v. Morris*, on appeal, 10 J. R. 524.

G. Putting the plaintiff to his election.

1790. Where a plaintiff has brought a suit at law, and obtained a judgment, and at the same time filed a bill against the defendant in Chancery, for the same matter, the Court, on the coming in of the answer, will put him to his election, either to proceed at law on the judgment, or in the suit in Chancery; and if he elect to proceed at law, the bill will be dismissed with costs; but if he elects to proceed in Chancery, he will be enjoined not to proceed under the judgment at law, without the leave of the Court. *Rogers v. Fessburgh*, 4 J. C. R. 84.

1791. A creditor filed a bill to set aside or obtain relief against a judgment at law confessed by his debtor in favor of a third person, on the ground of fraud; and while the suit was pending in Chancery, he proceeded at law, and recovered a judgment against his debtor, and issued execution thereon, under which the property of the debtor was advertised for sale; the Court ordered the plaintiff to make his election, either to stay execution at law, during the continuance of the injunction, or consent to have the injunction dissolved; and, the plaintiff refusing to make an election, the injunction was forthwith dissolved. *Livingston v. Kane*, 3 J. C. R. 224.

1792. Where the remedies at law and in equity are inconsistent, any decisive act of the

party, with knowledge of his rights, and of the facts, determines his election. *Sanger v. Wood*, 3 J. C. R. 416.

1793. As, where the plaintiffs sued the defendant on his contract at law, and a few days before the trial of the cause discovered facts amounting to a fraudulent concealment, but proceeded to take a verdict, and afterwards filed a bill to be relieved against the contract, on the ground of fraud; *held*, that the plaintiffs had made their election of their remedy at law, and were bound by it. *Ibid*.

H. Amending the answer, or filing a supplemental answer.

1794. Where there is a clear mistake in an answer, which is proper to be corrected, the practice is to permit the defendant to file an additional or supplemental answer. *Bowen v. Cross*, 4 J. C. R. 375. But this is allowed with great caution; and only where there is a mistake, properly speaking, in a matter of fact. *Ibid*.

I. Exceptions to the answer.

1795. Exceptions to an answer for impertinence, as well as insufficiency, are made in writing, and are referred to a master at the same time, and are disposed of together. *Woods v. Marrell*, 1 J. C. R. 103.

*1796. If exceptions are taken to [356] an answer, and the defendant submits to the exceptions, by putting in a further answer, the plaintiff, if he thinks the second answer not sufficient, should, within a reasonable time, as three weeks, obtain an order to refer the answer to the master, for insufficiency. *Sanford v. Bisell*, 1 J. C. R. 383.

1797. And the plaintiff ought, either in the order of reference, or by notice to the defendant, to specify in which of the exceptions the second answer is still imperfect. *Ibid*.

1798. Where exceptions to an answer were taken in November, and the defendant put in a second answer in December, and the plaintiff, in March following, obtained a rule of reference to a master without any notice to the defendant, the plaintiff was deemed to have acquiesced in the second answer, and the order of reference was set aside. *Ibid*. And though the second answer was not accompanied with an offer to pay the costs of the exceptions, which the defendant, in such case, is regularly bound to pay; yet, as the plaintiff made no objection on that ground, nor called on the defendant for the costs, he was precluded from making that objection afterwards. *Ibid*.

1799. There is no precise time for filing exceptions to a master's report on the insufficiency of an answer, as it does not require confirmation. *Myers v. Bradford*, 4 J. C. R. 434.

1800. On the filing of the report of the master on exceptions taken to the sufficiency of an answer, the plaintiff may immediately sue out a subpoena for a better answer and for costs; and if the defendant does not file exceptions to the report, and obtain an order for setting them down for hearing, within eight days from the service of the subpoena, the plaintiff may sue

out an attachment; after which the defendant cannot except to the report. *Ibid*.

K. Taking testimony, feigned issue, and other intermediate proceedings.

1801. No interrogatories can be filed in a cause, which do not arise from, or relate to, some fact charged in the plaintiff's bill; nor can any depositions be read which do not relate to some fact put in issue by the bill and answer. *James v. M'Kernon*, on appeal, 6 J. R. 543. *S. P. Lyon v. Tallmadge*, on appeal, 14 J. R. 501.

1802. And if such depositions are read at the hearing, and Chancery decides upon the evidence, though no objection be made at the time, the decree will be reversed on appeal. *Ibid*.

1803. Examinations of witnesses are always taken *de bene esse*, or subject to all just exceptions; and if inadmissible on account of the incompetency of the witnesses, they may be suppressed at the hearing; or, if admitted, they are ground for an appeal from the decree. *Trustees of Huntington v. Nicoll*, 3 J. R. 568.

1804. Where publication has passed, without any witnesses being examined on either side, the Court, after the lapse of more than two years from the time of filing the bill, refused to open the rule for publication, on the affidavit of the plaintiff of the discovery of a witness, who would prove a material fact in the cause, denied in the answer. *Smith v. Brush*, 1 J. C. R. 459.

*1805. Nor would the Court, under [357] the circumstances, award a feigned issue in the cause, that being a measure of sound discretion. *Ibid*.

1806. Liberty to re-examine witnesses rests in the discretion of the Court, and is to be governed by circumstances. *Boyd v. Dunlap*, 1 J. C. R. 478.

1807. It is not of course to enlarge the rule to pass publication, and it will be refused, where there has been great delay; but it was granted until the plaintiffs had sufficiently answered a cross bill of the defendants. *Underhill v. Van Cortlandt*, 1 J. C. R. 500.

1808. Where a replication is filed, and the cause set down for hearing, without any rule having been entered to produce witnesses, it is a waiver of the replication; and the defendants are entitled to the benefit of their answers, as if the cause had been set down on bill and answer. *Wiser v. Blachly*, 1 J. C. R. 607.

1809. After publication passed, and the cause set down for a hearing, the deposition of a witness was allowed to be amended, on examination of him by the Court, he being aged and very deaf, and a mistake having been made in taking down his testimony. *Denton v. Jackson*, 1 J. C. R. 526.

1810. On a cause coming on to be heard, if it appear that a witness has misbehaved in his answers to the interrogatories, the deposition may be suppressed. *Phillips v. Thompson*, 1 J. C. R. 131. 140.

1811. Or, if a further answer be deemed material, the Court may order a further examina-

tion of the witness upon the interrogatories, either before a master, or in open Court. *Ibid.*

1812. Where at the hearing, and after the argument had closed, an objection was made to the competency of a witness, whose deposition had been read, the Court allowed the plaintiff to prove the execution of a release by the witness of all his interest, by examining a witness, *viva voce*, without any previous order or notice for that purpose. *Barrow v. Rhinelanders*, 1 J. C. R. 550.

1813. A witness may be examined *viva voce*, at the hearing, for a particular purpose, as to prove exhibits not proved before the examiner. *Ibid.*

1814. But the regular course is to serve a previous order for that purpose, or a notice to the opposite party, four days before the hearing. *Ibid.*

1815. The Court will order a witness to be examined *de bene esse*, though no answer has been filed, if the necessity for taking the deposition is satisfactorily shown by affidavit. *Fort v. Ragusin*, 2 J. C. R. 146.

1816. The deposition of a witness, whose examination was not closed until after publication had passed, was allowed to be read, he having been cross-examined by the opposite party, and no actual abuse appearing; but such practice is irregular. *Underhill v. Van Cortlandt*, 2 J. C. R. 339.

1817. A witness should go before the examiner free to answer all interrogatories, not with a deposition already prepared. *Ibid.*

1818. If a cross bill contains a charge of fraudulent misconduct in arbitrators, but no such allegation is made in the answer to the original bill, though by a general order of the

Court, the depositions taken *in [358] the original suit, are allowed to be read in the cross suit, yet such parts of the depositions as related to the fraudulent misconduct, not charged in the original suit in which they were taken, will be suppressed. *Ibid.*

1819. Leave to withdraw the replication, for the purpose of excepting to the answer, is not allowed, unless for special cause, clearly shown, and satisfactorily accounting for the neglect of the plaintiff. *Brown v. Ricketts*, 2 J. C. R. 425.

1820. Where three months had elapsed from the time of filing the answer, and no good cause shown for the delay, leave to withdraw the replication, &c. was refused. *Ibid.*

1821. But if the plaintiff wishes to withdraw the replication merely for the purpose of setting the cause down for hearing on the bill and answer, if seems, the motion will not be granted. *Ibid.*

1822. A replication cannot be withdrawn for the purpose of amending the bill, unless the plaintiff shows the materiality of the amendments, and why the matter proposed as an amendment was not before stated in the bill. *Ibid.*

1823. A rule to produce certain bonds before the examiner, for the inspection of the opposite party, will not be granted, where the existence of one of the bonds is denied, and the other is denied to have been received by the

plaintiff, for the purpose alleged by the defendant. *Lupton v. Johnson*, 2 J. C. R. 429.

1824. A cross bill, or bill of discovery, is the proper remedy in such a case.

1825. After publication has passed, but the depositions taken not read, a motion to enlarge the time of publication will not be granted, unless upon special cause shown, and due notice to the opposite party of the motion. *Hamersley v. Brown*, 2 J. C. R. 428.

1826. After publication has once passed, witnesses cannot be examined, unless under very special circumstances. *Hamersley v. Lambert*, 2 J. C. R. 432.

1827. To enlarge publication is to stay or postpone the rule for passing publication; and a motion for that purpose may be granted, on reasonable cause shown; but this is very different from a motion to examine witnesses after publication has actually passed. *Ibid.*

1828. Publication is passed in a cause, by filing a certificate of the clerk, of the entry and expiration of the previous rules, with the register or assistant register, and entering a rule with him to pass publication. *Brown v. Ricketts*, 3 J. C. R. 63.

1829. Notice of the rule to pass publication, must be served on the defendant's solicitor or his agent; and if it is served on the agent, the time of service must be double, as in other cases, or six weeks. *Billings v. Rattoon*, 5 J. C. R. 189.

1830. Either party, who has examined witnesses, may give rules for publication, but the rule for publication can be entered by the party only who has given the previous rules. *Brown v. Ricketts*, 3 J. C. R. 63.

1831. The defendant cannot pass publication on the plaintiff's rules, nor vice versa. *Ibid.*

1832. Where the rule to show cause why publication should not pass, has been enlarged by an order for that purpose, at the instance *of the defendants, and [359] that order has expired, publication may pass, without entering a further rule with the register, as is the practice in ordinary cases, on the expiration of the rule to show cause. *Moody v. Payne*, 3 J. C. R. 244.

1833. If, after publication has so passed, the substance of the testimony taken on a material point upon which further testimony is sought, has been disclosed to the defendant, it is too late to move to open or enlarge the rule, on affidavit. *Ibid.*

1834. After a cause has been regularly set down for hearing, on the bill and answer, the plaintiff was allowed to file a replication, on payment of costs. *Smith v. West*, 3 J. C. R. 363.

1835. Where the objection is to the credit of the witnesses, the application to the Court is by filing articles to impeach it. *Furmen v. Coe*, 1 C. C. E. 96.

1836. Where, after publication passed, a party files articles, and gives notice of the examination of witnesses, to impeach the credit of former witnesses, the adverse party may examine witnesses to support the credit of his witnesses who have already deposed; and is entitled to a rule to produce witnesses and

pass publication, as in other cases. *Troup v. Sherwood*, 3 J. C. R. 558.

1837. A copy of the articles filed, with notice of the examination, to discredit the former witnesses, must be served on the adverse party, within *fourteen days* after obtaining a copy of the depositions. *Ibid.*

1838. And copies of the interrogatories to be administered to the witnesses, must be furnished to the adverse party *six days*, at least, before the day assigned for their examination. *Ibid.*

1839. *It seems*, that articles to impeach the credit of witnesses who have been examined, and after publication has passed, may be filed after the cause has been set down for hearing. *Ibid.*

1840. The rule of evidence, as to impeaching the credit of witnesses who have been examined, should be the same in equity as at law. The inquiry should be as to the *general character* of the witnesses for veracity. *Ibid.*

1841. But, *it seems*, that, on a special application to the Court, the inquiry may be allowed to go beyond the general character, as to particular facts affecting the character, provided those facts are not material to the matter in issue between the parties. *Ibid.*

1842. Where a witness is about to depart the state, to reside permanently abroad, the Court, on *petition*, verified by affidavit, and on motion for that purpose, will order him to be examined *de bene esse*, without previous notice of the motion. *Rockwell v. Folsom*, 4 J. C. R. 165.

1843. A *cross bill* must be filed before publication is passed in the original cause. *Gouverneur v. Elmendorf*, 4 J. C. R. 357. *S. P. Field v. Schieffelin*, 7 J. C. R. 250.

1844. It is not matter of course to stay proceedings, or to enlarge publication in the original cause, until an answer is put in to a cross bill, filed after proceeding or answer in the original cause; but it must depend on special circumstances. *Ibid.*

1845. Where there has been very great delay and negligence on the part of the defendant, he will not be allowed to [*360] file a cross bill, nor to amend his answer, nor to issue a commission, so as to delay the plaintiff. *Ibid.*

1846. But the Court may, at a hearing, direct a cross bill to be filed, when it appears that the first suit is insufficient to bring before the Court the rights of the parties, and the merits, necessary to a complete and just determination of the cause. *Field v. Schieffelin*, 7 J. C. R. 250.

1847. To entitle the plaintiff, before hearing, or publication, or issue joined, to call for the inspection of papers, accounts, &c., it is not sufficient that there has been a general reference to them, in the answer, or in the schedule annexed to it; they must be described with reasonable certainty, in the answer, or in the schedule, so as to be considered by the reference, as incorporated in the answer, which must admit them to be in the possession or power of the defendant; and it must appear, that the plaintiff has an interest in the pro-

duction of the papers, books, or instruments sought after. *Watson v. Renswick*, 4 J. C. R. 381.

1848. A party is not entitled to copies of deeds, or other writings, referred to in the interrogatories of the opposite party, until after publication. *Troup v. Haight*, 6 J. C. R. 335.

1849. *Exhibits*, however, ought to be sufficiently described in the interrogatories, so as to enable the adverse party to know what is intended to be proved, and to put him on all due inquiry. *Ibid.*

1850. A reexamination of witnesses is not of course, but only on special application to the Court, and on sufficient cause shown, by affidavit or otherwise, according to circumstances. *Hallock v. Smith*, 4 J. C. R. 649.

1851. A witness who has been examined before a *commissioner*, by consent of parties, on affidavit that his testimony was not duly taken down by the commissioner, who had materially mistaken it, was ordered to be re-examined before an examiner, there being no suggestion of any tampering with the witness. *Trustees of Kingston v. Tappen*, 1 J. C. R. 368.

1852. A party who had not received due notice of the examination of witnesses before *commissioners*, suffering *ten months* to elapse before applying to the Court, was deemed to have waived, by his delay, any right to cross examine witnesses, or to object to the want of notice. *Skinner v. Dayton*, 5 J. C. R. 191.

1853. Each party has a right to elect his own *examiner*, and the Court will not, on motion of the opposite party, interfere with that right; but a direct examination may be made before one examiner, and a cross examination before another. *Troup v. Haight*, 6 J. C. R. 335.

1854. A motion for a second or new trial of a feigned issue, directed by the Court, to try the validity of a will, made the second term after that in which the *nisi prius* record and judge's certificate had been filed, and upon an *ex parte* statement of the evidence given at the trial, was denied, on the ground of the delay, and the want of proper documents. *Van Alst v. Hunter*, 5 J. C. R. 148.

1855. A new trial may be moved for, and granted, at the final hearing, on the equity reserved. *Ibid.*

*1856. Though it is the most [*361] usual course, to award a second trial on a feigned issue, in cases touching the inheritance, where the verdict is in favor of the will and against the heir at law; yet it rests entirely in the discretion of the Court to award a second trial or not, according to the circumstances and testimony in the cause. *Ibid.*

1857. And where the truth of the facts can be satisfactorily ascertained by the Court without the aid of a jury, it is its duty to decide as to the facts, and not to subject the parties to the expense and delay of a trial at law. *Dale v. Roosevelt*, 6 J. C. R. 255. *S. P. Le Guen v. Gouverneur*, on appeal, 1 J. C. 436.

1858. Where, on a bill for a specific performance of an agreement to convey land, the

plaintiff alleged payment of part of the purchase money, under a verbal agreement prior to the written contract, and a feigned issue was awarded to try the truth of the allegation of payment, and the jury found the fact; *held*, that the defendant having acquiesced in the feigned issue, and controverted the fact at the trial, could not, afterwards, object to the decree allowing the payment in part of the purchase money. *Waters v. Travis*, on appeal, 9 J. R. 450.

[*It seems*, that the Supreme Court will grant a new trial of a feigned issue out of Chancery, on an affidavit of newly-discovered evidence. *Doe v. Roe*, 1 J. C. 402. If, on a feigned issue from the Court of Chancery, an inquest be improperly taken, relief must be sought in the Supreme Court, before which the issue was directed to be tried; and if notice of trial has not been given, the inquest will be set aside, with costs, to be paid by the plaintiff's attorney. *Den v. Fen*, 1 C. R. 487.]

L. Hearing and re-hearing.

1859. Where a cause is brought to a hearing on the bill and answer, the answer is to be taken as true in all points. *Brinkerhoff v. Brown*, 7 J. C. R. 217.

1860. And where the defendant, in his answer, states that he believes, and hopes to be able to prove, such and such matters, they will be considered as proved. *Ibid*.

1861. It is too late to object to the jurisdiction of the Court, at the hearing, after the defendant had answered, and put himself on the merits of the case, instead of demurring to so much of the bill as sought relief. *Livingston v. Livingston*, 4 J. C. R. 287.

1862. *Papers* or writings of every description may be proved at the hearing, and the witnesses may be cross examined at the discretion and under the direction of the Court. *Consequa v. Fanning*, 2 J. C. R. 481. But no paper can be proved as an *exhibit* at the hearing, unless satisfactory reasons are shown to the Court why it was not regularly proved before the examiner. *Ibid*.

1863. After hearing, and a final decree in the cause, a witness cannot be re-examined to explain or correct his testimony taken on examination in chief, and read at the hearing; unless, perhaps, under very special circumstances. *Gray v. Murray*, 4 J. C. R. 412.

*1864. Affidavits taken *ex parte*, [***362**] after a cause has been set down for a final hearing, are inadmissible. *Mfinuse v. Cox*, 5 J. C. R. 441.

1865. Proofs are allowed to be read in Chancery, without prejudice, subject to all just exceptions; but this is not allowed at law. *Mann v. Mann*, on appeal, 14 J. R. 1.

1866. In two causes against the same defendant, depending on the same facts, the plaintiffs were, respectively, witnesses for each other, and after publication had passed, and the causes were set down for hearing, the defendant filed *cross bills* for discovery, on the ground that the witnesses had not fully and satisfactorily answered one of the *cross inter-*

rogatories; and a motion was made to put off the hearing of the causes until answers were put in to the *cross bills*; which motion was refused, it being too late for such an application, and the answers not appearing to be evasive. *Serry v. Arden*, 1 J. C. R. 62.

1867. A re-hearing rests in the sound discretion of the Court, and is not granted on a decree for costs only, unless under special circumstances. *Travis v. Waters*, 1 J. C. R. 42. *S. P. Eastburn v. Kirk*, 2 J. C. R. 317.

1868. On a re-hearing, the party complaining of the decree, and seeking to have it corrected, is entitled to open and close the argument. *Sills v. Brown*, 1 J. C. R. 444.

1869. A petition for a re-hearing ought to state the grounds on which a re-hearing is asked, to enable the Court to exercise its judgment as to the propriety of granting the motion. *Wiser v. Blackly*, 2 J. C. R. 486.

1870. And the party must deposit *fifty dollars* with the register, towards the costs of the re-hearing, in case the decree is not materially varied. *Consequa v. Fanning*, 3 J. C. R. 364.

1871. On a re-hearing, the cause is open to the party who petitions for it, to those parts only of the decree complained of in the petition; but as to the other party, the cause is open as to the whole matter. *Ibid*. *S. P. Dale v. Roosevelt*, 6 J. C. R. 255.

1872. Where a decretal order of reference to a master, to take an account, was made in September, 1817, and in January, 1818, the master, after hearing both parties, made his report, and in June following, the defendant petitioned for a re-hearing, on grounds affecting the merits of the decretal order; the Court, although the party was not entitled to a re-hearing, as of course, on account of the delay in making the application, granted the petition, on the defendant paying all the costs of reference under the order, and depositing fifty dollars with the register, &c. *Consequa v. Fanning*, 3 J. C. R. 364.

1873. Evidence, duly taken in chief, omitted to be read at the former hearing, through negligence, or other cause; or evidence as to new matter not before ready, or as to papers since found, and which may be proved at the hearing; or evidence to show the incompetency of a witness, whose deposition was read at the former hearing, is admissible at the re-hearing. *Dale v. Roosevelt*, 6 J. C. R. 255.

1874. But *new* evidence as to the merits, is not allowed at a re-hearing; especially, when it has been taken *ex parte*. *Ibid*.

1875. Where a decree is entered by consent, there can be no re-hearing; but the party, in case of fraud or collusion, must seek relief by original bill. *Monell v. Lawrence*, on appeal, 12 J. R. 521.

*M. Reference to a master, report [***363**] and exceptions.

1876. In the case of *Rensen v. Rensen*, (2 J. C. R. 495.) the Court laid down the following *general rules* of practice, to be deduced from the books, and which ought to prevail on the subject of examinations before a master, so as

to unite convenience and despatch, with sound principle and safety:—1. The parties should make their proofs as full, before publication, as the nature of the case requires or admits of, to the end, that the supplementary proofs before the master may be as limited as the rights and responsibilities of the parties will admit. 2. The orders of reference should specify the principles on which the accounts are to be taken, and the inquiry is to proceed, as far as the Court shall have decided upon them; and the examinations before the master should be limited to such matters, within the limits of the order, as the principles of the decree, or the order, may render necessary. 3. That no witness in chief, nor the parties, be examined before the master, without an order for that purpose, specifying the subject and extent of the examination; and such an order to be given, when a witness, who has once been examined, is to be reexamined before the master on the same matter. 4. Upon the defendant accounting before the master, he is to be allowed on his own oath, being credible and uncontradicted, for sums not exceeding *twenty dollars* each; but he must mention when and to whom he paid them, and must swear positively to the fact, and not as to belief only, and the whole of the items so established, must not exceed (500) dollars; and the defendant cannot, by way of charge, charge another person in that way. 5. The master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or items are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed items ought to be reduced to writing by the parties respectively, by the way of charges, and discharges, and the requisite proofs taken on written interrogatories, prepared by the parties and approved by the master, or by a *visu voce* examination, as the parties may deem most expedient, or the master may direct, in the given case. The testimony is to be taken in the presence of the parties, or their counsel, (except when it is specially ordered to be taken privately,) and reduced to writing by the master, or under his direction, if he shall deem it advisable, as well where the party, as a witness, is examined. 6. In all cases where the master is directed by the order to report proofs, the depositions of the witnesses should be reduced to writing by the master, and subscribed by the witnesses, and the depositions returned, with the report of the Court. 7. When an examination is once begun before a master, he ought, on assigning a reasonable time to the parties, to proceed with as little delay and intermission as the nature of the case will admit of, to the conclusion of the examination; and when concluded, it ought not to be opened for further proof, without special and very satisfactory cause shown. 8. After the examination is concluded, in cases of a reference to take accounts, or to make inquiry, the parties, their solicitors, or counsel, after being furnished by the master with a copy of his report, ought to have a

[*364] *day assigned to them to attend before him, to the settling of the re-

port, and to make objections in writing, if any they have; and when the report is finally settled and signed, the parties ought to be confined, in their exceptions, to such objections as are overruled or disallowed by the master. *Remsen v. Remsen*, 2 J. C. R. 495.

1877. After a final decree, an order for the defendant to account before a master, so as to vary the relief sought by the bill, will not be granted on motion; but the reference must be granted, if at all, after a re-hearing in the cause. *Hendricks v. Robinson*, 2 J. C. R. 484.

1878. It is not the proper course to refer to a master an examination into facts, going to the merits of the cause, and as to which proofs have been taken in chief, in the usual way. *Slee v. Bloom*, on appeal, 20 J. R. 669. S. C. 5 J. C. R. 366.

1879. In an order of reference, the defendant may be directed to produce before the master, on oath, all books, papers, &c. in his custody or power, and be examined on oath, on such interrogatories as the master may direct, relative to transactions set forth in the pleadings. *Hart v. Ten Eyck*, 2 J. C. R. 513.

1880. A party in an account before a master, under the head of *general expenses*, is not to be allowed any thing, without specifying particulars. *Methodist Episcopal Church v. Jaques*, 3 J. C. R. 78.

1881. Where one party produces a paper to charge the other, the opposite party may use it, in his discharge; but it does not follow, that each party is to have the same credit. *Ibid.*

1882. Where the discharges are inaccurate in some instances, and are destitute of precision and certainty as to place and circumstances, the whole may be rejected. *Ibid.*

1883. An order of reference for an account before a master, cannot be more extensive than the allegations and proofs of the parties. *Consequa v. Flanning*, 3 J. C. R. 587.

1884. Where the charges in the bill are specific, setting forth the items of the account, with their dates, on an order of reference for an account, the inquiry is not open beyond the special matters charged; although the bill may contain a general charge at the conclusion, and a prayer for "a full account concerning the premises." *Ibid.*

1885. Where the plaintiff produces and examines a witness before a master, but neglects to inquire as to the particular item in the account which the witness alone could explain, he cannot, afterwards, except to the report of the master, as incorrect, in regard to such item. *Barrow v. Rhinelanders*, 3 J. C. R. 614.

1886. On a reference, aged witnesses residing in a distant part of the state, may be examined on interrogatories, before a master, in the county where they reside, under the directions of the master before whom the reference is pending; and examinations so taken may be used on the reference, saving all just exceptions. *Mason v. Roosevelt*, 3 J. C. R. 637.

1887. If the decretal order of reference is silent as to the mode of calculating interest, and the master does not allow *annual rests*, the plaintiff should apply, on the coming in of the report, for an order on the master to report his

reasons for rejecting the claim, or make the rejection a ground of exception to the report. If he does neither, and *the report is [*365] confirmed, he cannot, on a final hearing, on the equity reserved, make the objection to the report. *Smith v. Smith*, 4 J. C. R. 445.

1888. Objections to the admissibility of evidence before a master, not made the ground of exception on the report being filed, will be considered as waived, and cannot be made at the final hearing. *Minuse v. Cox*, 5 J. C. R. 441.

1889. In a suit between the representatives of a father, and the representatives of his son, where all the matters in controversy were referred to a master, the Court refused to allow the exceptions made to the report; the transactions being very stale and ancient, and most of them family dealings and concerns, and the parties and their witnesses having been fully examined before the master. *Arden's Executors v. Executors of Arden*, 1 J. C. R. 313.

1890. Where numerous exceptions were taken to a master's report, and the facts were multiplied, and the defendant applied for an order on the master to furnish certified copies of the minutes of testimony taken in the case before a former master, since deceased, and before himself, as the same were in his possession, and of all notes and memorandums made upon the testimony by the masters, and all the vouchers produced in evidence before them relative to the matters of charge and discharge, in taking the account; the Court, on account of the difficulty of specifying particular parts of the testimony wanted, granted the order, on condition that the expense of returning such parts of the testimony as should not be found necessary to support the exceptions, should, in any event, be paid by the defendant. *Jaques v. Methodist Episcopal Church*, 2 J. C. R. 543.

1891. Costs on exceptions to a master's report are allowed to each party on the exceptions in which they have each respectively prevailed. *S. C.* 3 J. C. R. 78.

1892. The mistake of a master is not like the error of a judge, and is no rule as to costs. *Ibid.*

1893. Where there were exceptions on both sides, some of which were allowed, and some overruled, and one of the exceptions was modified by the Court, the parties respectively were allowed costs of the exceptions on which they prevailed, and of those made by the opposite party, which were overruled; but costs were granted to neither party on the exception which was modified. *Barrow v. Rhineland*, 3 J. C. R. 614. 627.

1894. No exceptions can be taken to a master's report, unless the objection was made to him, previous to the signing of the report. *Methodist Episcopal Church v. Jaques*, 3 J. C. R. 78.

1895. Exceptions to the reports of masters are in the nature of special demurrers, and the party objecting must lay his finger on the error; otherwise, the part not pointed out by the exception, will be taken to be admitted. *Wilkes v. Rogers*, on appeal, 6 J. R. 566.

1896. The Court cannot set aside a report upon matters to which exceptions are not taken, and require further proof; not even in a case where infants are concerned, if they have a guardian. *Ibid.*

1897. Where the order for confirming the master's report is regular, it will not be vacated afterwards, so as to allow the defendant to except to the report, when he purposely kept back his objections at *the time, and did not state them to the master, though he had full knowledge of all the facts which formed the ground of his exception. *See v. Bloom*, 7 J. C. R. 137. *S. P. Methodist Episcopal Church v. Jaques*, 3 J. C. R. 78. [*366]

N. Decree.

1898. The plaintiff is not confined to the particular relief prayed for in the bill, but, under the general prayer, is entitled to such a decree as the circumstances of the case may require. *Beebe v. Bank of New-York*, on appeal, 1 J. R. 529.

1899. A decree can never be impeached by an original bill; it can be questioned only by a bill of review. *Gelston v. Codwise*, 1 J. C. R. 189. 195. Except on the ground of fraud. *Davoue v. Fanning*, 4 J. C. R. 199. *Murray v. Murray*, 5 J. C. R. 60.

1900. A regular decree on the merits cannot be set aside on motion; and it seems, that where it is sought to set aside a decree on the ground of surprise and irregularity, the course is to apply by petition. *Radley v. Shaver*, 1 J. C. R. 200.

1901. The recitals in a decree should not be argumentative, but state merely the conclusions of law and fact. *Dey v. Dunham*, 2 J. C. R. 182.

1902. Where a deed is set aside as constructively fraudulent, it is usual to direct a release and re-conveyance by the party claiming under the deed, with a covenant against his own acts. *Ibid.*

1903. If a final decree is silent as to costs, they are lost, and cannot afterwards be ordered to be paid, unless, on a re-hearing, the decree has been opened for that purpose. *Travis v. Waters*, 1 J. C. R. 85. on appeal, 12 J. R. 500.

1904. A decree on a bill for the specific performance, on the coming in of the master's report, as to the quantity of land to be conveyed, and the payments made, directing the balance due to be paid, and the conveyance to be executed, is a final decree. *Ibid.*

1905. A final decree is that which is made when all the material facts are ascertained, so as to enable the Court to understand and decide on the merits of the case. *Jaques v. Methodist Episcopal Church*, on appeal, 17 J. R. 548.

1906. A final decree, regularly obtained and enrolled, cannot be opened, or altered, except by a bill of review; and if not enrolled, it can be corrected only by a re-hearing, duly obtained according to the rules of the Court. *Bennett v. Winter*, 2 J. C. R. 205.

1907. But before enrolment it may be corrected, where the mistake or omission was in-

advertent, and is clearly ascertained. *Lawrence v. Cornell*, 4 J. C. R. 542.

1908. Instead of enrolments of decrees on parchment, as formerly used, the *bill*, *answer*, *pleadings*, and *orders*, &c., in a cause, are annexed, and filed with a fair engrossed copy of the decree in the *register's* office, after the expiration of thirty days from the time the final decree is pronounced. (Sess. 36. c. 95. s. 6. 1 N. R. L. 488.) *Wiser v. Blachly*, 2 J. C. R. 488.

1909. There can be no valid decree against an *infant*, by default, *nor on his [*367] answer by his guardian; but the plaintiff must prove his demand in Court, or before a master, and the infant will have a day in Court, after he comes of age, to show error in the decree. *Mills v. Dennis*, 3 J. C. R. 367.

1910. If, instead of seeking a foreclosure merely of a mortgage against the infant heir of the mortgagor, there is a decree for the sale of the premises, the decree will bind the infant. *Ibid.*

1911. A decree entered by default, and enrolled, was set aside on motion and payment of costs, the plaintiff having been previously served with notice of the motion and copies of the affidavits, on which it was intended to be made. *Beckman v. Peck*, 3 J. C. R. 415.

1912. Where one of the defendants dies, after the argument of a cause, and before judgment, the decree may be entered so as to have relation back to the day of final hearing. *Campbell v. Mesier*, 4 J. C. R. 334.

1913. A decree is never pronounced, unless the cause is regularly set down for hearing in term, except when it is submitted by consent of all parties, out of term; and the decree may be afterwards entered in term time, or in the vacation, at the discretion of the chancellor; and where a bill is taken *pro confesso*, the cause must, nevertheless, be set down for hearing in term; but no notice of the hearing need be given. *Rose v. Woodruff*, 4 J. C. R. 547.

1914. A decree of Chancery is equivalent to a judgment at law, and in the case of executors and administrators, if it is prior to a judgment at law, it will be first paid. *Thompson v. Brown*, 4 J. C. R. 619.

1915. Where there is a general reservation in a decree of all questions not disposed of by the Court, but nothing said as to *interest*, it may be allowed on the final decree. *Campbell v. Mesier*, 6 J. C. R. 21.

1916. The *thirty-fifth* rule of the Court, which declares, that no process shall be issued, or other proceeding had, on any final decree, until the same has been *enrolled*, does not, it seems, apply to *decretal orders* for the sale of mortgaged premises; but, at any rate, if the enrolment, which is matter of form, be afterwards made, it will have relation back to the time of the decree, and protect the intermediate sale. *Goeld v. Lansing*, 6 J. C. R. 75.

1917. A decree entered by consent of the solicitors or counsel of the parties, cannot be set aside, *on motion*, unless there be fraud, or

collusion. *Monell v. Lawrence*, on appeal, 12 J. R. 521.

1918. The party must seek relief by original bill. *Ibid.* *S. P. French v. Shotwell*, 5 J. C. R. 555.

1919. All persons are bound to take notice of decrees in Chancery, as well as of judgments at law. *Ibid.*

1920. It seems, that if a party is present in Court, and has knowledge of any order or proceeding of the Court, and acts contrary to, or in violation of it, it is a contempt. *Ibid.*

*O. Execution of a decree. [*368]

1921. A purchaser under a decree of the Court, at a master's sale, may be compelled to complete the purchase; and the Court, where the conditions of sale give no alternative to the purchaser, will exercise its discretion, under the circumstances of the case, in coercing the purchaser by *attachment*. *Executors of Brasher v. Van Cortlandt*, 2 J. C. R. 505.

1922. An appeal interposed after a decree of sale is essentially executed, does not supersede the completion of the purchase. *Ibid.*

1923. If, after a foreclosure and sale of mortgaged premises, the mortgagor, or any person who has come into possession under him pending the suit, refuses to deliver up the possession, on demand, to the purchaser, under the decree, the Court, on motion for that purpose, will order the possession to be delivered to the purchaser, though the delivery of possession is not made part of the decree. *Kershaw v. Thompson*, 4 J. C. R. 609.

1924. And in case of disobedience to such order, an *injunction* issues, on affidavit of service of the order, &c.; and on proof of service of the injunction, and a refusal of the party to comply with it, a *writ of assistance* issues, of course, to the sheriff. *Ibid.*

1925. But where the delivery of possession is made part of the decree, a *writ of execution* is the proper remedy in case of disobedience. *Ibid.*

P. Solicitors and Agents.

1926. Where a *solicitor* files a bill, in *propria persona*, as plaintiff, a notice served on his agent, as solicitor of the Court, is good service. *Champlin v. Fonda*, 4 J. C. R. 62.

1927. Whether a solicitor or attorney of the plaintiff can purchase property of the defendant, at a sheriff's sale, under an execution? *Quere.* *Howell v. Baker*, 4 J. C. R. 118.

1928. The attorney's or solicitor's *lien* for costs does not affect the equitable right of set-off between the parties. It extends only to the clear balance resulting from the equity between them. But the *lien* will not be suspended, or satisfaction of the judgment delayed, until an unliquidated claim of the opposite party is ascertained, and a balance finally struck between the parties. *Mohawk Bank v. Burrows*, 6 J. C. R. 317.

1929. A bill by attorneys and solicitors for account of moneys paid and services performed by them, &c., was dismissed, the remedy

being at law. *Lynch v Willard*, 6 J. C. R. 342.

1930. The Court does not ordinarily, and of course, interfere, to compel the payment of solicitors' fees. *In the matter of Southwick*, 1 J. C. R. 22.

[*369] *LV. *PRINCIPAL AND AGENT.*

- A. *How far the principal is bound by the acts of his agent.*
- B. *Of the duty and responsibility of the agent to his principal; and when personally liable.*
- C. *How an agent shall account to his principal.*
- D. *Rights of the agent in regard to his principal.*
- E. *Rights and liabilities of agents in regard to third persons.*

A. *How far the principal is bound by the acts of his agent.*

1931. A general agent cannot bind his principal personally, for a debt chargeable on the land descended to his principal. *Duke of Cumberland v. Codrington*, 3 J. C. R. 229. 274.

1932. Where an agent of a merchant here delivers goods to a merchant abroad, for sale, and the agent settles with the merchant abroad, according to the account stated by him, with full knowledge of all the facts, without any fraud or imposition, the principal here is bound by the acts of his agent, and is concluded from any further claim against the merchant abroad. *Murray v. Toland*, 3 J. C. R. 569.

1933. The defendants being a company incorporated in the city of New-York, for the purpose of insuring against loss or damage by fire, appointed R., their surveyor at Savannah, to survey and return a description of the property offered for insurance, and state the terms or probable rates of insurance to applicants, and to receive from those who were willing to pay, premiums, and to transmit the same to the defendants, who reserved to themselves the right of deliberating and deciding on the applications, and to accept or reject them, in their discretion; and their printed proposals stated, that no insurance should be considered as made or binding, until the premium was paid, &c.; held, that R. was not the general agent of the defendants for effecting insurance, nor were they bound by his agreement for that purpose, or by his receipt of the premium, so as to make them responsible for a loss happening before the premium was transmitted to them, and before they had considered of and accepted the proposals, or executed the policy of insurance. *Perkins v. The Washington Insurance Company*, 6 J. C. R. 485.

B. *Duty and responsibility of the agent to his principal; and when personally liable.*

1934. An agent or trustee, undertaking a special business, cannot, on the subject of that

business or trust, act for his own benefit, to the injury of his principal. *Parkist v. Alexander*, 1 J. C. R. 334. *Green v. Winter*, 1 J. C. R. 26.

1935. If an agent undertakes to judge whether he may or he may *not innocently depart from the instructions of his principal, he does it at his peril. *Ibid.* [*370]

1936. When one person bids for another at auction, but does not, at the time the lot is knocked down to him, nor on the day of sale, disclose to the vendor, or auctioneer, the name of his principal, he is personally responsible, as purchaser. *M'Comb v. Wright*, 4 J. C. R. 659.

1937. A special authority must be strictly pursued; and a purchaser is presumed to know such authority when it is given in a public statute, and he purchases at his peril. *Dening v. Smith*, 3 J. C. R. 332. 344.

1938. A factor cannot pledge the goods of his principal, though the creditor has no notice of his being a factor. *Rodriguez v. Hefernan*, 5 J. C. R. 417.

[See *Promissory Note*, 1974.]

C. *How an agent shall account to his principal.*

1939. Whether the principle that citizens or subjects are to be considered as parties to the laws of their government, can be applied to a question arising between principal and agent; as, where a foreign merchant consigns goods to his factor here for sale, and the latter is prevented by an embargo from remitting the proceeds to his principal? *Fanning v. Consequa*, on appeal, 17 J. R. 511.

1940. *It seems*, that the rule of the civil law, that a power does not expire until the death of the principal, has not been adopted into the English law. *Stirnermaun v. Cowing*, 7 J. C. R. 275.

1941. If an agent compromises a debt due to his principal, with the knowledge of his principal, who makes no objection at the time, the agent will be responsible to him for no more than he has actually received; the silence of the principal amounting to a ratification of the act of the agent. *Armstrong v. Gilchrist*, 2 J. C. 424.

1942. Where an agent or attorney is authorized to sell land for his principal, and to collect money, on a bond and mortgage, it is sufficient, if he keeps the money received by him safely, and is ready to pay it over on demand, to the party entitled to it. He is not chargeable with interest on the moneys of his principal, unless in case of default, or where he has employed the money for the purpose of gain to himself. *Williams v. Storrs*, 6 J. C. R. 353.

D. *Rights of agents in regard to their principals.*

1943. Where the several joint owners of a cargo appointed one of the part owners their agent, to receive and sell the cargo, and distribute the proceeds, he is entitled, under such

special agency, to a commission or compensation for his services, as a factor or agent, and he may retain the goods, or their proceeds, as security, not merely for his advances and responsibilities, in regard to the particular property, *but for the balance of his general account. *Bradford v. Kimberly*, 3 J. C. R. 431.

[*371] 1944. G., a supercargo on a trading voyage, who was to receive from the owner a commission of two and one half per cent. on the proceeds of the outward, and five per cent. on the proceeds of the homeward cargo, as a compensation for his services, falling sick on the outward voyage, appointed another supercargo, engaging to pay him out of his own commissions, and G. having died on the homeward voyage; *held*, that his legal representatives were entitled to the full compensation stipulated, the ship having performed her voyage successfully, and the substitute of G. having performed the duty of the supercargo faithfully. *Gray v. Murray*, 3 J. C. R. 167. 178.

1945. G., being about to proceed on a distant voyage, requested the defendant to procure insurance on his life, in London, for 3,000 pounds, which the defendant undertook to do, and to pay the premium for one year, and a policy was effected, by his order, for that amount. The defendant, afterwards, under pretence that there was some mistake in the order given by him for the policy, without the knowledge or consent of G., procured the policy to be cancelled, and the premium returned, and another policy to be effected, for 450 pounds only. G. having died within a year, the defendant was held to be responsible to the legal representatives of A., for the amount of the original policy, so cancelled, deducting the premium. *Ibid*.

1946. Where an agent suffered thirty years after his agency had ceased, and sixteen years before the death of his principal, to elapse, without rendering an account; *held*, that the lapse of time was a bar to the admission of his demand. *Mooers v. White*, 6 J. C. R. 360.

1947. Where goods were consigned by a person abroad to a firm or co-partnership here, which was at the time dissolved, but that fact unknown to the consignor, who directed them to be sent to C., and one of the firm received the bill of lading, took possession of the goods, and transferred them to H., under a color of a sale, in payment of his own debt; *held*, that the firm being dissolved at the time the bill of lading was signed and the goods shipped, they never came into the possession of the consignees named; and that the individual partner took them, not as a member or authorized agent of the firm, but as an agent or trustee of the consignor; and having no power to pledge or sell the goods for the security or payment of his own debt, the transfer to H. was fraudulent and void. *Stirnerman v. Cowing*, 7 J. C. R. 275.

E. Rights and liabilities of agents in regard to third persons.

1948. A factor who delivers goods to a third

person, to be sold on account of his principal, may maintain an action at law, in his own name, against such third person. *Murray v. Tbland*, 3 J. C. R. 569.

1949. Where an agent has duly and fairly accounted with his immediate and authorized principal, he is not bound to account over again to a person beneficially interested, or standing in the relation of *cestui que trust* to the principal. *Tripler v. Olcott*, 3 J. C. R. 473.

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*LVI. PRINCIPAL AND SURETY.

1950. The rules as to the relief of a surety, are the same in equity as in a Court of law, when the facts are the same. *King v. Baldwin*, 2 J. C. R. 554.

1951. If the creditor, by express agreement with the principal, varies the terms of the contract by enlarging the time of performance, without the assent of the surety, the latter is discharged. *Ibid*.

1952. Mere delay of the creditor to call on the principal debtor for payment, will not discharge the surety. *Ibid*.

1953. But, it seems, that if after being requested by the surety to prosecute and collect the money of the principal, the creditor refuses, and delays to sue, until the principal becomes insolvent, the surety will be relieved in equity. S. C. on appeal, 17 J. R. 384.

1954. Where a surety has made his defence at law, which is overruled as insufficient, he cannot afterwards, on the same facts only, obtain relief in equity. S. C. 2 J. C. R. 554.

1955. But if there be a doubt whether a defence be available at law, and there is no doubt of the jurisdiction of a Court of equity, and the defendant at law omits to make his defence there, or if he sets it up, and it is overruled, on the ground that it cannot be made at law, a Court of equity may afford relief, notwithstanding a trial at law. S. C. on appeal, 17 J. R. 384.

1956. As, where a defendant to a suit at law, being surety for his co-defendant, sets up, in his defence, that the plaintiff, though urged by the surety to prosecute and collect the money of the principal debtor, refused to do so, and delayed until the principal debtor became insolvent, and that defence was overruled; the surety may, notwithstanding, seek relief in Chancery, on the same ground set up by him in his defence at law. *Ibid*.

1957. Where a creditor does an act injurious to the surety, or omits to do an act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter is discharged, and may set up such conduct of the creditor, as a defence to a suit at law against the surety. *Ibid*.

1958. A surety, when the debt becomes due, may come into Chancery to compel the creditor to sue for, and collect the debt of the principal. S. C. 2 J. C. R. 554. and 17 J. R. 384. At least, on indemnifying the creditor for the consequences of risk, delay, and expense. *Hayes v. Ward*, 4 J. C. R. 123.

1959. A surety, on paying the debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal. *Ibid.*

1960. And he is entitled to all the means, and to every remedy, which the creditor possesses, to enforce payment from the principal debtor. *Ibid.*

1961. If, therefore, a creditor takes a mortgage from the principal debtor, he does it not only for his own security, but for [*373] the indemnity of the surety; and he must do no act by which it may be invalidated, in first instance, or be subsequently destroyed or defeated. *Ibid.*

1962. Whether the surety can compel the creditor to resort first to the principal debtor, and exhaust his remedies against him, before resorting to the surety? *Quære. Ibid.*

1963. A creditor in *New-Jersey*, where all the parties resided, took from the maker of a promissory note, endorsed by the plaintiff, a bond and mortgage, which was ample security for the debt; and, instead of resorting to the mortgage or the principal debtor, sued the plaintiff, who was transiently in this state, on the note, at law; this Court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage in *New-Jersey. Ibid.*

1964. A creditor, having a particular fund, as security for payment, may be compelled to resort to that fund, before he pursues the debtor personally. *Ibid.*

1965. Where the endorser of a note discounted by the *Utica Insurance Company*, not being an incorporated banking association, took from the maker of the note, a bond and judgment for his indemnity and security, and without any fraudulent intent to evade the act to restrain unincorporated banking associations, (2 N. R. L. 235. *secs.* 36. c. 71.) the bond and judgment were deemed valid; and the Court refused, at the instance of a purchaser under a subsequent judgment, to interfere, to prevent the endorser from obtaining payment of the judgment to him, he having been sued as endorser, and a judgment recovered against him. *Parker v. Rochester*, 4 J. C. R. 329.

1966. A surety cannot sue the principal debtor for his indemnity or discharge, before the debt is due. *Campbell v. Macomb*, 4 J. C. R. 534. 538.

1967. As, where a mortgagee, holding a mortgage as a trustee for others, was also a guarantee or surety for the debt, and the mortgaged premises were in a state of ruin and decay, and the security, therefore, rendered precarious; *held*, that he could not file a bill for the sale of the property, the debt not being due, nor the mortgagor in default. *Ibid.*

1968. When bail become fixed at law with the payment of the debt, their character as bail ceases; and after judgment and execution against them, there is an end of the relation of the principal and surety. *Bay v. Tallmadge*, 5 J. C. R. 305.

1969. And the bail or sureties, in such case, cannot claim any advantage against a creditor,

on the ground of want of due diligence in prosecuting the principal debtor. *Ibid.*

LVII. PROMISSORY NOTE.

1970. The holder of a promissory note is entitled to the benefit of a collateral security given by the maker to the endorser, for his indemnity. *Philips v. Thompson*, 2 J. C. R. 418.

*1971. R., a maker of a promissory note, gave a judgment bond to the endorser, to indemnify him against his endorsement. The note was protested for non-payment, but due notice was not given to the endorser, who afterwards assigned the judgment to the holder of the note, in consideration of being released from all responsibility on his endorsement: *held*, that the assignment was a waiver of want of due notice, and tantamount to a promise to pay. *Ibid.*

1972. A subsequent mortgage or judgment creditor, in such a case, has no equity to allege against such a waiver of want of notice, in order to avoid the judgment so given for the indemnity of the endorser. *Ibid.*

1973. An endorser is entitled to due notice of non-payment from the holder of the note, though he may be informed otherwise of the fact. *Ibid.*

1974. A person receiving negotiable paper, in the usual course of trade, for a fair and valuable consideration, from an agent or factor, having no authority to transfer them, but without knowledge of that fact, or notice of the fraud, may hold them against the true owner. *Bay v. Coddington*, 5 J. C. R. 54. S. P. on appeal, S. C. 20 J. R. 637.

1975. But where R., an agent of B., having received negotiable notes to be remitted to B., delivered them to C. as security against responsibilities as endorser of certain notes of R., who had then stopped payment, and become insolvent, but on which notes C. had not become chargeable: *held*, that though C. had no knowledge that the notes so deposited with him belonged to B., but believed that R. was the true owner of them; yet he was not entitled to hold them against the true owner, as he did not receive them in the regular course of trade, or in payment of an existing debt. *Ibid.* S. P. on appeal, S. C. 20 J. R. C. 637.

LVIII. QUO WARRANTO.

1976. A writ of *quo warranto*, at common law, was a criminal proceeding. *A. G. v. Utica Insurance Company*, 2 J. C. R. 371. 377.

1977. So, also, is an information in the nature of a *quo warranto* under the statute. *Ibid.*

1978. And Chancery has no jurisdiction to support informations filed by the attorney general, for injunctions, to restrain persons from usurping a franchise or violating a statute. *Ibid.*

[*375] *LIX. RECEIVER.

1979. The appointing of a receiver rests in the sound discretion of the Court. *Verplank v. Gaines*, 1 J. C. R. 57.

1980. Where a trustee was restrained by injunction from interfering with the trust estate, and a receiver appointed; and it became necessary to bring suits at law to recover possession of lands, and to collect moneys belonging to the trust estate, the Court, on application of the *cestui que trust*, ordered the receiver to bring the suits in the name of the trustee, on giving security to indemnify the trustee; and that the receiver should hold possession of the lands recovered and moneys received by him, subject to the further order of the Court. *Green v. Winter*, 1 J. C. R. 60.

1981. Where a bill charges an executor or trustee with abusing his trust, &c., an injunction will not be awarded in the first instance, but a receiver may be appointed. *Boyd v. Murray*, 3 J. C. R. 48.

LX. RELEASE.

1982. Where two or more persons are bound jointly and severally, in one bond or obligation, though a release of one obligor entirely discharges the rest at law, it does not do so strictly in equity; for equity will not extend the operation of the release beyond the clear intention of the parties, and the justice of the case; but will construe it to relate to the particular matter intended to be released. *Kirby v. Taylor*, 6 J. C. R. 242.

[See *Guardian and Ward*.]

LXI. SCIRE FACIAS.

1983. Writs of *scire facias*, directed to a person convicted of felony, and sentenced to imprisonment for life in the state prison, to revive a judgment against him, and *nihil* returned thereon, can have no legal operation or effect whatever; for such convict being regarded as *civiliter mortuus*, the writ ought to be directed to his legal representatives, or the *tenants*. *Troup v. Wood*, 4 J. C. R. 228. See *Civil Death*.

[*376] *LXII. SET-OFF.

1984. Judgments, not only in the same Court, but in different Courts, may be set off against each other; and the power of Courts of law in allowing such set-off, does not depend upon statute, but on the general jurisdiction of the Court over its suitors. *Simpson v. Hart*, 1 J. C. R. 91.

1985. Where A. recovered a judgment

against B. and C. for an assault and battery, and B. recovered a judgment against A. for an assault and battery; *held*, (B. being insolvent, and C. much embarrassed,) that A. was entitled to have the judgment recovered by him against B. and C. set off against the judgment recovered against him by B.; and that the Court of law having refused to allow the set-off, on motion for that purpose, A. might sustain a bill in Chancery to compel the set-off to be made; especially where new facts were disclosed, not presented to the Court of law. *S. C.* on appeal, 14 J. R. 63. *Contra*, *S. C.* 1 J. C. R. 91.

1986. A Court of law allows a set-off *ex gratia*, but a party is entitled in equity to a set-off, as a matter of right. *S. C.* 14 J. R. 63.

1987. It is not necessary that the judgments should be in the same right; it is sufficient, that the judgment prayed to be set off, may be enforced at law against the party who has recovered a judgment, which may be diminished or satisfied by the set-off, as in the above case; for the whole amount of A.'s judgment might be collected of B., who could have no right of contribution (it being an action of trespass) against C. *Ibid*.

1988. A set-off is not allowed, where the demand is for uncertain damages, arising from a breach of covenant. *Duncan v. Lyon*, 3 J. C. R. 351.

1989. Therefore, on a bill for discovery and account, and payment of arrears of rent, the defendant is not entitled to be allowed, by way of damages, for breach of a covenant to allow him sufficient common of pasture and estovers. *Livingston v. Livingston*, 4 J. C. R. 287.

1990. Chancery follows the rules of the Courts of law, as to allowing a set-off. *Duncan v. Lyon*, 3 J. C. R. 351.

1991. There must be mutual debts to authorize a set-off. *Ibid*.

1992. Mutual debts are such as are due to and from the same persons, in the same capacity. *Murray v. Toland*, 3 J. C. R. 569. 573. *S. P.* *Dale v. Cooke*, 4 J. C. R. 11.

1993. A debt arising on a contract made with an executor, cannot be set off against a debt due from the testator. *Dale v. Cooke*, 4 J. C. R. 11.

1994. Matters of *tort*, sounding in unliquidated damages, cannot be set off. *Ibid*.

1995. Joint and separate debts cannot be set off against each other. *Ibid*.

1996. The *lien* of the attorney or solicitor extends only to the clear *balance* resulting from the equity between the parties, and does not affect the [*377] right of set-off between them. *Mohawk Bank v. Burrows*, 6 J. C. R. 317.

LXIII. SHERIFFS.

See XXIII. EXECUTION.

LXIV. SHIPS AND SHIP OWNERS.

- A. Owners of ships.
 B. Charter party and freight.
 C. Authority and duty of master.

A. Owners of ships.

1997. Though the part owners of a ship are, generally speaking, *tenants in common*, not partners or joint tenants, yet there may be a *special* partnership between them, in the ship as well as in the cargo, in regard to a particular voyage and adventure, and the proceeds arising from the sale of the ship and cargo, and the profits of the adventure. *Mumford v. Nicoll*, on appeal, 20 J. R. 611. *Contra*, S. C. 4 J. C. R. 522. as to the principle, that a ship stands on the nice distinction of *tenancy in common*, laid down by the chancellor, on the authority of Lord Eldon, (2 *Ves. and Beames*, 242. 2 *Rose*, 76.) broadly, without any exception or modification.

1998. And where, in such case, one of two owners of a ship and cargo receives, or gets into his possession, the whole proceeds, he has a right to retain them, until he is paid or indemnified for what he has advanced or paid, more than his share, for outfits, repairs or expenses of the ship, for that particular voyage or adventure; but not for any general balance of account arising from former and distinct voyages or adventures, in which they have been concerned together, in the same, or other ships or vessels, there being no general partnership between them, and each adventure creating a special partnership by itself, which terminated with the particular adventure. S. C. 20 J. R. 611. *Contra*, S. C. 4 J. C. R. 522.

B. Charter party and freight.

1999. When a ship puts into an intermediate port, in distress, and is condemned as unseaworthy, and it becomes necessary to hire another ship to transport the cargo saved to its destined port, the cargo, on its arrival, is chargeable with the increase of freight arising from the charter of the new ship, that is to say, the *extra* freight beyond what [*378] the *freight would have been under the original charter party, if the necessity of hiring another ship had not intervened. *Searle v. Scovell*, 4 J. C. R. 218.

2000. The owner of the goods is not answerable both for the old and new freight. *Ibid*.

2001. To ascertain the extra freight, the proper rule seems to be, to determine the difference between the amount of the freight under the original charter party, and the *ratable freight* for the goods saved to the port of necessity, added to the freight of the new ship hired to carry on the goods. *Ibid*.

2002. The extra freight for the renewed voyage is, in such case, a lien on the cargo. *Ibid*.

2003. Owners of freight and cargo are part-

ners or joint-tenants. *Nicoll v. Mumford*, 4 J. C. R. 522.

C. Authority and duty of master.

2004. It is the duty of a master, when his vessel is disabled in the course of the voyage, to hire or procure another ship, if he can, to take on the cargo to its destined port. *Searle v. Scovell*, 4 J. C. R. 218.

2005. The master, in such case, becomes of necessity the agent of the owner of the cargo; and his acts in relation thereto are binding on him. *Ibid*.

2006. The master has no right, in such case, to sell the cargo at the port of necessity, and there put an end to the voyage, if another vessel can be found or hired to carry on the cargo. *Ibid*.

LXV. STATUTES.

2007. Though the legislature has power to take private property for useful and necessary public purposes, it is bound to provide a fair compensation to the individual whose property is taken; and until a just indemnity is afforded to the party, the power cannot be legally exercised. *Gardner v. Trustees of Newburgh*, 2 J. C. R. 162.

2008. An act of the legislature authorized the trustees of a village to supply it with water, by means of conduits, and for that purpose, to enter on the lands of other persons, to make reservoirs, and lay conduits, &c., and provided compensation for the owners of the land, and the owner of the land on which the spring or source of water was situated, but made no provision for indemnifying the owners of lands through which the stream flowed, and had run from such spring, from time immemorial, for the injury they must suffer by the course of the water being diverted from their lands; the Court granted an injunction to prevent any proceeding to divert the stream, until such provision *was made for a just compensation to [*379] the persons who might be injured by diverting the water. *Ibid*.

2009. The act of the 11th April, 1808, for the relief of *James Kain* and *Stephen Rea*, executors of *David Rea*, deceased, late sheriff of *Ulster*, did not authorize them to sell property under an execution, the execution of which had not been commenced by the deceased sheriff. *Mason v. Sudam*, 2 J. C. R. 172.

2010. And the amount of a judgment and execution, with the sheriff's fees, being tendered by a master on the sale of the land under a decree in favor of a subsequent mortgage, and refused; held, that a sale, afterwards, under the judgment and execution, by the agent of the executors of R., was wrongful and void. *Ibid*.

2011. Under the act for draining swamps and bog meadows in the counties of *Orange* and *Dutchess*, passed April 9th, 1804, sess. 27. c. 91. the inspectors appointed by the Court

of Common Pleas, for draining the great swamp or bog meadow near *Newburgh*, must strictly observe the precise limits prescribed by the act; and can only continue the main ditch, dug for that purpose at the north end of the great pond, through lands adjoining the swamp; they have no authority to dig down the outlet at the south-east end of the pond, and thereby injure or destroy valuable mills, &c., erected at the outlet on land not adjoining the great swamp; or to break up ancient and useful streams of water, draining natural reservoirs which feed them. *Belknap v. Belknap*, 2 J. C. R. 463.

2012. And if they exceed their powers in this respect, a perpetual injunction to restrain all proceedings, &c., and quieting the plaintiffs in their enjoyment of the water at the outlet, &c., will be granted. *Ibid.*

2013. The several acts of the legislature of the state, granting and securing to *R. R. Livingston*, *Robert Fulton*, and their assigns, the sole and exclusive right of using and navigating boats or vessels propelled by steam or fire, in the waters of this state, for a certain number of years, are constitutional and valid acts. *Ogden v. Gibbons*, 4 J. C. R. 150. S. C. on appeal, 17 J. R. 488. See *Steam-Boats, &c.* [But see 9 *Wheat. Rep.* 1.]

2014. Admitting that the *Ulster Insurance Company* have no banking powers, and that notes and securities for the payment of money to them, as a banking association, are void by the act, sess. 36. c. 71. yet a bond and judgment confessed thereon, by the maker of a note discounted by the company, for the indemnity and security of the endorser, without any fraudulent intent to evade the act, are valid. *Parker v. Rochester*, 4 J. C. R. 329.

2015. According to the true construction of the act to amend the act, entitled an act to incorporate the *Ulster and Orange Branch Turnpike Company*, sess. 40. c. 213. the owners of lands assessed under the act are entitled to make the road through their own lands under the inspection of the company, "by the first of August, next after the assessment is made and completed." *Couch v. Ulster and Orange Branch Turnpike Company*, 4 J. C. R. 26.

2016. The word "may," in a statute, means must and shall, in those cases only where the public are interested, and the public or third persons have a claim, *de jure*, to have the power exercised. *N. & C. Turnpike Company v. Miller*, 5 J. C. R. 101.

2017. But the words "shall or may," in a private act, leave it optional with the trustees, or persons, who are to act. *Ibid.*

2018. The act to prevent abuse, in the practice of the law, passed April 21st, 1816, sess. 41. c. 259. is not to be extended by construction. *Seaving v. Brinkerhoff*, 5 J. C. R. 329.

2019. Judgments entered up by confession or warrant of attorney, without the specification of the particulars of the debt, required by the act, sess. 41. c. 259. are good as against the debtor himself; and are fraudulent only as respects *bona fide creditors*, and *bona fide pur-*

chasers, in the usual and popular sense of the term *purchaser*, as distinguished from *creditor*. *Ibid.*

2020. The commissioners under the act relative to draining the drowned lands in *Orange county*, (Sess. 30. c. 25.) had no right to use the lands of a party, or to remove or destroy his property, without a valid or legal contract with him for that purpose, or until compensation has been made to him, according to the act. *Phillips v. Thompson*, 1 J. C. R. 131.

[See *Banking. Civil Death. Corporation. Surrogates. Steam-Boats, &c. Debtor and Creditor, D. Deed. Frauds, B. Habeas Corpus. Husband and Wife, F. Injunction, I. Limitation. Nuisance.*]

LXVI. STEAM-BOATS, AND NORTH RIVER STEAM-BOAT COMPANY.

2021. Chancery will grant an injunction to restrain citizens of another state from navigating the waters of this state by vessels or boats propelled by steam, without the consent of *R. R. Livingston* and *Robert Fulton*, or their assigns, to whom the exclusive right of navigating with steam-boats is given and secured by several acts of the legislature, although the vessels from other states may have been enrolled and licensed, under the laws of the *United States*, as coasting vessels. *Ogden v. Gibbons*, 4 J. C. R. 150. S. C. on appeal, 17 J. R. 488. S. P. *The North River Steam-Boat Company v. Hoffman*, 5 J. C. R. 300. [But see 9 *Wheat. Rep.* 1.]

2022. The running or employing of steam-boats over the waters of this state, for the transportation of passengers, between the city of *New-York* and *Elizabethtown Point*, in the state of *New-Jersey*, directly or circuitously, by one or more steam-boats, and shifting the passengers from one boat to another, at any intermediate point between those two places, without the consent of the person to whom *R. R. Livingston* and *Robert Fulton* had assigned the exclusive right of navigating with steam-boats between those two places, is a violation of the right of such assignees; and an injunction to restrain the party, &c. was accordingly granted. *Ogden v. Gibbons*, 4 J. C. R. 174.

*2023. Where the plaintiff, as assignee, having an exclusive right to navigate with steam-boats the waters of the *Bay of New-York*, and that part of the *Hudson River* south of the State Prison, granted to the defendant the exclusive right of navigating with steam-boats between the city of *New-York*, and the *Quarantine Ground* or *Staten Island*, &c.; and it was provided in the grant or assignment, that if the state or legislature of *New-Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with steam-boats the waters of that state, that, thenceforth the grant should cease and be void; held, that though the *casus fœderis* may have

occurred, yet this Court would not interfere to restrain the defendant from continuing to exercise his right under the grant to him, until the plaintiff had established the fact at law, and his right to resume the grant. *Livingston v. Tompkins*, 4 J. C. R. 415.

2024. The association of stockholders of the *North River Steam-Boat Company* is not a copartnership, but the parties are tenants in common of the property and franchises of the company. *Livingston v. Lynch*, 4 J. C. R. 573.

2025. The resolutions passed by the unanimous votes of the stockholders, on the 13th and 14th of April, 1817, and subscribed by all of them, are the fundamental articles, or constitution of the company, by which the former articles of agreement, of the 26th of July, 1814, were abrogated; and the company being only a private association of individuals, these articles cannot be altered or revoked, but by a like unanimous consent of the stockholders. *Ibid.* Therefore, certain resolutions passed the 5th of May, 1819, not having been consented to by all the stockholders, and being repugnant to the fundamental articles of the association, are null and void. *Ibid.*

2026. The masters of the *North*, or *Hudson River* steam-boats, in whose name contracts have been made with the postmaster general, for carrying the mail between the cities of *New-York* and *Albany*, are not entitled to take the profits of the contract to their own use and benefit, without the consent of the owners of the boats; nor is the contract to be considered as made with the masters personally; for they are mere agents or servants of the owners, liable to be discharged from their employment; and the owners have a right, at any time, to demand from them an assignment of the mail contract, and take the profits thereof, without making them any compensation for it, further than they may have expressly engaged to do, by the terms of their appointment or contract. *Roorbach v. The North River Steam-Boat Company*, 6 J. C. R. 469.

2027. It is not competent to the masters of these boats, to object to the legality of an assignment of the mail contract by them to the owners; nor, after having consented and continued to receive an additional salary for their services, in lieu of all fees and perquisites for carrying the mail or commissions for collecting the tax on steam-boats, can they, afterwards, claim any share of those perquisites or commissions. *Ibid.*

See Statutes pl. 2013.

[*382] *LXVII. SUBSTITUTION.

2028. If a creditor has a lien on two different parcels of land, and another creditor has a subsequent lien on one only of the parcels, and the prior creditor elects to have his whole demand out of the parcel of land on which the subsequent creditor takes his lien, the lat-

ter is entitled, by way of substitution, to have the prior lien assigned to him for his benefit. *Cheesebrough v. Millard*, 1 J. C. R. 409.

2029. So, if a bond creditor exacts the whole of the debt from one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he were a purchaser, either against the principal debtor, or his co-sureties. *Ibid.*

2030. And if the prior creditor has put it out of his power to make a cession, he will be excluded from so much of his demand, as the surety, or subsequent creditor, might have obtained, if the cession could have been made. *Ibid.*

2031. But if the prior creditor who has disabled himself from making the substitution, has acted with good faith, and without knowledge of the rights of the other creditor, he is not to be injured by his inability to make the cession, for the doctrine of substitution is founded on pure equity. *Ibid.*

2032. A surety, on paying the debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal. *King v. Baldwin*, 2 J. C. R. 554. *S. P. Hayes v. Ward*, 4 J. C. R. 123.

See Contribution.

LXVIII. SURROGATES.

2033. A surrogate has concurrent jurisdiction with Chancery to compel administrators to account and make distribution of the estate. *Seymour v. Seymour*, 4 J. C. R. 409.

2034. Where administrators have been brought before the surrogate, who granted the letters of administration, for an account and distribution of the intestate's personal estate, Chancery will not, without some special and satisfactory reason, interfere with the proceedings of the surrogate, by granting an injunction, and sustaining a bill for general relief. *Ibid.*

2035. A bill of discovery, in aid of a cause before the surrogate, must charge certain facts, within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that Court, and that he has no means of showing the facts, without such discovery. *Ibid.*

2036. The surrogate of the city and county of *New-York* has no authority to grant letters of administration, with [*383] the will annexed, of a person dying out of the state, not being an inhabitant of the state. *Goodrich v. Pendleton*, 4 J. C. R. 549.

2037. The powers of the surrogate of *New-York*, though they may exceed those of the county surrogates, who have no power to grant letters of administration of the goods of persons dying intestate out of the state, not being inhabitants of the state, are limited, in this respect, by the acts, (Sess. 36. c. 79. s. 17., Sess. 38. c. 159.) to the case of a non-resident of the state, dying intestate, and leaving goods and chattels in the city of *New-York*. *Ibid.*

LXIX. *TENANT IN COMMON.*

2038. Admitting that one tenant in common may, in a particular case, purchase in an outstanding title, for his own benefit; yet, where two devisees are in possession of land, under an imperfect title derived from their common ancestor, one of them cannot buy up an outstanding or adverse title, to disseise or expel his co-tenant; but such purchase will enure to their common benefit, subject to an equal contribution to the expense. *Van Horne v. Fonda*, 5 J. C. R. 388.

See Ships and Ship Owners, A.

LXX. *TENANT BY THE CURTESY.*

2039. Where a testator devises his real estate to his daughter, and empowers and directs his executors to sell the real estate, and the daughter marries, and has a child, which dies, and the mother also dies *before* sale of the estate, and the husband survives, he is entitled, as tenant by the curtesy, to have the interest of the money arising from the sale of the estate, during life, in lieu of the rents and profits of the land. *Dunscomb v. Dunscomb's Executors*, 1 J. C. R. 508.

LXXI. *TOWNS.*

2040. The several towns in this state are legal communities, or bodies politic, for certain purposes. *Denton v. Jackson*, 2 J. C. R. 320.

2041. Votes of town meetings relative to the common property of the town, unless carried into execution, may be altered or rescinded by subsequent town meetings. *Ibid.*

*2042. The erecting of a new [*384] town does not impair or take away the rights of the old town, in regard to the common property, unless there be some special provision for that purpose in the act erecting the new town. *Ibid.*

2043. So, when a new town is erected out of an old one, it loses its right to the use of the town property which remains in the old town, though acquired at the common expense of all the inhabitants, before the division of the town, unless there is some express provision to the contrary. *Ibid.*

2044. Each town takes to itself, unless otherwise expressly provided, the common lands which fall within its bounds. *Ibid.*

2045. The general revised act of 1788, relative to towns, made no change in the law, in this respect, as to the rights of towns. *Ibid.*

2046. As to the powers, capacities, rights, and privileges of the towns of *Hempstead* and *North and South Hempstead*, in *Queen's county*, and of their inhabitants, respectively, see S. C. 2 J. C. R. 320 to 338. [Note: This case was carried by appeal to the Court for the Correction of Errors, and the decree of the Chancellor was, Vol. I. 25

in part, reversed. But the reporter, who was not present when it was decided, not being able to obtain the reasons of the members of the Court, who delivered their opinions, did not report the case on appeal; nor can the grounds of reversal be now stated, or how far the above positions laid down by the Chancellor were affirmed, modified, or overruled, further than what is contained in the decree entered for the appellant, as the judges, it is understood, in assigning their reasons, took very different views of the case.]

LXXII. *TRUSTS.*

- A. *How trusts are created, and their incidents.*
- B. *Trusts resulting, or by implication.*
- C. *The trust estate and cestui que trust.*
- D. *Authority, duty, and responsibility of trustees.*
- E. *Trustee's accounts, allowances to, and charges against a trustee.*
- F. *Expenses and compensation of trustees.*

A. *How trusts are created, and their incidents.*

2047. No particular form of words is necessary to create a trust, the intent only being regarded by Courts of equity. *Fisher v. Fields*, on appeal, 10 J. R. 495.

2048. A trust is merely what a use was before the statute of uses. *Ibid.*

2049. It is an interest resting in conscience and equity, and the same rules apply to trusts in Chancery now, which were formerly applied to uses; and in exercising its jurisdiction over executory trusts, Chancery is not bound by the technical rules of law, but may take a wider range in favor of the intent of the parties. *Ibid.*

*2050. A trustee or *cestui que trust* will take a fee without the word [*385] heirs, when a less estate will not satisfy the object of the trust. *Ibid.*

2051. So, an assignment of a trust carries a fee to the assignee, though it contain no words of inheritance, if such appear to have been the intent of the parties. *Ibid.*

2052. As where G., a soldier entitled to military bounty land, in *March*, 1784, sold his right to B., for 15 dollars, and delivered to him his discharge, on which was the following certificate, under his hand and seal: "This is to certify, that the bearer hereof, I. B., is entitled to all the land that I, B. G., am entitled to, either from the state or continent, for my services as a soldier, certified in my discharge:" *held*, that at the time of the assignment, G. had only an equitable claim, and the certificate endorsed on the discharge, being an assignment of his equitable interest, transferred his whole interest. *Ibid.*

2053. And when, in 1792, the assignee sued out a patent for the land, to which G. was entitled, and which, by the statute, was issued in G.'s name; and F. afterwards, with knowledge of the transfer to B., purchased, and took a regular conveyance of the land from G., and brought an ejectment against the persons hold-

ing under B.; *held*, that after the patent issued, G. held it as trustee to B., and that B. or his assigns, was entitled to an adequate legal conveyance from F., who was perpetually enjoined from proceeding at law on this deed, or setting it up against B., or his assigns. *Ibid*.

2054. Though a trust need not be created by writing; yet to take the case out of the statute of frauds, its terms and conditions must be clearly manifested and proved in writing under the hand of the party to be charged, before the Court will carry it into execution. *Steele v. Steele*, 5 J. C. R. 1.

2055. Loose and general declarations of intention by one member of a family, of holding property in trust for the other members, are not sufficient for the deduction of a trust, which Chancery will recognize and enforce. *Ibid*.

2056. Letters and accounts addressed by a person to his brother, were held, under the circumstances, insufficient to raise a trust, by implication, to the father. *Ibid*.

2057. Parol evidence to contradict an inference as to a trust, deduced from written documents, is inadmissible. *Ibid*.

2058. But where written documents are loose and ambiguous, parol evidence is admissible to show the understanding of the parties. *Ibid*.

2059. Where a trust is created for the benefit of a third person, without his knowledge, at the time, he may afterwards affirm the trust and enforce its performance. *Moses v. Murgatroyd*, 1 J. C. R. 119. *S. P. Duke of Cumberland v. Codrington*, 3 J. C. R. 229. 261. *Shepherd v. M'Evers*, 4 J. C. R. 136.

2060. Collateral securities to creditors are considered as trusts, for the better protection of their debts, and Chancery will see that their intention is fulfilled. *Moses v. Murgatroyd*, 1 J. C. R. 119.

2061. Where no trust appears on the face of a deed, nor any manifestation of it by writing, parol evidence is inadmissible to show the trust. *Moran v. Hays*, 1 J. C. R. 339. [See *Statute of Frauds*, Sess. 10. c. 44. s. 12.]

*2062. If a purchaser has notice [*386] of a trust, at the time of the purchase, he himself becomes a trustee, notwithstanding the consideration he has paid. *Murray v. Ballou*, 1 J. C. R. 566. *S. P. Shepherd v. M'Evers*, 4 J. C. R. 136.

2063. Where trustees have accepted a trust, and entered on its execution, they cannot afterwards, without the consent of the *cestui que trust*, or the directions of the Court, surrender the trust, or discharge themselves from it. *Shepherd v. M'Evers*, 4 J. C. R. 136.

2064. A devise of all the estate, real and personal, of the testator, in trust, to pay his debts, and to distribute the residue, places the assets under the jurisdiction of Chancery. *Benson v. Le Roy*, 4 J. C. R. 651.

2065. Where D. agreed with S. to sell and convey to him a certain quantity of land, and for which S. covenanted to pay a large sum of money in a certain time; and D. gave to S. a power of attorney to sell and convey the land, in the name of D., &c. S. covenanting to give D. security for the due performance of his con-

tract, and to indemnify D., &c.; and S. sold parcels of the land, and took moneys and securities, &c. from the purchasers; *held*, that S. was a trustee, and that D. had an equitable lien on the proceeds of the sales, and on the securities, &c. in the hands of S., which could not be defeated by the assignment of S., who had become insolvent. *Dexter v. Stewart*, 7 J. C. R. 52.

B. Trusts resulting, or by implication.

2066. If A. purchase land with his own money, but the deed is taken in the name of B., a trust results, by operation of law, in favor of A.; and the fact whether the purchase was made with the money of A., on which the trust is to result or arise, may be proved by parol, it not being within the statute of frauds. *Boyd v. M'Lean*, 1 J. C. R. 582. *S. P. Botsford v. Burr*, 2 J. C. R. 405.

2067. Parol evidence is also admissible to rebut or destroy a resulting trust. *Botsford v. Burr*, 2 J. C. R. 405.

2068. If the person who sets up the resulting trust has, in fact, paid no part of the consideration money, he will not be allowed to show, by parol proof, that the purchase was made for his benefit. *Ibid*.

2069. If part only of the consideration is paid, the land will only be charged with the money advanced, or *pro tanto*. *Ibid*.

2070. Any payment or advance of money, after the purchase has been completed, will not raise a resulting trust. *Ibid*.

2071. To raise a trust by implication or operation of law, an actual payment of money by the *cestui que trust*, at the time of the purchase, must be shown. *Steele v. Steele*, 5 J. C. R. 1.

2072. A resulting trust is within the statute; (Sess. 24. c. 30. s. 7. 1 N. R. L. 147.) and an infant may be decreed to convey such trust, it being established by parol proof. *Livingston v. Livingston*, 2 J. C. R. 537.

2073. If a trustee by implication is to be affected by an equity, that equity must be pursued within a reasonable time. *Shaver v. Radley*, 4 J. C. R. 310.

*C. The trust estate, and *cestui* [*387] *que trust*.

2074. Property held in trust does not pass to the representatives of the trustee; but as long as it can be traced and distinguished, it enures to the benefit of the *cestui que trust*. *Moses v. Murgatroyd*, 1 J. C. R. 119.

2075. It does not pass, in case of bankruptcy or insolvency of the trustee, to his assignees. *Dexter v. Stewart*, 7 J. C. R. 52.

2076. The vested interest of a *cestui que trust* cannot be impaired or destroyed by the voluntary act of the trustee; but the trust will follow the land in the hands of the person to whom it has been conveyed by the trustee, with knowledge of the trust. *Shepherd v. M'Evers*, 4 J. C. R. 136.

2077. Where S., a *cestui que trust*, resided abroad, and before he was informed of the trust created by the deed of his debtor for the

benefit of his creditors, the trustees, without the assent of the *cestui que trust*, or the direction of the Court, conveyed the trust estate to others, upon other trusts and conditions, which in their operation would have excluded S. from all share or benefit in the trust estate; *held*, that the trustees in the second deed were chargeable with the trusts in the first deed, of which they had knowledge at the time. *Ibid*.

D. Authority, duty and responsibility of trustees.

2078. A trustee cannot act for his own benefit in a contract on the subject of the trust. *Green v. Winter*, 1 J. C. R. 27. *S. P. Parkist v. Alexander*, 1 J. C. R. 394.

2079. He is not allowed to make any gain, profit, or advantage, from the use of the trust funds. *Schieffelin v. Stewart*, 1 J. C. R. 620. *S. P. Brown v. Rickets*, 4 J. C. R. 303.

2080. A trustee, who purchases a judgment or mortgage which was a *lien* on the trust estate, at a discount, cannot turn such purchase to his own advantage. But the purchase accrues to the benefit of the trust estate. *Green v. Winter*, 1 J. C. R. 27.

2081. A trustee is not permitted to use the information he gains as trustee, by purchasing in for himself; and the principle is the same, as to buying in the trust estate, or buying securities upon it. *Ibid*. And see *Evertson v. Tappen*, 5 J. C. R. 497. *S. P. Hawley v. Mancius*, 7 J. C. R. 174.

2082. A trustee having authority to sell, cannot be a purchaser of the trust estate. *Munro v. Allaire*, on appeal, 2 C. C. E. 183.

2083. Where a trustee agreed to purchase and pay for a farm, at the request of the *cestui que trust*, out of the proceeds of the trust estate; and gave his bond, and also a mortgage on the premises, to secure the purchase money; and when his bond became due, refused to pay it, and procured a foreclosure and sale of the premises by the mortgagee at a loss, the trustee was *held* chargeable for the loss, and for all the costs of the suit. *Green v. Winter*, 1 J. C. R. 27.

2084. Where judgment was confessed by A., as security for debt, *&c. in [388] favor of M. and H., and A. afterwards assigned the property to M. and H., in trust for creditors, &c., to be paid in the order the trustee might think best, &c.; *held*, that M. and H., by accepting the trust, waived any remedy under the judgment, for their own demand; and that the lien of the judgment was preserved merely to give priority in the payment, and to guard against intervening liens. *Hawley v. Mancius*, 7 J. C. R. 174.

2085. If a trustee, mortgagee, executor, tenant for life, &c., having a limited interest, gets any advantage by being in possession, or otherwise, in obtaining a new lease, he is not allowed to retain it for his own benefit, but must hold it for the *cestui que trust*, or mortgagor. *Holbridge v. Gillespie*, 2 J. C. R. 30.

2086. Where the plaintiff assigned the lease of a farm, to secure the payment of a debt due

to the defendant; and the parties afterwards entered into an agreement, by which the plaintiff, in consideration of a sum of money expressed, though not in fact paid, agreed to give up to the defendant half of the farm, and the defendant entered into possession of the premises, and surrendered the lease to the landlord, and took a new lease for an extended term of years; *held*, that the plaintiff was entitled to redeem the whole premises, and on such redemption to have the entire benefit of the new lease. *Ibid*.

2087. Every advantage gained by a trustee belongs to the *cestui que trust*. *Hart v. Ten Eyck*, 2 J. C. R. 62, 104.

2088. Trustees will not be held responsible on slight grounds, or where there is evidence of fair and upright intention. *S. C.* 76.

2089. It is the duty of a trustee not to bring the property to a sale, until all information is acquired by him for the benefit of the *cestui que trust*, under circumstances likely to make it yield its utmost value. *S. C.* 110.

2090. If a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trusts* are entitled, as of course, to have the purchase set aside, and the property reexposed to sale under the direction of the Court. *Davoue v. Fanning*, 2 J. C. R. 252. Unless the trustee had fairly divested himself of that character. *Ibid*.

2091. And it makes no difference, in the application of the rule, that the sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but a third person, by previous arrangement, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trusts*, and had an interest in the land, under the will of the testator. *Ibid*. And see *Hendricks v. Robinson*, 2 J. C. R. 311. But see *Bergen v. Bennett*, 1 C. C. E. 1.

2092. A *cestui que trust* cannot claim to have a purchase of the trust estate set aside, unless he comes in a reasonable time; and the Court said, that sixteen years was not a reasonable time; and it was there said, that equity does not, of course, set aside such a purchase. As, where the suit is against a trustee who has procured the legal title. Per *Benson*, J. *Bergen v. Bennett*, 1 C. C. E. 1.

2093. So, where the *cestui que trusts*, or a majority of them, have assented to the sale. *Ibid*. See also 5 J. R. 43.

*2094. Where a trustee, pending [389] a suit against him for a breach of trust, fraudulently sells the trust estate, and assigns the securities taken for the purchase money, the *cestui que trust* may either disregard the sale, and take the land, or he may affirm the sale, and take the securities; but he cannot have both. *Murray v. Lybourn*, 2 J. C. R. 441.

2095. Whether the *cestui que trust*, in such a case, could take money, negotiable paper, or movable and personal property, the proceeds

of the trust estate fraudulently disposed of by the trustee? *Quare. Ibid.*

2096. Application under the statute, Sess. 24. c. 30. s. 7. for *infant trustees* to convey, &c., must be by *petition*, and not on motion; and the course is to refer the petition to a master to examine and ascertain the facts, and report the same, with his opinion. *Ex parte Quackenboss*, 3 J. C. R. 408.

2097. But, it seems, that if the trust is not in writing, or the infant has an interest, or it be a doubtful case, the *cestui que trust* will be put to his bill. *Ibid.*

2098. A person who receives bonds and notes as collateral security for a debt, is bound to use due diligence, and if the securities are lost through his negligence, by the insolvency of the makers, he is chargeable with the amount. *Barrow v. Rhineland*, 3 J. C. R. 614.

2099. Where the farm of a defendant, worth 2,000 dollars, was sold under a judgment and execution, on which there was not more than eighty dollars due, to the attorney of the plaintiff, who attended the sheriff's sale, for ten dollars; held, that under the circumstances, the purchase by the attorney was not to be considered as absolute, or as originally intended for his own benefit, but in trust for the respective interests of the parties to the execution; and the debtor, on a bill filed by him for that purpose, was allowed to redeem the estate, on paying the balance due on the execution, and the amount paid by the attorney, with interest and costs. *Howell v. Baker*, 4 J. C. R. 118.

2100. A person intrusted with the business of another, as an attorney or agent, ought not to make that business an object of interest or profit to him. *Ibid.*

2101. Whether an attorney or solicitor for the plaintiff can purchase the property of the defendant sold under execution, for his own benefit? *Quare. Ibid.*

2102. If a guardian or other trustee lends the money of the *cestui que trust*, without due security, he will be responsible, in case of loss. *Smith v. Smith*, 4 J. C. R. 281.

2103. But what is due security for money loaned by a trustee, seems not to be fully and precisely settled. In general, mere *personal* security seems not to be sufficient to protect the trustee from responsibility, in case of loss. *Ibid.*

2104. Where a guardian took promissory notes of persons who continued solvent to the time of taking the account before the master, under a decretal order for that purpose, on a bill filed for an account, and which notes were allowed by the master, and credited by the guardian, who was ready to deliver them up, the Court confirmed the master's report, the notes being for small sums, for rents, &c., and the credits and course of business, according to the practice of the testator, in his life-time. *Ibid.*

*2105. A trustee or guardian is [*390] not held to account for any neglect or breach of duty, not charged in the bill. *Ibid.*

2106. Where the responsibility of a trustee or guardian, or that of his sureties, becomes precarious, the Court will order the moneys to be brought into Court, to be put out for the benefit of the parties interested; or that further and sufficient security be given by the trustee or guardian. *Monell v. Monell*, 5 J. C. R. 283.

2107. Where a trustee is directed to sell, on giving public notice, &c., a sale by him, without such notice, will be valid, so as to confer a good title on the purchaser; but the trustee will be responsible for any deficiency in the price, below the real value of the land sold by him. *Munroe v. Cox*, 5 J. C. R. 441.

2108. The estate of C. was directed to be sold, and the proceeds paid to T., to pay off encumbrances and expenses, and the residue in trust for the creditors of C., and the surplus, if any, in trust for the wife of T.; T. purchased in the whole estate at one bid, and by assuming to pay the debts, prevented the creditors from bidding, and all competition at the sale, so that the real value of the estate at auction could not be ascertained, nor what surplus remained; and T. continued to hold the estate exclusively as his own, until his death; held, that the wife of T., the *cestui que trust* of the surplus, was entitled to consider the land, or so much thereof as remained unsold to pay the debts of C., as her own, discharged from any claim of her husband or his heirs. *Evertson v. Tuppen*, 5 J. C. R. 497.

2109. A., on the 1st of December, 1803, conveyed certain lands to D., in trust, to make partition, and to sell the same, and to pay a debt due by A. to the *United States*, &c. Afterwards, on the 24th of December, 1803, A. executed a deed of the same lands to B, C., and D., in trust, to sell the same, and out of the proceeds, in the first place, to pay the debt due by A. to the *United States*, &c. The lands were afterwards advertised for sale by the marshal, under a judgment and execution against A., at the suit of the *United States*; and in the advertisement was inserted a notice from B, C., and D., that they would release their interest under the deed of the 24th of December, 1803, to the purchaser, and which notice was publicly read at the marshal's sale, in the presence of D., who gave no intimation of any claim by him under the deed of the 1st of December, 1803, and the premises were sold at auction by the marshal, to the plaintiff, as the highest bidder, and having no knowledge of D.'s claim under the first deed. After the sale, B. and C. executed a release to the plaintiff, but D. refused, without adding a proviso, saving his rights under the first deed; decreed, that D. should execute the release to the plaintiff unconditionally, and pay costs. *Livingston v. Byrne*, on appeal, 11 J. R. 555.

2110. It seems, that had the plaintiff known of the first deed, it would not have altered the case; for the public notice in which D. joined was a waiver of his claim, under the first deed. *Ibid.* Besides, the second deed

being substantially for the same trusts, and having been acted upon by the trustees, while the first deed had laid dormant, was to be deemed an extinguishment of the first deed. *Ibid.*

2111. It is no objection to a sale by a trustee, that it was made to *one [*391] of his near relations. *Franklin v. Osgood*, on appeal, 14 J. R. 527.

2112. A purchase of a trustee, by one *cestui que trust*, without the consent or concurrence of the other *cestui que trust*, and in exclusion of them, is valid. *Ibid.*

2113. It is sufficient to support a sale by a trustee, that it was made *bona fide*, and for a valuable consideration, and that there was no supine negligence on his part: it is not requisite to show that he acted with the utmost possible prudence and sagacity. *Ibid.*

E. Trustee's accounts: allowances to, and charges against a trustee.

2114. Trustees acting with good faith, are treated by the Court with liberality and indulgence. And where there is no wilful misconduct or fraud on the part of the trustee or executor, he will not be held responsible for the loss, especially where he acts with the advice of counsel. *Thompson v. Brown*, 4 J. C. R. 619.

2115. If a trustee has been robbed of the trust money, he will be exonerated from the payment of it. *Furman v. Coe*, 1 C. C. E. 96.

2116. And after his death, his personal representatives may avail themselves of the fact, in excuse, though uncorroborated by the oath of the party. *Ibid.*

2117. Where G., being indebted to H., conveyed to W. certain bonds and mortgages, and part of the lands sold under the mortgages, and purchased in by W. in trust, to sell the same as H. might direct; and "upon payment of such sums as might be justly due to W., in relation to the execution of his trust, or that he might advance or become liable for," to convey to H. the lands and proceeds thereof, and to assign over to H. the bonds and mortgages taken by W. and which might remain in his hands, "after his said advances and responsibilities were secured and satisfied:" and H. afterwards assigned over all his interest in the trust estate to his sister, T., the wife of G., to her separate use for life, with power to dispose of the same to and among her children; held, that the payments made by the trustee to G., the husband of T., the *cestui que trust*, were not chargeable on the trust fund; nor, if authorized by T., could the trustee be allowed the benefit of them in his account, further than was actually necessary for the support of T. and her children; unless it appeared that G. had applied the payments to the specific purposes of the trust. *Green v. Winter*, 1 J. C. R. 26.

2118. A trustee will not be allowed for expenditures for improvements of the trust estate, though made *bona fide*, as, in building houses and mills, clearing land, and making roads, &c., such expenses not being within the purview of the trust, which was to sell the land to

raise money to pay off the encumbrance, and to restore the residue. *Ibid.*

2119. A trustee is entitled only to necessary expenditures, as for repairs, &c., and the *cestui que trust* has always an option to take or refuse the benefit or loss of the unauthorized act of the trustee. *Ibid.*

2120. Where, at the request of the *cestui que trust*, the trustees agreed to purchase a farm, out of the proceeds of the trust estate, for *the use of the *cestui que* [*392] trust, and the trustee purchased the farm, and gave his bond, and a mortgage on the farm; and when the bond became due, refused to pay it, and procured the mortgagee to foreclose and sell the farm mortgaged, at a loss of above 4,000 dollars; held, that the trustee was chargeable with the loss, with the costs of suit. *Ibid.*

2121. A trustee for his wife, and a third person who had purchased of the husband, with notice of the trust, were allowed for beneficial or permanent improvements made on the estate. *Methodist Episcopal Church v. Jaques*, 1 J. C. R. 450.

2122. Where an assignee of property in trust for the benefit of the creditors of the assignor, having received the proceeds of the property in 1801, neglected for many years to distribute the fund among the creditors, pursuant to his trust; decreed, that he should pay the amount, with interest from the time he received the money, and all the costs of the suit brought by the creditors. *Gray v. Thompson*, 1 J. C. R. 82.

2123. Trustees are chargeable with interest, if they have made use of the money themselves, or have been negligent either in not paying over the money, or not loaning or investing it so as to render it productive. *Duncomb v. Duncomb*, 1 J. C. R. 508. *S. P. Manning v. Manning*, 1 J. C. R. 527. *S. P. Shieffelin v. Stewart*, 1 J. C. R. 620. *Mumford v. Murray*, 6 J. C. R. 1. 452.

2124. And if a trustee converts the trust money to his own use, or employs it in trade or business, he is chargeable with compound interest. *Ibid.* *S. P. Brown v. Rickets*, 4 J. C. R. 303.

2125. But where there was no direction in the order of reference to a master, to inquire into the use and profit of the fund, and he had charged the party with interest, the report, to prevent the effect of surprise to the party, was recommitted to the master, to take further proofs or explanation, and to correct any mistakes. *Brown v. Rickets*, 3 J. C. R. 303.

2126. Where there is no unreasonable delay by a trustee, and he does not apply the money to his own use, he is not chargeable with interest. *Minuse v. Coz*, 5 J. C. R. 441.

2127. Compound interest is not allowed in favor of a trustee. *Evertson v. Tappen*, 5 J. C. R. 497.

2128. The time from which interest is to be charged against a trustee in case of negligence, varies according to circumstances. Six months from the time the money was received, is considered as a reasonable time, in most cases, from which to charge interest against a trustee. *Duncomb v. Duncomb*, 1 J. C. R. 508.

2129. The general rule is, that where the trustee must pay *interest*, because he is in default, he must also pay *costs*. *Ibid*.

2130. But where the *cestui que trust* demands more than he is entitled to receive, and the trustee submits to the direction of the Court, he will not be compelled to pay *costs*. *Ibid*.

2131. And if the conduct of the trustee was fair and honest, he will not be ordered to pay *costs*. *Smith v. Smith*, 4 J. C. R. 445.

2132. A trustee is not chargeable with more than he has received of the trust estate, unless there is evidence of gross negligence, amounting to wilful default. *Osgood v. Franklin*, 2 J. C. R. 1.

*2133. If a person having charge [*393] of the property of another, so confounds it with his own, that it cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he will lose it, and if damages are given to the plaintiff, the utmost value will be taken. *Hart v. Ten Eyck*, 2 J. C. R. 62.

2134. Where a trustee has sold land contrary to his duty as trustee, he is answerable for its value, not as it existed at the time of the sale, but at the time of filing the bill. *Ibid*.

2135. Where a trustee sells *stock*, contrary to his trust, the *cestui que trust* is entitled to have the stock replaced, or to the produce of it, with the highest interest, at his election. *Ibid*.

2136. No lapse of time is a bar to a direct technical trust, as between the trustee and *cestui que trust*. *Decouche v. Savetier*, 3 J. C. R. 190. This is to be understood of those trusts of which Chancery has the peculiar and exclusive jurisdiction. *Kane v. Bloodgood*, 7 J. C. R. 90.

2137. But where a person takes possession of property in his own right, and is afterwards, by matter of evidence and construction, changed into a trustee, lapse of time may be pleaded in bar. *Ibid*.

2138. Where R., while a confidential clerk of P., took bonds and notes belonging to P., without his knowledge or permission, which he refused to return, or to give any account of, he was held answerable for the whole of the principal and interest due on the securities, without any regard to his diligence in obtaining payment, or the subsequent solvency of the makers, it appearing that the securities were good about the time they were so taken by R. *Barrow v. Rhineland*, 3 J. C. R. 614.

2139. Where R. received a bond from P. as collateral security for a debt, and the obligor offered to pay him the amount of the bond in lands, at a fair price, as the only means of payment in his power, which R. refused to accept, though urged by P. to do so, and the obligor afterwards became insolvent, whereby the bond was wholly lost; held, that R. by his refusal to accept of the land so offered to him in payment, did not, under the circumstances of the case, render himself liable for the amount of the bond to P. S. C. on appeal, 17 J. R. 538. *Contra*, S. C. 3 J. C. R. 614.

2140. Where the securities held by a trustee, are directed, by a decree confirming the master's report, to be assigned to the *cestui que trust*,

the responsibility of the trustee ceases; and, there having been no culpable negligence or default on his part in taking the securities, he is not to be charged with them, on making the final decree on the equity reserved, though they may have been impaired by the delay of the litigation between the parties. *Smith v. Smith*, 4 J. C. R. 445.

2141. Payments by trustees of a debtor, after a bill filed by a creditor who had obtained judgment and issued execution against such debtor, or after notice of the priority of right acquired by such creditor, are made in his own wrong, and of no avail against such creditor. *Spader v. Davis*, 5 J. C. R. 280.

2142. If two trustees, executors or guardians, join in a receipt for money, it is presumptive evidence that the money came equally into *the possession, or under the control of both; and there must be direct and positive proof to rebut that presumption. *Monell v. Monell*, 5 J. C. R. 283.

2143. But if the joining of one in the receipt was necessary, and merely formal, and the money was in fact paid to his co-trustee without his direction or consent, and it was out of his power to control it, he will not be responsible. *Ibid*.

2144. A trustee, who suffers the funds to pass improperly into the hands of his co-trustee, is liable for any loss arising from such negligence or abuse of trust. *Mumford v. Murray*, 6 J. C. R. 1. 452.

2145. Where, by any act or agreement of one trustee, the trust money gets into the hands of his co-trustee, both are answerable. *Ibid*.

2146. A person who acts as agent or trustee for an administratrix, is not entitled to compensation for his services in regard to the estate; nor is he chargeable with interest for moneys received by him; but if he assumes to act as guardian for the infant heirs, and receives the rents and profits of the real estate, he is chargeable with interest. *Mason v. Roosevelt*, 5 J. C. R. 534.

2147. A trustee who has made advances in good faith, for the benefit and protection of the trust estate, as paying the *taxes* on the property, is entitled to look to the estate, in the first instance, leaving the *cestui que trusts* to their remedy, if any, against the grantor in the trust deed, by substitution; and the trustee who has paid off encumbrances on the trust estate, and taken an assignment of them, is entitled to his indemnity out of the property so redeemed by him. *Murray v. De Rotterdam*, 6 J. C. R. 32.

2148. A trustee, acting in good faith, is entitled to a prompt indemnity for his necessary disbursements and expenses, and has a *lien* on the trust property for them. *Ibid*.

2149. Costs may be decreed against a trustee unreasonably refusing a conveyance. *Livingston v. Byrne*, on appeal, 11 J. R. 555. So, if he be guilty of negligence or misconduct. *Gray v. Thompson*, 1 J. C. R. 82.

2150. In an action by a trustee, or other nominal plaintiff, the defendant is, at law, entitled to the same defence as if the person beneficially interested were a party. *McFicker v. Wolcott*, on appeal, 4 J. R. 510.

F. Expenses and compensation of a trustee.

2151. A trustee cannot demand a compensation for services beyond what is founded on the positive agreement of the parties. *Green v. Winter*, 1 J. C. R. 27. *S. P. Manning v. Manning*, 1 J. C. R. 527.

2152. Where a trustee, who was a counselor at law, was to be allowed for "all his advances and responsibilities;" *held*, that though he was entitled to a liberal indemnity for his expenses and responsibilities, incurred in the due and faithful execution of his trust, yet he was not entitled to a counsel fee, as a general retainer, nor for any *thing more [*395] than what is understood, in the language of a Court of Equity, to be "just allowances." *Green v. Winter*, 1 J. C. R. 27.

2153. A trustee or executor is not entitled to commissions on sales of the trust property, or on moneys received and paid by him, or to any compensation for his care and pains in executing the trust; but he is entitled to an allowance *per diem*, for his time and travelling expenses, &c. *Ibid.* *S. P. Manning v. Manning*, 1 J. C. R. 527.

2154. Whether an agreement with the *cestui que trust*, subsequent to the creation of the trust, for the allowance of commissions, be valid? *Quere.* *Manning v. Manning*, 1 J. C. R. 527.

[*Note.*—After the decision of the above causes, the legislature passed an act, (*April 15th*, 1817, sess. 40. c. 251.) relative to *executors, administrators, and guardians*, by which it is declared "to be lawful for the Court of Chancery, in the settlement of the accounts of guardians, executors and administrators, on petition or otherwise, to make a reasonable allowance to them for their services as guardians, &c., over and above their expenses; and when the rate of such allowance shall have been settled by the Chancellor, it shall be conforming to in all cases of the settlement of such accounts;" and on the 16th of October, 1817, the Chancellor made the following general rule or order: "That the allowance, as a compensation to guardians, executors, and administrators, in the settlement of their accounts, under the act of the legislature for receiving and paying money, shall be *five per cent.* on all sums not exceeding one thousand dollars, for receiving and paying out the same; *two and an half per cent.* on any excess between one and five thousand dollars; and *one per cent.* for all above five thousand dollars." See 3 J. C. R. 630, 631.]

[*See Debtor and Creditor. Executors and Administrators. Husband and Wife.*]

LXXIII. TURNPIKES AND TURNPIKE COMPANIES.

2155. Where a turnpike company, incorporated with the exclusive privilege of erecting toll-gates and receiving toll, had duly opened

and established the road, with gates, &c., and certain persons, with a view to avoid the payment of toll, opened a by-road near the turnpike, and kept it open at their own expense, for the use of the public, by which travellers were enabled to avoid passing through the gate, and paying toll to the plaintiffs; the Court granted a perpetual injunction, to prevent the defendants from using, or allowing others to use such by-road, and ordered the same to be shut up. *Croton Turnpike Company v. Ryder*, 1 J. C. R. 611.

*LXXIV. VENDOR AND PURCHASER. [*396]

- A. Of the vendor's lien on the estate sold, for the purchase money.
- B. When and how purchasers are favored and relieved in equity.
- C. Of notice to a purchaser, and how far he is affected by it.

- A. Of the vendor's lien on the estate sold, for the purchase money.

2156. A vendor has a lien on the estate sold for the purchase money, while the estate is in the hands of the purchaser, and when there is no contract by which it may be implied that the lien was not intended to be reserved. *Garson v. Green*, 1 J. C. R. 308.

2157. The purchase money, *prima facie*, is a lien, and it is for the purchaser to show the contrary; and the death of the purchaser will not alter or defeat the lien. *Ibid.*

2158. Nor does the taking of a promissory note affect the lien; and if part be paid, the lien is good for the residue, and the purchaser is a trustee for what is unpaid. *Ibid.*

2159. Goods were sold at auction in the city of New-York, to be paid for in approved endorsed notes at four and six months; and it is the usage in that city, where goods are so sold, to deliver them to the buyers when called for, and for the vendors, afterwards, to send to them for the notes. A purchaser of goods at auction, after he had received the goods, and before he was called upon for the notes, according to the terms of sale, stopped payment, and assigned the goods, with other property, in trust, to pay certain favored creditors; *held*, that the delivery of the goods by the vendors was conditional, and the vendee was a trustee for them, until the notes were delivered; that the assignment by the vendee was voluntary and fraudulent, and did not defeat the lien of the vendors, there being no intervening purchaser for a valuable consideration without notice. *Haggerty v. Palmer*, 6 J. C. R. 437.

- B. When and how purchasers are favored and relieved in equity.

2160. A purchaser of land buys at his peril, and must look to the title and competency of

the vendor. *Murray v. Ballou*, 1 J. C. R. 566.

2161. A purchaser of land, who has paid part of the purchase money, and given a bond and mortgage for the residue, and is in the undisturbed possession, will not be relieved against the payment of the bond, or proceeding on the mortgage, on the mere ground of a defect of title, there being no allegation of fraud, nor any eviction; but he must seek his remedy at law, on the covenants in his deed. *Abbot v. Allen*, 2 J. C. R. 519.

2162. If there is no fraud, and no covenants taken to secure the title, the purchaser has no remedy, on a failure of title. *Ibid*.

*2163. Where the purchaser [*397] gave a bond and mortgage to secure the purchase money, and an action of ejectment was, afterwards, brought to recover the land purchased, by a person claiming paramount title, and the vendor brought a suit on the bond, and also advertised the premises for sale, under a power contained in the mortgage, the proceedings on the bond and mortgage were stayed, until the action of ejectment against the purchaser was determined, and until the further order of this Court. *Johnson v. Gere*, 2 J. C. R. 546.

2164. Where one person bids for another at auction, but does not, at the time the lot is knocked down, nor on the day of sale, disclose to the vendor or auctioneer the name of his principal, he becomes responsible as the purchaser. *M'Comb v. Wright*, 4 J. C. R. 659.

2165. If there is any doubt or difficulty about the title, it will be referred to a master to examine and report thereon. *Ibid*.

2166. A vendor of land, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed. *Gouverneur v. Elmendorf*, 5 J. C. R. 79.

C. Notice to the purchaser, and how far he is affected by it.

2167. A conveyance, with a recital of the intent of the purchase, is a conveyance with notice, and the grantee takes subject to trusts implied as well as expressed. *Cuyler v. Bradt*, on appeal, 2 C. C. E. 326.

2168. A *lis pendens*, duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree: the pendency of the suit is deemed to commence from the service of the *subpoena*, after the bill is filed. *Murray v. Ballou*, 1 J. C. R. 566.

2169. A purchase, *pendente lite*, of the subject matter in controversy, does not vary or affect the rights of the parties. *Murray v. Lyburn*, 2 J. C. R. 441.

2170. Where the defendant purchased part of a trust estate, with notice of the pendency of a suit against the trustee for a breach of trust, and of an injunction, it was decreed, that he should pay the consideration money, with interest, to the plaintiff, for the use of the *cestui que trusts*, or convey in fee the land purchased to and for the same trusts. *Murray v. Finster*, 2 J. C. R. 155.

2171. A purchaser being chargeable with notice of a suit pending in this Court, all further proceedings towards completing the purchase, or paying the money, are fraudulent and void. *Headley v. Finster*, 2 J. C. R. 158.

2172. A denial of notice of the pendency of the suit will not avail, if the defendant, at the time, knew the character of the person of whom he purchased; that he was trustee, and had no power to sell. *Ibid*.

2173. Though, in a bill filed against a trustee of lands, for an account, and a conveyance of them to the *cestui que trust*, the description of the lands is general, as "divers lands in *Cosby's Manor*, in the patent of S.," yet it is enough to put a purchaser of a lot in *Cosby's Manor* on inquiry; and being chargeable with notice of the pendency of the suit, and of all the facts in the bill, it is good notice to him that *the lot purchased by [*398] him was part of the trust estate mentioned in the bill. *Green v. Slayter*, 4 J. C. R. 38.

2174. A *lis pendens*, or constructive notice of a suit pending against a trustee, for an account, &c., will not prevent the payment by a debtor of a bond to the trustee, or his assignee, being the legal owner of the bond, there being no receiver appointed by the Court. *Ibid*.

2175. A purchaser of A., a trustee, is not chargeable with notice of the trust, by means of the registry of a deed from H. to B., reciting that A. had executed a declaration of the trust. *Murray v. Ballou*, 1 J. C. R. 566.

2176. If a purchaser has notice of the trust, at the time of the purchase, he himself becomes a trustee, notwithstanding the consideration paid by him. *Ibid*.

2177. A purchaser of land chargeable with constructive notice only, by means of a *lis pendens*, is not to be charged with costs, there being no actual fraud. *Ibid*.

2178. Whether a latent equity in a third person, will defeat a *bona fide* assignee, without notice of his right, except it be an assignment by an executor, which carries on the face of it notice of his fiduciary character? *Quære. Ibid*.

2179. A purchaser, without notice, from one who has fraudulently purchased, is not affected by the fraud. *Bumpus v. Platner*, 1 J. C. R. 213.

2180. And a purchaser with notice to himself, from one who purchased without notice of the fraud, may protect himself under the first purchaser. *Ibid*. [And see *Debtor and Creditor*.]

2181. Equity does not lend its aid against a purchaser for a valuable consideration without notice. *Frost v. Beekman*, 1 J. C. R. 288. 300.

2182. Notice of an encumbrance stops all further proceedings towards the completion of the purchase or payment of the money. *Ibid*.

2183. A party claiming relief in equity, as a *bona fide* purchaser, must positively and precisely deny all notice, though it is not charged. *Ibid*. *S. P. Murray v. Ballou*, 1 J. C. R. 566.

S. P. Murray v. Finster, 2 J. C. R. 155. *S. P. Denning v. Smith*, 3 J. C. R. 332.

2184. Where the executors of a deceased sheriff were authorized by a statute to sell property under execution, and a master sold land under a decree in favor of a subsequent mortgagee, with the assent of the agent of the executors, with a mutual understanding that the sale should be valid, and the execution be satisfied out of the proceeds of such sale, and that was made known to the purchasers at the time; and the agent of the executors afterwards sold the land to persons who knew all the circumstances, such subsequent sale was held to be fraudulent and void. *Mason v. Sudam*, 2 J. C. R. 172.

2185. Though a purchaser at a public sale be chargeable with notice, yet a *bona fide* purchaser under him is not affected by his notice. *Demarest v. Wynkoop*, 3 J. C. R. 129. 147.

2186. That the plaintiff is a *bona fide* purchaser, without notice, is not ground for a bill for relief, though it is a good ground of defence in equity. *Beekman v. Frost*, on appeal, 18 J. R. 543. *S. C.* 1 J. C. R. 288. *Jewett v. Palmer*, 7 J. C. R. 65.

2187. A purchaser for a valuable consideration, without notice, *from a voluntary or fraudulent grantee, will be preferred to a subsequent purchaser for a valuable consideration, without notice, from the fraudulent grantor. *Roberts v. Anderson*, 3 J. C. R. 371. 377. The first purchaser for a valuable consideration, without notice, (under the 27 Eliz. c. 4. or sess. 10. c. 41. s. 3.) whether from the fraudulent grantor or grantee, will be preferred. *Ibid.* *S. C.* on appeal, 18 J. R. 515.

2188. The possession of a tenant is notice to a purchaser of the reversion of the actual interest of the tenant, and the purchaser is bound to admit every claim which the tenant could enforce against the vendor. *Chesterman v. Gardner*, 5 J. C. R. 29.

2189. A purchaser under persons authorized by statute to sell, is presumed to know the nature and extent of the authority, and purchases at his peril. *Denning v. Smith*, 3 J. C. R. 332. 344.

2190. To support the plea of a *bona fide* purchase, without notice, so as to entitle the party to relief against a conveyance alleged to be fraudulent, the party must not only aver and prove that he had no notice of the rights of the other party, but that he *actually paid the purchase money before any such notice*. It is not sufficient, that he has merely secured the purchase money. *Jewett v. Palmer*, 7 J. C. R. 65.

2191. If a person who has contracted to sell land, refuses to perform his contract, and sells the land to a third person, for a valuable consideration, such purchaser, having notice of the equitable title of the vendee under the contract, may be compelled to convey the land to him. *Champion v. Brown*, 6 J. C. R. 398. 403.

See Agreement. Debtor and Creditor. Mortgage.
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LXXV. WILL.

- A. *Who may make a will.*
- B. *Construction of a will.*
- C. *Republication.*
- D. *Revocation.*

A. *Who may make a will.*

2192. Extreme old age does not disqualify a person from making a will. *Van Alst v. Hunter*, 5 J. C. R. 148. 158. It is sufficient, if the testator possesses a competent understanding. *Ibid.*

2193. A feme covert may make a will in favor of her husband, in execution of a power reserved to her, while sole, over her separate estate. *Bradish v. Gibbs*, 3 J. C. R. 523.

2194. And a will made in execution of a power retains all the properties of a will, and is revocable at the pleasure of the wife. *Ibid.*

[See further, as to the power of a wife over her separate estate, *Husband and Wife*, C.]

*B. *Construction of a will.* [*400]

2195. The intention of a testator must be collected from the will itself. *Mann v. Mann*, on appeal, 14 J. R. 1.

2196. Parol evidence is inadmissible to explain, vary, or enlarge the words of a will, except in the case of a latent ambiguity, or to rebut a resulting trust. *Ibid.*

2197. Where the testator bequeathed to his wife "all the rest, residue, and remainder of the moneys belonging to his estate, at the time of his decease;" held, that the word "moneys" must be taken in its ordinary acceptation, and to mean only cash, and not bonds, mortgages, or choses in action, there being nothing in the will to show that the testator intended to use the word in that extended sense. *Ibid.* *S. C.* 1 J. C. R. 231.

2198. Money means gold or silver, or the lawful currency of the country, or bank notes where they are known and used in the market as cash, or money deposited in the bank for safe keeping, and does not comprehend promissory notes, bonds, mortgages, or other securities. *Ibid.*

2199. Nor are the declarations of the testator, or evidence as to the state of his property, admissible, to show a different intent. *Ibid.*

2200. A will is to be so construed, that all the parts of it may be effectual and consistent; and an ambiguity apparent on the face of it cannot be removed by parol proof. *Ibid.*

2201. Where a false or inapplicable description is annexed to a subject, which is certain without such description, it is to be rejected. *Ibid.*

2202. That construction will be most favored, which will prevent a total failure of the bequest, if specific; but the full force of this rule does not apply to the residuary clause. *Ibid.*

2203. A will and codicil are to be taken together, as parts of one and the same instrument. *Westcott v. Cady*, 5 J. C. R. 334.

. 2204. The introductory part of a will has some effect in aiding the construction of the subsequent bequests or devises ; but the intention manifested in the introductory part, is not alone sufficient, without an actual devise. *Earl v. Grim*, 1 J. C. R. 494.

2205. But if it is apparent in the introductory part, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clauses may include the whole, they may be taken in the largest sense, in order to correspond with the introductory part. *Ibid.*

2206. The words of a will are to be construed according to their natural sense, unless some obvious incongruity would arise from such construction. *Roosevelt v. Thurman*, 1 J. C. R. 220.

2207. Where a testator directed his real estate to be sold by his executors, and the proceeds to be put out at interest, on good security, and the interest to be annually paid, in equal proportion, to A., B., and C., and the survivors of them, without limitation of time, but was silent as to any further disposition as to the principal or residuum of his real estate ; *held*, that this was a bequest of the principal as well as the interest ; it being apparent [*401] from the introductory and other clauses in the will, that the testator did not intend to die intestate, in that respect. *Earl v. Grim*, 1 J. C. R. 494.

2208. S., being about to sail on a voyage to the *West Indies*, where he afterwards died, addressed a letter to M., containing the following clause : " A thousand accidents might occur to me, which might deprive my sisters of that protection which it would be my study to afford ; and, in that event, I must beg that you will attend to putting them in possession of two thirds of what I may be worth, appropriating one third to Miss C. and her child, in any manner that may appear most proper ; " *held*, that this was a valid will ; especially, after it had been proved, as the last will of S., before the surrogate, and administration granted with the will annexed ; and that C. and her son were each entitled to a moiety of one third of the personal estate of the testator, in the hands of the administrator. *Morrell v. Dickey*, 1 J. C. R. 153.

2209. Plate used in the family, passes under a devise or conveyance of " household goods and furniture." *Bunn v. Winthrop*, 1 J. C. R. 329.

2210. Where the will of the testator is so ambiguously expressed as to render it proper for the executor to take the direction of the Court, the costs of the suit will be ordered to be paid out of the fund in controversy. *Rogers v. Ross*, 4 J. C. R. 608.

C. Republication.

2211. A codicil with three competent witnesses, being executed with all the solemnities required by the statute, may be a republication of a will, so as to give effect to a devise otherwise void, on account of the devisee being a

witness to the original will. *Moore v. White*, 6 J. C. R. 360. 375.

D. Revocation.

2212. Subsequent marriage and birth of a child are an implied revocation of a will, either of real or personal estate. *Brush v. Wilkins*, 4 J. C. R. 506.

2213. But such presumptive revocation may be rebutted by circumstances. *Ibid.*

2214. It seems, that a subsequent marriage, or subsequent birth of a child alone, will not amount to an implied revocation. *Ibid.*

2215. Implied revocations of wills are not within the statute of frauds. *Ibid.*

2216. A will duly executed, but revoked by a subsequent marriage and birth of a child, cannot be connected with a subsequent will not executed with the requisite solemnities to pass real estate, so as to constitute a valid will ; but the estate descends to the heir. *Ibid.*

2217. A conveyance by a testator of land devised by him, is a revocation of his will *pro tanto*. *Minuse v. Cox*, 5 J. C. R. 441. *Livingston v. Livingston*, 3 J. C. R. 148.

*2218. As, where a testator conveyed his share of the real estate [*402] under the will of his deceased father (and which made part of the testator's real estate devised to his children) to trustees, for the payment of the debts of his father ; *held*, that the subsequent conveyance, being merely for the payment of debts, was a revocation only as to that particular purpose ; and the trust as to the residue was for the devisees, and not for the heirs of the testator. *Livingston v. Livingston*, 3 J. C. R. 148.

2219. So, when an estate specially devised is sold by the testator, by an executory contract, it is a revocation of the devise in equity ; for the estate, at the time of the contract of sale, is considered as in the vendee. *Walton v. Walton*, 7 J. C. R. 258.

2220. And where the contract is for a part of the land devised, it is a revocation *pro tanto*, in equity, though not at law. *Ibid.*

2221. And this, though the contract of sale be rescinded by the purchaser, and the testator is thereby restored to his former title and estate, and died seised of the same land. *Ibid.*

2222. It seems, that if a testator conveys the estate devised, though he takes it back by the same instrument or otherwise, it is a revocation of the will, at law and in equity, though he did not intend to revoke it. *Ibid.*

2223. But a mortgage or charge by the testator, for the payment of debts, is not a revocation beyond the special purpose of it. *Ibid.*

2224. A conveyance inoperative for the want of completion, or by the incapacity of the grantee, may amount to a revocation, if it shows the intention of the testator to revoke his will. *Ibid.*

2225. A devise once revoked, expressly or by implication, cannot be restored without a republication of the will. *Ibid.*

See Devise. *Husband and Wife.*

CHATELS.

1. *It seems*, that a stone for grinding bark, affixed to a mill, called a bark mill, is not part of the freehold, but a personal chattel. *Heermance v. Vernoy*, 6 J. R. 5.

2. Wheat or corn, growing, is a chattel. *Whipple v. Foot*, 2 J. R. 418. *S. P. Newcomb et al. v. Ramer*, id. 421. n.

3. The word "chattels" denotes property and ownership. *People v. Holbrook*, 13 J. R. 90.

4. *It seems*, that machinery for spinning flax and tow, and carding machines, attached to the building by an upright board resting on the frames, and fastened at the ceiling and by cleets nailed to the floor round the feet of the frames, but the frames or machines themselves not otherwise fastened to the building, are not fixtures, but personal chattels. *Cresson v. Stout*, 17 J. R. 116.

*5. A cider mill and press, erected by a tenant holding from year to year at his own expense, and for his own use, in making cider on the farm, are not fixtures, but personal chattels belonging to the tenant, who may remove them, at the expiration of his tenancy. *Holmes v. Trempier*, 20 J. R. 29.

6. And if the tenant enters on the land, after the expiration of his tenancy, and removes such cider mill and press, though he may be liable as a trespasser on the soil, yet the property in the mill and press remains in him. *Ibid.*

See SALE OF CHATELS. BAILMENT. LEASE. ASSIGNMENT.

CHEAT.

1. To constitute a cheat or fraud an indictable offence at common law, it must be such a fraud as would affect the public; such a deception as common prudence cannot guard against; as, by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. *The People v. Babcock*, 7 J. R. 201.

2. Where a person pretended that he had money in his pocket ready to pay a debt, whereby he obtained a receipt in full in discharge of it, and then went away without paying the money, no indictment will lie, there being no false token, but only a false assertion. *Ibid.*

3. A person who obtains goods under the pretence that he lived with and was employed by A. B., and who sent him for them, is indictable for obtaining goods by false pretences, under the statute. (Sess. 13. c. 29. s. 13.) *People v. Johnson*, 12 J. R. 292.

4. Where the credit is obtained, by means of the false pretence, the case comes within the statute. *Ibid.*

5. The statute introduced a new rule of law; the common law extending only to

cheats effected by means of any false token, having the semblance of public authority, or in any manner touching the public interest. *Ibid.*

6. A fraud, to be indictable at common law, must be one affecting the public, such as common prudence is not sufficient to guard against; as using false weights and measures, false tokens, or where there is a conspiracy to cheat. *People v. Miller*, 14 J. R. 371.

7. Where a person got possession of a promissory note, by pretending that he wished to look at it, and then carried it away, and refused to return it to the holder; *held*, that this was merely a private fraud, and not punishable criminally. *Ibid.*

8. A Court of Special Sessions of the Peace has jurisdiction of cheats. *Ibid.*

*CHENANGO BANK. [*404]

1. The act incorporating the *Bank of Chenango*, (Sess. 41. c. 253. s. 16.) directs that all the parties, whether makers, endorsers, drawers or guarantors of any note, &c. counted at the bank, shall be sued jointly, &c., so that only one bill of costs shall be charged on one note, &c.; *held*, that a declaration against the maker and endorser of a note (discounted at the bank) jointly, as if they were joint makers, is good, and that the note might be given in evidence, under such a count. *Bank of Chenango v. Curtiss*, 19 J. R. 326.

2. But such note cannot be given in evidence under the common money counts, when the endorser is joined; the statute having given a new remedy, unknown to the common law. *Ibid.*

3. The *Chenango* bank agreed with the defendants, on their depositing two thousand dollars, to let them have five thousand dollars in the notes of the bank, which were marked; and as long as the notes were kept from returning to the bank, the defendants were to pay no interest, and they were at no times to suffer a greater amount of notes to return than the amount of their deposit; and they were to have the money as long as they kept the exchange good; but either party was at liberty to put an end to the agreement, on giving six months' notice; and if the exchange were not kept good, the agreement was to be forfeited, and the bank to be at liberty to call for immediate payment; and the defendants gave a note to the bank made by two of them, and endorsed by the other two, for 5000 dollars, payable ninety days after date; *held*, in an action brought by the bank on the note, against all the defendants as makers, that the contract between the parties was not usurious; that the note was discounted by the bank, within the meaning of the act of incorporation; and that although, when the note fell due, no bills of the bank had been returned, and therefore nothing was due on the note, and more than six months had elapsed, yet the endorsers were not discharged, as they were estopped by the agreement from making any such objection. *Ibid.*

COLLECTOR OF TAXES.

In an action brought on a bond given by a collector of taxes against him and his sureties, the declaration alleged the delivery of the tax list and assessment roll to the collector, and the warrant of the supervisors, requiring him to collect and pay over the amount, including *fees of collection*; and assigned, as a breach of the condition of the bond, the non-payment of the amount of the tax list, on which the damages were assessed; *held*, that the plaintiff was not entitled to recover as part of the damages, the *fees of collection*, and that the [*405] declaration *was*, therefore bad, and the damages improperly assessed. *Lathrop v. Allen*, 19 J. R. 229.

COLONIAL LAWS.

1. The charter of 1683, of *James, Duke of York*, was not in force after the revolution of 1688. *Jackson, ex dem. Woodruff, v. Gilchrist*, 15 J. R. 89.

2. Whether before the colonial act of 1771, the interest of a *feme covert* in land could, in this state, be conveyed, otherwise than by *fine*? *Quære. Ibid.*

3. The statute of 1771, "to confirm certain ancient conveyances," provided, that no claim to any real estate whereof any person was then actually possessed, should be deemed to be void, upon the pretence, that the *feme covert* granting the same had not been privately examined; *it seems*, that in regard to new and unsettled lands, the constructive possession arising from the right of property is sufficient to satisfy the words of the act, such possession being sufficient in other cases; as, to entitle the husband to an estate by the *curtesy*, or to enable the owner to maintain trespass. *Ibid.*

COMMISSIONER,

With the powers of a Judge of the Supreme Court, in certain cases. (Sess. 36. c. 16.)

The Supreme Court has the same power over the proceedings of the recorder of *New-York*, while acting as a commissioner, as when acting as recorder; but they will not exercise the power where the recorder has a discretion by the act, and has acted definitively, as in granting a *supersedeas* under the act, as to absconding debtors. The regular course is to bring up the proceedings of the recorder by *certiorari*, not by an order of the Court. *Learned v. Duval*, 3 J. C. 141.

COMMON.

1. Land was leased in fee; the grantee covenanted to pay rent; the grantor covenanted that

the grantee should have common of estovers **and* pasture out of the [*406] other lands of the grantor; the grantor approved those lands, whereby the grantee was prevented from enjoying the common. In an action by the assignees of the grantor, to recover the rent, *held*, that the covenant that the grantee should have common, did not operate as a grant, but as a covenant; and that the common made no part of the premises granted, and on which rent was reserved; consequently, that the grantor's approving did not furnish a defence in an action for the rent, and that the grantee's remedy in such case was by action on the covenant. *Watts v. Coffin*, 11 J. R. 495.

2. The estate granted in this lease being an estate in fee, the common of estovers and of pasture, mentioned in the covenant, are of that species which are denominated *appurtenant*, and not *appendant*. Per *Van Ness, J. Ibid.*

3. Common *appurtenant* does not arise from any connection of tenure, and may be created by grant or claimed by prescription; but common *appendant* can only arise from prescription. Per *Van Ness, J. Ibid.*

4. Common *appurtenant* may be apportioned. *Livingston v. Ten Broeck*, 16 J. R. 14.

5. But where the owner of land to which common is *appurtenant*, purchases part of the land out of which the common is to be taken, or the owner of part of the land out of which common is to be taken, purchases the land or part of the land to which the common is *appurtenant*, the right of common becomes extinct, not only as to the part, but as to the whole. *Ibid.*

6. A conveyance of a right of common by the eldest tenant in common or *parcener*, is void, but all the tenants must join in the grant; for it descends to all the children of an intestate, by statute, and not according to the rule of the common law. *Leyman v. Abel*, 16 J. R. 30.

7. The grantee in fee of a right of common *in gross*, and without number, may alienate it, and it descends to his heirs; but it cannot be aliened in such a way, as to give the entire right to several persons, to be enjoyed by them separately. *Ibid.*

8. And where a right of common *in gross* descends to several persons, as tenants in common, or *parceners*, *it seems*, that it cannot be divided between them, but there must be a joint enjoyment of it. *Ibid.*

9. One tenant in common of such a right of common, cannot convey a right in the common, though he may, jointly with other tenants, alienate it. *Ibid.*

See TENANT IN COMMON.

COMMON CARRIERS.

1. Common carriers are liable for every injury which happens to goods entrusted to their care, unless it be caused by the act of GOD, **(inevitable acci- [*407]*

dent,) or of the enemies of the land. *Colt v. M'Mechen*, 6 J. R. 160. *S. P. Kemp v. Coughtry*, 11 J. R. 107.

2. Where a vessel was beating up the *Hudson*, against a light and variable wind, and being near shore, and whilst changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; *held*, that the sudden failure of the wind was the act of GOD, (inevitable accident,) and excused the carrier, there being no negligence on his part. *Colt v. M'Mechen*, 6 J. R. 160.

3. And whether there was negligence or not, is a question of fact for the jury to decide. *Ibid.*

4. Masters and owners of vessels, who undertake to carry goods for hire, are liable, as common carriers, whether the transportation be from port to port, within the state or beyond sea, at home or abroad; and they are answerable, as well by the marine law as by the common law, for all losses not arising from inevitable accident, or such as could not be foreseen or prevented. *Elliot v. Rossell*, 10 J. R. 1. *S. P. Kemp v. Coughtry*, 11 J. R. 107.

5. The master and owners of a ship are responsible for the goods which they have undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to them. *Schieffelin v. Harvey*, 6 J. R. 170.

6. Where goods were shipped at *New-York*, to be delivered at *London*, and on the arrival of the ship the goods were refused admission, being prohibited by the laws of *England*, and the consignee and master agreed that the goods should remain on board, and be returned to the shippers in *New-York*, at their risk, they paying the freight from *London*, and an endorsement was made on the bill of lading to that effect; *held*, that the ship owner was responsible for the embezzlement of any part of the goods, between the time of the first shipment at *New-York* and their return there, though *English* custom-house officers were on board during the time the vessel was in *London*, and though they might have embezzled the goods, not the master, or crew, or any person, with their knowledge. *Ibid.*

7. Where goods are embezzled, or lost, during the voyage, the master is bound to answer for the value of the goods missing, according to the clear net value of goods of like kind and quality, at the port of delivery. *Watkinson v. Loughton*, 8 J. R. 213.

8. But whether he is liable to pay interest from the time when the goods ought to have been delivered or not, depends on the circumstances of the case; but if no fraud or misconduct is imputable to the master, interest will not be allowed. *Ibid.*

9. The carrier of goods laden on deck is not liable, in case of their being thrown overboard, for the preservation of ship and cargo. *Smith v. Wright*, 1 C. R. 43.

10. Nor is there any contribution in such case. *Ibid.*

11. A person may be a common carrier of money, as well as of other property. *Kemp v. Coughtry*, 11 J. R. 107.

12. Where the master of a vessel, employed in the transportation of goods between the cities of *New-York* and *Albany*, received on board a quantity of flour, to be carried to *New-York*, and there sold in the usual course of such business, for the ordinary freight, and having *sold the flour [*408] at *New-York* for cash, was robbed of the money; *held*, that the owners of the vessel were answerable for the money to the shippers of the flour, though no commission or distinct compensation beyond the freight was allowed for the sale of the goods and bringing back the money, such being the duty of the master in the usual course of his employment, where no special instructions were given. *Ibid.*

13. The person who receives and forwards goods, taking upon himself the expense of transportation, for which he receives a compensation from the owner of the goods, but who has no concern in the vessel by which the goods are forwarded, nor any interest in the freight, is not a common carrier. *Roberts v. Turner*, 12 J. R. 232.

14. Where goods were put on board the defendant's vessel, to be carried to *Albany*, and, on arriving there, were, by the defendant's direction, put upon the wharf; *held*, that this was not a delivery of the goods to the consignee; and that the evidence of usage to deliver goods in this manner was immaterial; that the defendant was liable in trover, for such part of the goods as were not actually delivered to the consignee. *Ostrander v. Brown*, 15 J. R. 39.

15. Though the goods, in this case, were taken away without the direction of the consignee, by a cartman usually employed to transport his goods, and the greater part were actually received by the consignee; *held*, that this did not amount to evidence of a delivery of that part of the goods alleged to be lost, as the cartman was not to be deemed to be the general agent of the consignee for receiving his goods. *Ibid.*

16. A carrier is not justified by the inability or refusal of the consignee to receive the goods, to leave them exposed on a wharf; but it is his duty to secure them for the owner. *Ibid.*

COMMON SCHOOLS.

1. The act relative to common schools, (Sess. 35. c. 24. s. 8.) authorizes the inhabitants of a school district to meet and vote a tax on the resident inhabitants of the district, for the purpose of building a school-house, &c., and to choose trustees, who are to raise the sum of money voted, by assessment on the taxable inhabitants, agreeable to the levy on which the town was taxed the preceding year. A tax was voted by the inhabitants of a school district, in *September*, 1813, and the trustees made out their assessment roll, agreeable to the levy of the town tax in the year 1813, by which A., who was a resident taxable inhabitant of the town when the tax was voted, but

not a resident or taxable inhabitant in 1812, was assessed for his proportion of the tax; *held*, that the *tax list of the preceding year* must be understood, according to the general law relative to the assessment and collection of taxes, to mean the year ending on the 1st day of *August*; and the assessment on A. was, therefore, legal and correct. *Ryder v. Cuddeback*, 12 J. R. 412.

*2. Persons not inhabitants of a [*409] town, are not liable to be taxed for the support of common schools in that town; and if a tax be assessed and levied upon the property of such non-resident, both the trustees who issued the warrant, and the collector who executes it, are trespassers. *Suydam v. Keys*, 13 J. R. 444.

3. The trustees, in such case, having only a special and limited authority, the collector or officer is bound to see that they act within the scope of their legal powers. *Ibid*.

4. It is not necessary that the clerk of a school district, appointed under the act of the 15th of *April*, 1814, (Sess. 37. c. 192.) should take the oath prescribed by law within *fifteen days* from the time of his appointment; it is sufficient if he takes the oath before any official act is done by him. *Howland v. Luce*, 16 J. R. 135.

5. The same person may be appointed clerk of the school district, and collector at the same time, there being nothing incompatible in the two offices. *Ibid*.

6. Under the act, (Sess. 37. c. 192.) the *freeholders and inhabitants* of the school district, at their regular meeting, must vote a *precise and definite sum*, as a tax on the inhabitants of the district for building a school-house, &c. *Robinson v. Dodge*, 18 J. R. 351.

7. The trustees of the school district are not authorized, by a general vote of such meeting, for levying a tax to defray the expenses of building a school-house, without specifying the sum to be levied, to issue their warrant to levy the amount of moneys expended by them for that purpose. *Ibid*.

[See an act, passed *April 12*, 1819, (Sess. 42. c. 152.) repealing former acts; and, also, an act amending the same, passed *April 17*, 1822, (Sess. 45. c. 256.)]

CONDITION.

- I. Condition, how construed; (a) *When precedent*; (b) *When subsequent*.
- II. *When void*.
- III. *What is a good performance, how it may be waived, and how the time of performance may be enlarged*.
- IV. *Breach of a condition, and how waived*.

- I. Condition, how construed; (a) *When precedent*; (b) *When subsequent*.

(a) *When precedent*.

1. There are no technical words which make a condition precedent or subsequent, but

it depends on the good sense and plain understanding of the contract. *Barruso v. Madan*, 2 J. R. 145.

2. If it appear, by the agreement, that the plain intent of either party was to have the thing to be done to him per- [*410] formed before his doing what he undertakes on his part, the performance must then be averred. *Cunningham v. Morrell*, 10 J. R. 203.

3. Where, by the agreement, payments are to be made as the work proceeds, but the whole consideration is not to be paid until the whole work has been performed, the covenants are not independent, but an entire performance must be averred, according as the plaintiff claims the entire consideration, or such part of it as remains due on the completion of the service; or else, if he claims a ratable part of the consideration, he must aver a ratable performance. *Cunningham v. Morrell*, 10 J. R. 203. *Contra*, *Seers v. Fowler*, 2 J. R. 272. *Havens v. Bush*, *id*. 387.

4. So, where A., by his agreement, was to complete a certain piece of road, on or before a certain day, and B. covenanted to pay him for completing the whole of the work 6,000 dollars, to be paid in instalments, as the work progressed; *held*, that A. could not maintain an action for the whole consideration money, without averring and proving a performance of the whole work; and that, if he brought his action for a ratable part of the money, he must show a ratable performance. *Cunningham v. Morrell*, 10 J. R. 203.

5. Where the plaintiff agreed to work for the defendant, for eight months, for 104 dollars, or 13 dollars per month; *held*, that the contract was entire, and that the performance of the work for the whole period of eight months was a condition precedent, to be executed before the plaintiff could sue for his hire. *Reab v. Moor*, 19 J. R. 337.

6. G. covenants to execute and deliver to R., on a certain day, a good and sufficient deed of land, and R. covenants to pay G., on the same day, a certain sum of money; these are dependent covenants, and the delivery or tender of the deed by G. to R. is a condition precedent, on the part of G., to his bringing an action for the money. *Green v. Reynolds*, 2 J. R. 207. *S. P. Jones v. Gardner*, 10 J. R. 266. *S. P. Gazly v. Price*, 16 J. R. 267. *Hardin v. Krelsinger*, 17 J. R. 293. *Robb v. Montgomery*, 20 J. R. 15.

7. On a contract for the delivery of stock, the delivery and payment of the money are dependent covenants, and the plaintiff must aver a performance, or an offer to perform, before he can bring his action. *Per Kent, Ch. J. Green v. Reynolds*, 2 J. R. 207.

8. A bond was given by A. and B., as trustees of a church, conditioned to furnish F., the obligee, with a comfortable dwelling-house, &c., *if necessity required*; *held*, that the plaintiff was bound to show the existence of a necessity, arising from his inability, from poverty, to procure a house, as a condition precedent to a right to recover on the bond. *Farris v. Purdy*, 16 J. R. 359.

Further, as to averring a performance of a condition precedent. See PLEADINGS.

(b) *When subsequent.*

9. If by the terms of the contract, the money is to be paid by a day certain, and which is to happen before the performance of [*411] the *service, or by a day certain, and there is no day certain for the performance, the performance is not a condition precedent. *Cunningham v. Morrell*, 10 J. R. 203. (See *Seers v. Fowler*, 2 J. R. 272.)

10. Where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, the defendant cannot set it up as a condition precedent, but the covenants in such case are regarded as independent. *Bennet v. Executors of Pixley*, 7 J. R. 249.

11. In consideration of 400 dollars, A. covenanted to convey to B., on a certain day, a certain lot of land, the same to be appraised by C. and D., and if appraised at more than 400 dollars, B. was to pay A. the surplus, and if at less, A. to pay B. the surplus: the appraisement and payment of the surplus by B. are not a condition precedent to his bringing an action, and need not be averred, for A. was bound to convey, and if a surplus was, on appraisement, found in his favor, he might recover from B. *Ibid.*

12. M. covenanted to provide vessels and funds for certain mercantile expeditions, and B. covenanted to select the goods, or send samples, if necessary; and it was agreed, that if the first expedition was not sent out by M. in one month from the date of the contract, it should be void, the party in default to pay all damages and costs; it was held, that the covenants were independent, and that B. was not bound to select the goods before the vessel was provided by M., and that B. was entitled to damages for the non-performance of the contract on the part of M. *Barruso v. Madan*, 2 J. R. 145.

13. Where A., by articles of agreement, dated 9th September, 1807, covenanted to execute a deed, in fee, to B., on the 15th May, 1808, and B., in consideration thereof, covenanted to pay to N. 50 dollars in four weeks after the date of the agreement; 50 dollars in three weeks thereafter; 900 dollars on the 15th May, 1808, &c.; the covenants were held to be mutual and independent. *Wilcox v. Ten Eyck*, 5 J. R. 78.

14. If covenants be once established to be independent, they continue so throughout, although the plaintiff has covenanted to do certain acts on his part, in the intermediate time, between the performance of the different acts to be done by the defendant. *Ibid.*

II. *When void.*

15. A man devises land to his children, in case they inhabit the town of H.; these words, whether a condition subsequent or precedent, or a limitation, are void, as being repugnant to

the estate devised; unreasonable or uncertain, or as being nugatory, the heirs themselves being to take advantage of it, there being no limitation or devise over by the will. *Newkerk v. Newkerk*, 2 C. R. 345.

III. *What is a good performance, how it may be waived, and how the time of performance may be enlarged.*

16. When an obligor undertakes for the act of a third person, it is *incumbent on the obligor to procure the act to [*412] be done, unless, at the time of entering into the bond, there was an impossibility of doing the act, or the doing of it had since been impossible, by the act of GOD, or of the law, or of the obligee himself. *Mounsey v. Drake*, 10 J. R. 27.

17. So, if A. gave a bond to B., the plaintiff in a suit, conditioned to be void if C., the defendant therein, should, on or before a certain day, surrender himself into the custody of the sheriff of L., in that suit; it is not sufficient, that C. offered himself to the sheriff and to the attorney of the plaintiff, for the purpose of being surrendered, but a strict performance must be shown, for the want of which, it is no excuse that the plaintiff might, and did not issue an execution to the sheriff, or that the sheriff might, and did not, or would not receive the defendant into custody. *Ibid.*

18. The condition of a bond to convey a lot of land, number 78, in the township of, &c., containing a certain number of acres, is performed by a delivery of a deed for the land, according to its usual and known description, although, on actual survey, it may be found to contain a less number of acres; for the mention of the number of acres is merely matter of description. *Mann v. Pearson*, 2 J. R. 37.

19. The time of performing a condition may be enlarged by a parol agreement. *Fleming v. Gilbert*, 3 J. R. 528.

20. So, performance may be waived by parol. *Ibid.*

IV. *Breach of a condition, and how waived.*

21. The condition of a bond, to save the obligee harmless against a certain mortgage, which was an encumbrance on land sold by the obligee to the obligor, is broken, if the obligee be not indemnified against the bond accompanying the mortgage. *White v. De Villiers*, 1 J. C. 173.

22. If it be covenanted in a lease, that in case the lessee should suffer or permit more than one person to every 100 acres, to reside on, use, or occupy any part of the premises, the lease should be void, and the lessee let parts of the premises to persons for a year, to cultivate for shares, in the proportion of more than one to each 100 acres, it is a breach of the condition, and defeats the lease. *Jackson, ex dem. Colden, v. Brownell*, 1 J. R. 267.

23. But where the quantity of land demised was 135 acres, and the lessee covenanted not

to permit more than one tenant to each 100 acres to reside on, or occupy the premises, his permitting one other tenant besides himself to occupy the premises, is not a breach. *Jackson, ex dem. Colden, v. Agan*, 1 J. R. 273.

24. Where the condition of a bond was, that the obligor should secure the obligee from all encumbrances on certain lands, and it was agreed that the obligor should see the lands free from all encumbrances by the 20th of February; it was held, that this did not amount to a covenant for quiet enjoyment, and that if the land was not freed from all encumbrances by the 20th of February, there was a breach of the condition, and that the obligee might recover on the bond without showing an eviction. *Julian v. Burgott*, 11 J. R. 477.

*25. The condition of a recognition, that the party shall prosecute a suit to effect, is broken by his submitting to a nonsuit. *Covenhoven v. Seaman et al.* 1 J. C. 23.

26. Nor, if the writ be abated for any cause, will it save the recognizance, unless another writ be sued out with diligence. *Ibid.*

27. The forfeiture of a condition is not waived by parol assent, or silent acquiescence. *Jackson, ex dem. Bronck, v. Crysler*, 1 J. C. 125.

CONSIGNOR AND CONSIGNEE.

1. If the consignor purchase goods merely as agent of the consignee, and which are to be transported at the risk of the latter; by delivery to the carrier, the property of the consignor is divested, and he cannot bring an action against the carrier. *Potter v. Lansing*, 1 J. R. 215.

2. If the papers accompanying the goods, state them to be shipped on account and risk of the consignee, he paying freight, without further explanation, it will be intended that the consignor was a mere agent to make the purchase. *Ibid.*

3. But if the goods are not to be paid for until delivery, and the consignor is to run all the risk of transportation, the property remains in him until delivery, notwithstanding that the freight is to be paid by the consignee. *McIntyre v. Boune*, 1 J. R. 229.

4. Goods were purchased, and shipped in an American vessel, by American merchants, to merchants in France, under an agreement between them, for that purpose, by which the former were to deliver the goods at St. Valéry, for which they were to be allowed eight per cent. commission, taking on themselves all risks, expressly including a premium for sea risk as well as war risks; the consignees to pay the freight on delivery, and also for the amount of cargo, in bills on London, guaranteed by a commercial house in London; it was held, that the goods remained the property of the consignors until their delivery in France. *Ludlow v. Boune*, 1 J. R. 1. See *De Wolf v. New-York Firemen Ins. Co.* 20 J. R. 214.

CONSPIRACY.

Three persons were engaged in a conspiracy; one was acquitted, and another died before trial; the survivor may, notwithstanding, be tried and convicted. *People v. Olcott*, 2 J. C. 301.

*CONSTABLE. [*414]

1. In trespass, the defendant justified as a constable, under an appointment of three justices, pursuant to the 6th section of the act (Sess. 24. c. 78.) relative to the duties and privileges of towns, and that he took the goods as constable, by virtue of an execution issued against the goods of the plaintiff, &c.; held, that the appointment made by the justices, was a judicial act, and, being within their jurisdiction, was conclusive and valid, until set aside or quashed on certiorari, and could not be questioned in a collateral action. *Wood v. Penke*, 8 J. R. 69.

2. Whether a constable has power to summon a jury of inquiry to try a claim to property taken by him on execution? *Quare. Townsend v. Phillips*, 10 J. R. 98.

3. The bond taken from a constable with sureties, under the act, (Sess. 36. ch. 35.) should be made to the people of the state. *Warner v. Racey*, 20 J. R. 74.

4. Though a constable neglects to return an execution, for above thirty days, it is no breach of the condition of a bond taken from him, pursuant to the statute, unless money has come to his hands, on account of such execution, which he has neglected or refused to pay over. *Ibid.*

See COURTS OF JUSTICES OF THE PEACE, II. III. XVI.

CONTEMPT.

1. Where A. B., who was a master in Chancery, was committed by the chancellor, and the order of commitment stated, that A. B., while he was master, filed a bill, to which he subscribed the name of C. D., one of the solicitors of the Court, without his knowledge or consent, and prosecuted the cause in his name, contrary to the statute in such case made and provided, in wilful violation of his duty, as master, and in contempt of the authority of the Court, and for the said malpractice and contempt, the said A. B. was ordered to be committed to gaol, there to remain until the further order of the Court: It seems, that the commitment is valid. *Yates v. Lansing*, in error, 9 J. R. 395. *Case of J. F. N. Yates*, 4 J. R. 317. Contra, *Yates v. The People*, in error, 6 J. R. 337.

2. The Supreme Court has no power to discharge a person committed by the Court of Chancery for a contempt. *Ibid.*

3. Commitment, *until the further order of the Court*, is good. *Ibid.*

4. *It seems*, that the Court of Chancery may commit for a contempt, on the affidavits of witnesses only, without first putting the party to answer to interrogatories. *Ibid.*

5. If a judge, in vacation, on *habeas corpus*, discharge a master in *Chancery, [*415] committed by order of the Court of Chancery, for malpractice and contempt, the chancellor may recommit the party for the same cause. *Ibid.*

6. *It seems*, that a person who has been regularly committed, by the chancellor, for a contempt, and afterwards is improperly set at large, may be recommitted, by an order of the Court of Chancery, grounded upon, and reciting the original warrant or attachment. *Ibid.*

7. A judge of the Supreme Court cannot discharge a person committed by order of the Court of Chancery, on a conviction for a contempt of that Court. *Ibid.*

8. *It seems*, that the Supreme Court cannot discharge, on *habeas corpus*, a person committed by the Court of Chancery, for a contempt of that Court. *Ibid.*

But see, as to all these points, *Yates v. The People*, 6 J. R. 337. which seems *contra*.

And see ATTACHMENT. HABEAS CORPUS.

CONSTITUTION OF THE STATE.

1. The *council of appointment*, being created by the *constitution*, with certain powers, the legislature cannot prescribe to them the manner in which they are to execute those powers, or prevent their removing an incumbent from office, and appointing a successor, wherever they think proper. *People v. Foot*, 19 J. R. 58.

2. Therefore, the 13th section of the act, (Sess. 31. c. 216.) passed April 11, 1806, which directs that, if the council of appointment are satisfied that a *commissioner for loaning money* has faithfully discharged the duties of his office, they may accept his resignation, and appoint another in his place, is void and of no effect. *Ibid.*

COPARCENERS.

One of several *coparceners* may maintain ejectment on her separate demise. *Jackson, ex dem. Fitzroy, v. Sample*, 1 J. C. 231.

[*416] *CORPORATION.

I. *Corporations generally.*

II. *Religious corporations.*

I. *Corporations generally.*

1. Individuals acting together, for the benefit of a society, are not to be considered as a
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corporation, unless their corporate capacity be expressly shown. *Ernst v. Bartle*, 1 J. C. 319.

2. A corporation can act only in the mode prescribed by the law creating it, and the acts of its agents are no further binding upon it than as they are done in pursuance to that law. *Beatty v. Marine Insurance Company*, 2 J. R. 109.

3. Where two trustees, being a corporation, sign their names separately to a lease, and affix the corporation seal separately to each name, it is a good execution of the lease. *Jackson, ex dem. Donally, v. Walsh*, 3 J. R. 226.

4. Where A., B., and C., by the name and description of *Trustees of the Baptist Society of R.*, execute a bond with their individual names and seals, but with that addition, it is a mere description of persons, and the obligors are liable in their individual capacity. *Taft v. Brewster*, 9 J. R. 334.

5. Where an act, incorporating a joint stock company, directs the commissioners appointed thereby for the purpose of receiving subscriptions, as soon as a certain number of shares are subscribed, to give notice to the stockholders to choose directors, but the notice is not given until a greater number of shares are subscribed; it will not affect the existence of the company, or invalidate any contracts made with them. *Union Turnpike Company v. Jenkins*, 1 C. R. 381.

6. The president and directors of a company are the proper persons to conduct the affairs of the company, and an order made by them, without the intervention of the company, is good. *Ibid.*

7. *It seems*, that the right of a corporation to take toll, may be tried in an action against the collector, where notice is given to him not to pay it over. *Hearsey v. Pruyn*, 7 J. R. 179.

8. A corporation cannot be seized of land in trust, for purposes foreign to its institution. *Jackson, ex dem. Lynch, v. Hartwell*, 8 J. R. 422.

9. So, the supervisors of a county, if they are a corporation, have no capacity to take and hold lands, as a corporation, for any other use or purpose than that of the county which they represent. *Ibid.*

10. Where the officers of a corporation are required to be annually elected, *it seems*, that they may continue in office after the year, and until others are elected. *The People v. Runkle*, 9 J. R. 147.

11. When a corporation sues, either on a contract, or to recover real property, they must, at the trial, under the general issue, show that they are a corporation, or be nonsuited. *Jackson, ex dem. Union Academy, v. Plumb*, 8 J. R. 378.

*12. A corporation plaintiff may [*417] declare by its name of incorporation, and without setting forth the act of incorporation, notwithstanding it may be a private law. *The United States Bank v. Haskins*, 1 J. C. 132.

13. A corporation may be liable on a contract not under seal; and that as well where the contract is implied, as where it is express. *Danforth v. S. & D. Turnpike Company*, 12 J. R. 237.

14. Where a deed is made to a corporation by a name different from its true name, the plaintiffs may sue in their true name, and aver in the declaration, that the defendant made the deed to them, by the name mentioned in the deed. *New-York African Society v. Varick*, 13 J. R. 36.

15. In debt on a bond to the committee or trustees of a corporation, *solvendum* to the corporation by its true name, the corporation may sue in their own name, and allege that the bond was made to them, by the description of the committee, &c. *Ibid.*

16. An action of *assumpsit* against a corporation must be commenced by *summons*, not by *attachment*. *Lynch v. Mechanics' Bank*, 13 J. R. 197. [And see the act concerning suits against corporations, passed February 7, 1817, *Sec.* 40. c. 26.]

17. Wherever a corporation is acting within the scope of the legitimate objects of its incorporation, all *parol* contracts made by its authorized agents, are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. *Dunn v. Rector, &c. of St. Andrew's Church*, 14 J. R. 118.

18. A person becoming a stockholder of an incorporated company, by signing an agreement, by which the subscribers promised to pay the company 100 dollars for every share of stock set opposite their names, in such manner and proportion, and at such time and place as shall be determined by the trustees of the said company, is liable, in *assumpsit*, at the suit of the company, for the instalments directed by its trustees to be paid. *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 238.

19. And such agreement, although without the words *bearer or order*, is a promissory note within the statute, and no consideration need be averred in the declaration. *Ibid.*

20. In an action by an incorporated company for manufacturing purposes, the plaintiffs need not aver that they have been duly incorporated, as the act authorizing such incorporation is a public law, and the certificate required by the act, on being filed, becomes a matter of record. *Ibid.*

21. A person entering into a contract with a corporation, in its corporate name, cannot object that they have not been duly constituted a corporation. *Ibid.*

22. In an action by a corporation, they must, under the general issue, show that they are a corporation. Per Thompson, C. J. *Ibid.* *S. P. Bill v. Fourth Western Turnpike Company*, 14 J. R. 416.

23. In an action by a turnpike company, the appointment of inspectors by the governors, and the certificate of the inspectors, that the road was completed, and that the gates [*418] were erected, are not sufficient evidence of the existence of the corporation. *Bill v. Fourth Western Turnpike Company*, 14 J. R. 416.

24. A corporation authorized to employ their solely in advancing money upon goods,

and the sale of such goods upon commission, may lawfully accept bills drawn on account of future consignments, or deposits of goods. *Munn v. The Commission Company*, 15 J. R. 44.

25. A company authorized to sell goods on commission, is bound by the acceptance of its general agent of a bill drawn on the company, on account of goods stipulated to be deposited with the company, for sale on commission. *Ibid.*

26. A corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. *The People v. The Utica Insurance Company*, 15 J. R. 358.

27. An information in the nature of a *quo warranto* lies against an incorporated company, for carrying on banking operations without authority from the legislature. *Ibid.*

28. A statute, restraining any person from doing certain acts, applies equally to corporations, or bodies politic, although not mentioned. *Ibid.*

29. Corporations are liable to be taxed or rated, as persons or inhabitants, within the meaning of the statute. *Ibid.* Per Thompson, C. J.

30. But an attachment under the act relative to absent and absconding debtors, does not lie against the property of a foreign corporation. *M'Queen v. M. Manufacturing Company*, 16 J. R. 5.

31. The *Utica Insurance Company*, not being authorized by law to become proprietors of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may lawfully do, any note discounted by them, or security taken for money lent, &c. is void, within the meaning of the act (*sec.* 36. c. 71.) to restrain unincorporated associations. *Utica Insurance Company v. Scott*, 19 J. R. 1.

32. The lending of money by that company is not, however, declared void; and the money may be recovered, though the security be void. *Ibid.*

33. The defendants, describing themselves as a committee of the corporation of the city of Albany, entered into a contract with the plaintiff, under their respective hands and seals, for a survey of the city, &c.; and the corporation had recognized their authority to make the contract; held, that the defendants were not liable to the plaintiff in their individual capacities, but that *assumpsit* would lie against the corporation. *Randall v. Van Veckten and others*, 19 J. R. 60.

34. It makes no difference in regard to a corporation, whether its agent is appointed under seal or not, or whether he puts his own seal or not, to the contract he makes in their behalf. *Ibid.*

35. A corporation may be dissolved by a surrender of its corporate rights. *See v. Bloom*, 19 J. R. 456. on appeal.

36. And if a corporation suffers acts to be done, which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. *Ibid.* [*419]

37. In December, 1814, the respondents, according to the provisions of the act of the 22d of March, 1811, relative to corporations for manufacturing purposes, (Sess. 34. c. 67.) became a corporation for the period of twenty years. After December, 1817, there was no meeting of the trustees, nor any business or act done by the corporation; and on the 1st of February, 1818, all the property of the corporation, real and personal, was sold under execution; held, that the corporation, within the meaning of the act, as regarded creditors, was dissolved, after ceasing to act for such a length of time, and after a sale of all its property; and that the members were therefore individually responsible, to the extent of their shares, for the debts of the corporation, according to the act. *Ibid.*

38. A resolution or by-law of such corporation, allowing the stockholders, on paying thirty per cent. of their shares, to forfeit their stock, is void as against creditors. *Ibid.*

39. Where a creditor, who was a trustee also of the corporation, openly protested at the time against such resolution or by-law, though he accepted money raised under it, and was present at a subsequent meeting of the trustees when the application of the money was directed, and to which he assented; held, that this was not a ratification by him of such by-law or resolution. *Ibid.*

40. A by-law or resolution of such corporation, that any stockholder paying fifty per cent. of his shares, should be discharged from all future calls on his subscription, other than proceeding by way of forfeiture, is valid, and those who had complied with the terms of the resolution, before the dissolution of the company, were held to be discharged from all responsibility to creditors. *Ibid.*

41. Where such a corporation had executed a bond to the plaintiff, under the incorporate seal on which a judgment was obtained, in March, 1817; held, that the judgment was binding and conclusive on the members, individually, to the extent of their shares. *S. C. 20 J. R. 669.*

42. Though the trustees or agents of the company are not the trustees or agents of the individual stockholders, yet they may bind the individuals, to the extent of their respective shares, in case of a dissolution of the company. *Ibid.*

43. And the individual stockholders, who become liable on the dissolution of the company, for a judgment debt contracted by the trustees or agents of the company, cannot impeach its consideration, except by showing fraud or imposition, or that it was founded in error. *Ibid. See tit. CHANCERY, XV.*

II. Religious corporations.

44. Under the act (2 N. R. L. 212.) enabling churches to incorporate themselves, they cannot take by devise; for it does not operate as an enlargement of the restriction in the statute of wills. *Jackson, ex dem. Smith, v. Hammond, 2 C. C. E. 337.*

*45. A. devises to B., in trust, to
[420] pay the rents and profits to the min-

ister, &c. of the Baptist Church, at, &c.; the devisees and *cestui que trust* take nothing under the devise, but the land goes to the heir. *Ibid.*

46. Trustees of a church, *qua* trustees, cannot be in possession but constructively, by reason of having the right of possession. *The People v. Runkle, 8 J. R. 464.*

47. Having the key of the church, is *prima facie* evidence of possession, but it does not preclude an inquiry into the fact, who are the legal trustees, and have the right of possession. *Ibid.*

48. The trustees are, *virtute officii*, entitled to the possession of all the temporalities, and are considered as lawfully seized of the ground and buildings belonging to the church. *The People v. Runkle, 9 J. R. 147.*

49. And if the trustees close the doors of the church against the minister and congregation, and they break, and enter the church by force, an indictment, at the instance of the trustees, will lie against them, for such forcible entry. *Ibid.*

50. Where the trustees were required, by statute, to be divided into three classes, and the seats of one class were to be vacated at the expiration of every year, so that one third should be *annually chosen*, and that the time of the annual election should be at least six days before the vacancies should happen; and the annual election is held on a movable holiday, by which means, in some years, the election would not be at least six days, &c.; such election is, notwithstanding, valid. *Ibid.*

51. An agreement made with the trustees of a religious society, by which the subscribers to the agreement engage to pay every year to the trustees, certain sums respectively, for the support of A. B., a minister of the gospel, so long as he shall administer the gospel in the said society, and so long as the subscribers shall reside within, &c., is obligatory on the subscribers, so long as A. B. shall administer the gospel, or they shall continue to reside, &c., or until the agreement is dissolved by mutual consent; and the trustees, for the time being, may bring an action against such of the subscribers as are in default. *Religious Society in Whites-town v. Stone, 7 J. R. 112.*

52. The pews of a church were, by a vote of the congregation, sold at auction, free of rent, for the purpose of raising money to complete the building. A. purchased a pew, of which he continued in possession for several years, without any lease or other agreement, as to the pew or rent. In an action of *assumpsit*, brought by the trustees against A., to recover his proportion of the assessments, laid by the corporation on the pews, in order to defray the salary of the minister, it was held, that A. was not liable on any implied *assumpsit*; and the trustees having no power to make assessments *in personam*, A. was not liable personally, unless some contract or promise to pay was shown. *Trustees of the First Presbyterian Congregation in Hebron v. Quackenbush, 10 J. R. 217.*

53. In an action of ejectment, on several demises, (one of which was from the trustees of the parish of Newburgh, elected under an incorporation, pursuant to the act of the legisla-

ture to provide for the incorporation *of religious societies, passed in March, 1801, to recover the possession of 100 acres of land, part of 500 acres, granted by a charter of incorporation in 1752, for the use of a minister of the church of England, against the tenant, claiming to hold under the trustees of the same parish, elected pursuant to an act of the legislature, passed in April, 1803, relative to the said glebe; it was held, that the lessors of the plaintiff were not entitled to recover the premises against the tenant in possession. *Jackson, ex dem. Trustees of the Parish of Newburgh, v. Nestles*, 3 J. R. 115.

Corporation books, when evidence. See EVIDENCE.

COSTS.

- I. (a) *When costs are recoverable; (b) When costs are not recoverable; and when, if paid, an action lies to recover them back.*
- II. *When the plaintiff shall have full costs or not; (a) When the plaintiff, recovering 250 dollars, or less, shall have common pleas costs only; (b) When the plaintiff, recovering 50 dollars, or less, shall pay costs, and when the costs may be set off against the plaintiff's verdict; (c) When the plaintiff recovers 25 dollars, or less; (d) Costs in an action against an attorney.*
- III. *Costs in particular actions; (a) In trespass; (b) In actions in which the title to land comes in question; (c) Certificate of the judge to entitle to costs.*
- IV. *Double costs.*
- V. *Costs of a former action.*
- VI. *Costs on interlocutory proceedings.*
- VII. *Security for costs, when required, and when to be paid by the attorney for want of such security.*
- VIII. *Costs in error.*
- IX. *Taxation of costs; (a) What charges are taxable; (b) Notice of taxation of costs.*

- I. (a) *When costs are recoverable; (b) When costs are not recoverable; and when, if paid, an action lies to recover them back.*

(a) *When costs are recoverable.*

1. Wherever damages are given, costs follow, without being found by the jury. *Brown v. Smith*, 3 C. R. 81.

2. When the demandant, in dower, recovers damages, she shall have costs. *Hillyer v. Larzelere*, 10 J. R. 216.

3. In forcible entry and detainer, costs are given only where the defendant traverses the indictment. *The People v. Shaw*, 1 C. R. 125.

*4. If separate suits be brought [*422] against several joint trespassers, the plaintiff, although he can have but one satisfaction, may recover costs from each

of the defendants. *Livingston v. Bishop*, 1 J. R. 290.

5. Where separate suits are brought against the maker and endorser of a note, and separate judgments recovered, the plaintiff is entitled to the costs in each suit. *Austin v. Bemis*, 8 J. R. 356.

6. A defendant who attends with his witnesses before a sheriff, on notice from the plaintiff of executing a writ of inquiry of damages, is entitled to costs, if the plaintiff does not appear, and the writ of inquiry is not executed. *Butler v. Kelsey*, 14 J. R. 342.

7. Where costs are improperly struck out of the bill, the party cannot bring an action against the opposite party to recover them; but should appeal from the taxation. *Low v. Vrooman*, 15 J. R. 238.

8. In an action by a witness to recover his fees from the party by whom he was subpoenaed, *parol* evidence of his attendance, and examination before the Court, is admissible. *Baker v. Brill*, 15 J. R. 260.

9. A promise to pay the costs of a motion, the costs having been taxed, is founded on a sufficient consideration. *Warner v. Booge*, 15 J. R. 233.

10. Where judgment is given for the defendant, on a demurrer, in an action of *audita querela*, he is entitled to costs against the plaintiff, under the 12th section of the act, (Sess. 36. c. 96.) *Brooks v. Hunt*, 20 J. R. 295.

11. Though costs are not allowed to either party on a motion to change the venue; yet they abide the event of the suit, and may be taxed after judgment. *Norton v. Rich*, 20 J. R. 475.

(b) *When costs are not recoverable; and when, if paid, an action lies to recover them back.*

12. When the parties themselves settle a suit, without making any agreement respecting the costs, each party shall pay his own costs. *Watson v. Depeyster*, 1 C. R. 60. *S. P. Johnston v. Brannan*, 5 J. R. 268.

13. In an action *qui tam*, on the 4th section of the statute of frauds, (1 N. R. L. 76.) no costs are recoverable by either party. *Clark v. Devey*, 5 J. R. 251.

14. Costs are the consequence of some default, and are not awarded at common law, or in the instance Court against an innocent party. *Clinton v. Strong*, 9 J. R. 370.

15. No costs are given on an arrest of judgment. *Pangburn v. Ramsay*, 11 J. R. 141.

16. Where a judgment is reversed in part, and affirmed in part, no costs are allowed on either side. *Anonymous*, 12 J. R. 310.

17. Where a party dies before judgment, the costs die with the person. *Travis v. Waters*, 12 J. R. 500.

18. Where the costs were exacted by the clerk of the District Court of the United States, as a condition of giving an order for the redelivery of property seized by the collector of the customs, and by whom it had been liberated; it was held, that the payment was not *voluntary, and being exacted [*423] *colore officii*, might be recovered back in an action of *indebitatus assumpsit*, at

common law. *Clinton v. Strong*, 9 J. R. 370.

19. Where a suit is discontinued, for want of cause, without any decision of the Court, the exaction of costs is an act in pais, and the money may be recovered back by suit against the officer exacting it, in any other Court having competent jurisdiction. *Ibid*.

II. When the plaintiff shall have full costs or not; (a) When the plaintiff, recovering 250 dollars, or less, shall have Common Pleas costs only; (b) When the plaintiff recovering 50 dollars, or less, shall pay costs, and when the costs may be set off against the plaintiff's verdict; (c) When the plaintiff recovers 25 dollars, or less; (d) Costs in an action against an attorney.

(a) When the plaintiff, recovering 250 dollars, or less, shall have Common Pleas costs only.

20. In an action on a bond, conditioned for the performance of covenants, the plaintiff shall have full costs, although the jury assess nominal damages; for the judgment is for the penalty and not for the damages. *Hodges v. Suffitt*, 2 J. C. 406.

21. But, on a bond to secure the payment of instalments, if the amount due be reduced by a set-off, judgment will not be for the penalty but for the balance, and the plaintiff must recover costs accordingly. *Van Antwerp v. Ingersoll*, 2 C. R. 107.

22. A plaintiff, recovering 250 dollars debt, and also damages for the detention, is entitled to full costs. *Clapp v. Reynolds*, 2 J. C. 409.

23. In an action of debt on a bond, for 4,600 dollars, conditioned to pay 1,800 dollars in yearly instalments of 200 dollars each, brought to recover the first instalment, the plaintiff recovered judgment for the debt, and 49 dollars and 80 cents damages; it was held, that he was entitled to full costs. *Pearson v. Bailey*, 10 J. R. 219. *Sed quare*.

24. An attorney, suing by attachment of privilege, for a debt less than 250 dollars, can only recover Common Pleas costs. *Bailey's Case*, 1 J. C. 32.

25. If, after suit brought, the sum due be reduced by partial payments below 250 dollars, and a *cognovit* is taken for the residue, the plaintiff cannot recover Supreme Court costs. *McGregor v. Loveland*, 1 C. R. 66.

26. Where several suits are consolidated, and the plaintiff, in the leading suits, recovers more than 250 dollars, and in the other suits less, he will not be entitled to Supreme Court costs in the suits in which less than 250 dollars is recovered. *Ibid*.

27. In covenant for non-payment of rent reserved in a lease, the plaintiff recovering less than 250 dollars, can have only Common Pleas costs. *Becker v. Platt*, 7 J. R. 555.

28. Where a suit is brought in the Supreme Court, on a bail bond taken in the Common Pleas, the plaintiff can recover
[*424] Common Pleas costs only. *Haswell v. Bates*, 9 J. R. 80. *S. P. Gardiner v. Burham*, 12 J. R. 450. [Those

cases were on motions pending the suit; but if the plaintiff had proceeded to judgment, and recovered more than 250 dollars, would he not have been entitled to Supreme Court costs? *Quare*.]

29. In an action of debt on a bond, for the penal sum of 500 dollars, conditioned to abide the award of arbitrators, judgment in form was entered up for the penalty, though the jury assessed the damages to 13 dollars only; held, that the plaintiff was entitled to recover full costs. *Godfrey v. Vancott*, 13 J. R. 345.

30. The judgment is the test by which the right to costs is to be determined. *Ibid*.

31. Where a suit is brought in the Supreme Court, but, from the amount recovered, the plaintiff is entitled only to costs in the Common Pleas, the plaintiff can recover costs only according to the existing rate of costs in the Court of Common Pleas. (*See Sess. 41. c. 259*.) *Anon.* 17 J. R. 109.

32. A verdict rendered in the Supreme Court for the plaintiff, for less than 250 dollars, was set aside, on payment of costs; the plaintiff made out a bill of costs, according to the rate established for that Court, which was served, notice of taxation given, and costs taxed, *ex parte*, no person attending for the defendant, who paid the costs thus taxed; the Court refused to grant a retaxation, and to order what had been paid beyond Common Pleas costs to be returned. *Hinkley v. Boardman*, 3 C. R. 134.

(b) Where the plaintiff, recovering 50 dollars, or less, shall pay costs, and when the costs may be set off against the plaintiff's verdict.

33. The damages recovered above the sum of 50 dollars, in order to entitle the plaintiff to costs, must be damages assessed by the jury, *eo nomine*, exclusively of the costs which they may find. *Van Horne v. Petrie*, 2 C. R. 213.

34. So, where the jury, in an action in the Supreme Court, find for the plaintiff 50 dollars damages, and 6 cents costs, he must pay costs to the defendant. *Ibid.* *S. P. Steele v. Western Lock Company*, 2 J. R. 283. *Ross v. Dole*, 13 J. R. 306.

35. Where the plaintiff in the Supreme Court recovers less than 50 dollars, the defendant may set off his costs against the money recovered. *Spence v. White*, 1 J. C. 102. *S. C. C. C. 67.* *S. P. Porter v. Lane*, 8 J. R. 357. *And see Ross v. Dole*, 13 J. R. 306. *Jackson v. Randall*, 11 J. R. 405.

36. If in an action of slander commenced in a Court of Common Pleas, and removed into the Supreme Court by *habeas corpus*, the plaintiff in the Supreme Court recovers less than 50 dollars damages, he is entitled to no more costs than damages under the act. (*Sess. 36. c. 96. s. 37.*) *Waterman v. Benschootten*, 13 J. R. 425.

37. In an action for a nuisance, if the plaintiff does not recover fifty dollars damages, he must pay costs; but may set off the damages against the defendant's costs. *Ross v. Dole*, 13 J. R. 306.

38. In an action for false imprisonment only,
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[*425] if the plaintiff recovers *damages, though less than \$/by dollars, he is entitled to full costs in the Supreme Court. *Bigelow v. Stearns*, 19 J. R. 168.

(c) *When the plaintiff recovers 25 dollars, or less.*

39. In the Common Pleas, if the jury find for the plaintiff 25 dollars damages, and 6 cents costs, he must pay costs to the defendant. *Seaman v. Bailey*, 2 C. R. 214.

40. Plaintiff, in trespass on the case, in the Common Pleas, recovering 6 cents damages and 6 cents costs, must pay the defendant's costs. *Van Cott v. Negus*, 2 C. R. 235. Whether this rule is not to be confined to those cases only, which are within the jurisdiction of a Justice's Court? *Quere.*

41. In the Common Pleas, if the plaintiff's judgment be reduced under 25 dollars, by the defendant's set-off, he must pay costs. *Hodges v. Suffell*, 2 J. C. 406.

42. If, in an action in the Common Pleas, there are mutual accounts between the parties, and the sum of the accounts of both parties taken together exceeds 200 dollars, the plaintiff, on obtaining a verdict, or report, if the cause were referred, for less than 25 dollars, is entitled to costs. *Dunham v. Chamberlain*, 9 J. R. 224.

(d) *Costs in an action against an attorney.*

43. Where a judgment is obtained against an attorney in the Supreme Court for less than 250 dollars, [but over 25 dollars,] the plaintiff is entitled to full costs. *Varian v. Ogilvie*, 3 J. R. 450.

44. Where, in a suit against an attorney of the Supreme Court, the plaintiff recovers less than 25 dollars, the defendant is not liable for costs, since, by the act, (Sess. 28. c. 93. s. 6.) attorneys may be sued before justices of the peace, in the same manner as other persons, except during the sitting of the Court. *Moulton v. Hubbard*, 6 J. R. 352. (See *Bailey's Case*, 1 J. C. 32.)

45. So, if a plaintiff recover less than 25 dollars against an attorney, he will be liable to pay costs to the defendant; but the plaintiff may set off the amount he has recovered against so much of the costs. *Willett v. Starr*, 8 J. R. 123.

46. Where an attorney of the Supreme Court is sued, and judgment is recovered for a sum exceeding 25 dollars, but less than 50 dollars, the plaintiff is entitled to full costs. *Walah v. Sackrider*, 7 J. R. 537.

47. The privilege of counsellors and attorneys being taken away, (except while the Court is actually sitting,) by the act, (Sess. 36. c. 93. s. 12.) so that they may be arrested and held to bail like other persons, they stand on the same ground, also, in respect to costs; and if sued by bill, during term, and less than fifty dollars is recovered against them, they are not liable for costs. *Foster v. Gurnsey*, 13 J. R. 405.

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*III. *Costs in particular actions; [*426]*
(a) *In trespass; (b) In actions in which the title to land comes in question; (c) Certificate of the judge, to entitle to costs.*

(a) *In trespass.*

48. In actions of trespass, it rests in the discretion of the judge, to certify whether the trespass was malicious or not, and if he refuses, the Court will not interfere. *Heath v. M'Inroy*, 6 J. R. 277.

49. It seems, that a voluntary trespass is not, *per se*, wilful and malicious, within the meaning of the act, but it should appear to be done *mala fide*, or with an intention to injure or vex the plaintiff, or with a consciousness of violating right. *Ibid.*

50. To warrant a certificate that the trespass was wilful and malicious, it must have been voluntary in fact, and not merely by construction. *Tower v. Wilson*, 3 C. R. 174.

51. A certificate ought not to be granted in an action against a sheriff for an act of his deputy, in taking wrong property, on a *fi. fa.* when he knew nothing of it himself. *Ibid.*

52. In assault and battery, where the jury find for the plaintiff less than five dollars, the judge is not bound to certify, unless, on the evidence, he is satisfied that an assault and battery were sufficiently proved. *Hunt v. Leon*, 3 J. C. 140.

53. Where the plaintiff declared in trespass *quare clausum fregit*, and for assaulting and debauching his daughter, *per quod*, &c., and obtained a general verdict for 10 dollars damages, he was allowed costs. *Spalbergh v. Walrod*, 1 J. C. 162.

54. The revised act concerning costs, (Sess. 36. c. 96. 1 N. R. L. 343.) does not authorize a certificate that the trespass was wilful and malicious. *Crane v. Comstock*, 11 J. R. 404.

55. In trespass for cutting down timber, brought under the statute, (Sess. 36. c. 56. s. 29.) the plaintiff is entitled to *treble* costs, as well as *treble* damages. *Morris v. Brush*, 14 J. R. 328.

(b) *In actions in which the title to land comes in question.*

56. In order to entitle the plaintiff to full costs in trespass, on the ground that the freehold was in question, that fact must appear from the certificate of the judge who presided, and cannot be determined by reference to the pleadings. *Farrington v. Rennie*, 2 C. R. 220. *S. P. Jackson v. Randall*, 11 J. R. 405.

57. In trespass *quare clausum fregit*, if the defendant justify under a right of way, and the jury find six cents damages for the plaintiff, he will be entitled to full costs under the statute. *Heaton v. Ferris*, 1 J. R. 146.

58. In an action on the case, for overflowing the plaintiff's lands, the defendant justified, under a prescription to overflow those lands, the plaintiff, after a verdict for him for 15 dol-

lars, was held entitled to full costs. *Eustace v. Tutwill*, 2 J. R. 185.

59. In an action on the case, for overflowing the plaintiff's land, *by means [*427] of a mill-dam, the defendant gave in evidence a license from the plaintiff, but the plaintiff proved a revocation of the license, and the jury found a verdict in his favor for 9 dollars; held, that the freehold, or title to land, did not come in question, so as to entitle the plaintiff to full costs. *Otis v. Hall*, 3 J. R. 450.

60. In an action of trespass *quare clausum fregit*, brought in a Court of Common Pleas, in which the title to land did not come in question, the plaintiff recovered damages to the amount of one dollar; held, that the suit being cognizable before a justice of the peace, the defendant was entitled to recover his costs against the plaintiff. *Sing v. Annin*, 10 J. R. 302.

61. In trespass *quare clausum fregit*, the plaintiff, to entitle himself to costs, must recover above the sum of 50 dollars, unless the freehold or title to the land comes in question. *Crane v. Comstock*, 11 J. R. 404. *S. P. Jackson v. Randall*, *id.* 405.

62. In an action of trespass for mesne profits, after a recovery in ejectment, the title, ordinarily, cannot come in question. *Jackson v. Randall*, 11 J. R. 405.

63. If the plaintiff claims damages for the occupation prior to the time laid in the demise, the defendant may dispute the title prior to that time, and the plaintiff may, in such case, recover costs. *Ibid.*

64. But where the plaintiff seeks only to recover from the time of the demise laid in the declaration, the defendant cannot dispute the title, and the plaintiff cannot recover costs on the ground that the title was in question. *Ibid.*

65. In an action on the case, for erecting a nuisance, the plaintiff having recovered forty-five dollars damages only, and there being no certificate of the judge that the title to land came in question; held, that the plaintiff could not recover costs, but must pay costs to the defendant. *Ross v. Dole*, 13 J. R. 306. But the plaintiff was allowed to set off the damages against the costs, without regard to any lien claimed by the attorney. *Ibid.*

(c) *Certificate of the judge, to entitle to costs.*

66. The judge's certificate need not be given at the trial. *Towers v. Viehe*, 1 J. C. 221. *S. C. C. C.* 88.

67. A certificate granted after costs have been taxed, is sufficient. *Heaton v. Ferris*, 1 J. R. 146.

IV. Double Costs.

68. In an action for a malicious prosecution, against a justice and the person at whose instance he sued the warrant, on which the plaintiff was nonsuited at the trial, the defendants having pleaded separately; held, that the justice was entitled to double costs, and the other defendant to single costs, to be taxed separately. *Row v. Sherwood*, 6 J. R. 100.

69. The act, giving double costs in suits against sheriffs, and other *officers, does not extend to the case of a [*428] judgment for the defendant, on demurrer. *Stone v. Woods*, 5 J. R. 182.

70. So, where in an action against a justice, for an act done in his official capacity, there is an issue of fact and a demurrer, and the plaintiff is nonsuited on the issue of fact, for not proceeding to trial, and judgment is given against him on the demurrer, the defendant is entitled to double costs on the *nonsuit*, but not on the demurrer. *Wait v. Durand*, 9 J. R. 254.

71. And after double costs have been taxed on both issues, and part of the costs paid, and an execution issued for the residue, on motion to set aside the execution, the Court ordered a retaxation of the costs, at the expense of the plaintiff, with a stay of execution in the mean time, and neither party to recover costs on the application. *Ibid.*

72. On a notice for judgment as in case of nonsuit, for not proceeding to trial, in an action against a sheriff, where a plaintiff is entitled to stipulate, he is not bound to pay double costs on making the stipulation. *Tulcot v. Woodruff*, 3 J. R. 443. See *Morris v. Brush*, 14 J. R. 328.

73. Where an action of trespass *quare clausum fregit*, was commenced before a justice of the peace, and the defendant put in a plea of title in the *locus in quo*, and the plaintiff then commenced his action in the Court of Common Pleas of the county, and the defendant removed the cause, by *habeas corpus*, into the Supreme Court, and the plaintiff recovered damages; held, that he was entitled to double costs, under the seventh section of the act of April 5, 1813, (Sess. 36. c. 53.) the action being considered, after its removal, as if it had been originally commenced in the Supreme Court. *Bennet v. Rathbun*, 17 J. R. 37.

74. Where a sheriff, or other officer, is sued, and the plaintiff recovers less than 50 dollars damages, so that he is not entitled to costs, but the defendant; the latter is not entitled to double costs, but to single costs only, under the act, (Sess. 36. c. 96. s. 4.) *Nichols v. Ketchum*, 19 J. R. 167.

75. Where there was a demurrer to one of the counts in an action of *replevin*, and issue joined on the other counts, and judgment was given for the defendant on the demurrer, as well as on the verdict found in his favor on the issues; held, that he was not entitled to treble costs, but to single costs only on the demurrer, and double costs on the issues. *Gibbs v. Bull*, 20 J. R. 212. And see *ante*, pl. 55.

V. Costs of a former action.

76. Where a plaintiff voluntarily suffers a nonsuit, and then brings a second action, proceedings may be stayed, on motion, at any time before trial, until the costs of the first suit are paid. *Cuyler v. Vanderwerk*, 1 J. C. 247. *S. C. C. C.* 89.

77. The Court will not stay proceedings in a suit, until the costs of a suit in the Court of Chancery, between the same parties, concern-

ing the same matter, and in which the plaintiff's bill was dismissed with costs, are first paid. *Stebbins v. Grant*, 19 J. R. 196.

*78. Where a second action, (personal or mixed,) is brought either in the Supreme Court, or a Court of Common Pleas, and a trial has been had, or the plaintiff has become nonsuited, the Court will stay proceedings until the costs of the former action for the same cause are paid. *Perkins v. Hinman*, 19 J. R. 237.

VI. Costs on interlocutory proceedings.

80. Where a regular proceeding is set aside, on motion, the party applying must pay costs. *Torrey v. Murchouse*, 1 J. C. 242.

81. If a plaintiff, after giving notice of the trial, countermands it, he must pay the costs incurred by the defendant, between the time of receiving notice of trial and the countermand. *Keys v. Beardley*, 18 J. R. 135.

82. The imposing costs upon the party applying for relief, does not depend upon any statute, but upon the equity and discretion of the Court. *Philips v. Peck*, 2 J. C. 104.

83. Where the party has it in his power to enforce payment of costs awarded him, by attachment, the Court will not take the non-payment into consideration, in forming a subsequent decision on a collateral matter. *Jackson v. Mann*, 2 C. R. 92.

84. If the party does not move for all the costs, which he is then entitled to on his motion, he cannot move for them at a subsequent term. *Palmer v. Mulligan*, 2 C. R. 380.

85. A party obtaining leave to amend, must pay costs. *Holmes v. Lansing*, 1 J. C. 248. *Livingston v. Rogers*, 1 C. R. 583. *Stafford v. Greene*, 1 J. R. 505.

86. Where a party obtains a stay of proceedings, on payment of costs, he should seek the other party, and tender them to him. *Stansbury v. Durell*, 1 J. C. 396. S. C. C. C. 99. *Cathcart v. Cannon*, id. 220. *Gilliland v. Morrell*, 1 C. R. 154.

87. Costs must be paid within twenty days. *Brooks v. Hunt*, 3 C. R. 94, 95.

VII. Security for costs, when required, and when to be paid by the attorney for want of such security.

88. Where a suit shall be commenced for a non-resident plaintiff, before security for costs, by a sufficient householder of the state, in the sum of one hundred dollars, in the usual form, shall be given, the attorney shall be deemed to have become security for the costs. Gen. Rule, XIV. January, 1798.

89. So, if pending the suit, the plaintiff remove out of the state, and the attorney proceed in the cause, before security be given. *Ibid.*

90. But he shall not, in any case, be liable to an amount exceeding one hundred dollars. *Ibid.*

91. Or, where if there shall be a plurality of plaintiffs, one of them shall be resident within the state. *Ibid.*

*92. Although the resident plaintiff die pending the suit. *Jackson*, ex dem. *Lewis*, v. *Powell*, 2 J. C. 67.

93. Or becomes insolvent. *Pfister v. Gillespie*, 2 J. C. 109. S. C. C. C. 119.

94. Where an insolvent had assigned over all his estate for the benefit of his creditors, and a judgment was recovered in his name, in the Court of Common Pleas, on which a writ of error was brought; the assignees, for whose benefit the suit was prosecuted, were ordered to give security in the sum of one hundred dollars. *Ketchum v. Clark*, 4 J. R. 484.

95. The bringing a writ of error is not the commencement of such a suit as comes within the rule, by which the attorney can be made responsible for the costs. *Frary v. Dubin*, 8 J. R. 353.

96. But, it seems, that where a writ of error is brought by a non-resident plaintiff, the Court will stay proceedings until security for costs has been given. *Ibid.*

97. The clerk cannot give up bonds, filed for security for costs, in an action where a non-resident is plaintiff; the application must be to the Court, on an affidavit, stating the due taxation of costs, the name of the surety, and the non-residence of the plaintiff. *Melke v. Childs*, 3 C. R. 139.

98. A bond, as security for costs, in the case of a non-resident plaintiff, executed at the trial, and tendered to the defendant's counsel, who, admitting the sufficiency of the obligors, refuses to receive it, and it is then filed with the clerk, is a valid security, of which the defendant may avail himself, in case of a verdict in his favor, or the plaintiff becomes nonsuit. *Brandigee v. Hale*, 13 J. R. 125.

99. But if the defendant had not admitted the sufficiency of the obligors, could the judge, at the circuit, have decided upon it? *Quere. Ibid.*

100. It is too late, after trial, to move that the lessors of the plaintiff in ejectment, who were infants, filed security for costs, *nunc pro tunc*. *Jackson*, ex dem. *Erving*, v. *Bushnell*, 13 J. R. 330.

VIII. Costs in error.

101. Where the judgment in the Court below is reversed, the plaintiff in error can only have costs in the Court below, up to the time of giving judgment, and cannot recover costs on the writ of error. *Le Guen v. Gouverneur & Kemble*, 1 J. C. 436. *Pease v. Morgan*, 7 J. R. 468.

102. But now, by the revised act concerning costs, (Sess. 36. c. 96. s. 13. 1 N. R. L. 346.) costs are recoverable on a reversal of a judgment, on error.

103. Where a judgment is reversed in part, and affirmed in part, costs will be allowed on neither side. *Smith v. Jansen*, 8 J. R. 111.

104. Where judgment is given in the Court below, against the plaintiff, who brings a writ of error, and the judgment is affirmed, the defendant is not entitled to double costs, under the 14th section of the act concerning costs, (1 N. R. L. 346.) which is only for delaying

[*431] *execution; but he is entitled to single costs under the 12th section of the act. *Peters v. Henry*, 6 J. R. 278.

IX. *Taxation of costs; (a) What charges are taxable; (b) Notice of taxation.*

(a) *What charges are taxable.*

105. When the fee-bill mentions, that, in certain cases, there shall be but one taxation of costs, it means, that in the case where the plaintiff might consolidate, and yet proceeds separately, he shall have costs taxed but in one suit, and may elect the suit. 1 C. R. 109.

106. The plaintiff is not entitled to charge entries on the roll, until the cause has proceeded to an issue or judgment. *Ibid.*

107. If the same plea, instead of being pleaded to the whole of the previous pleading, be pleaded separately to each plea or count, only one plea will be allowed in taxing costs. *Pellon v. Ward*, 3 C. R. 73.

108. The crier is entitled to fees for ringing the bell, and calling the action at the sittings and circuit. *Anonymous*, 1 J. R. 312.

109. The costs of suing out a commission to examine witnesses, such as the affidavit, notice and motion, drawing, engrossing, and sealing the commission, &c. may be taxed; but not the expenses of executing the commission. *Kenney v. Vanhorne*, 2 J. R. 107.

110. Cases made for the argument of a cause are not taxable. *Ibid.* [But by the late act regulating fees, they are taxable.]

111. In the Court of Errors, four copies only of the cases or paper books, are taxable. *Clason v. Shotwell*, 12 J. R. 512.

112. When witnesses are brought from another state, the time of their attendance can only be computed from the place of trial, arriving and returning, to the boundary line of the state; and the distance, in taxing the costs, must be taken accordingly. *Howland v. Lenox*, 4 J. R. 311.

113. No fees for attendance and travel of witnesses, can be taxed without proof, by affidavit, of their actual attendance and travel. *Jackson, ex dem. Kincard, v. Scott*, 6 J. R. 330.

114. Costs for the travel and attendance of witnesses at the city of New-York, examined *ex parte*, are not allowable. *Clason v. Shotwell*, 12 J. R. 512.

115. Costs to counsel, for perusing pleadings or entries, shall not be taxable without a certificate, signed by the counsel, certifying that he perused the pleading or entry charged in the bill as special; and that, in his opinion, they were special. Gen. Rule, XI. January, 1799.

116. The plaintiff can have but one count in his declaration taxed, for each distinct cause of action; and where there shall be more than one count for the same cause of action, the plaintiff's attorney may elect the count to be taxed. Gen. Rule, XII. January, 1799.

117. But if the plaintiff's attorney produce an affidavit to the judge or clerk, taxing the costs, that the suit was brought for several causes of action to be specified in the affidavit,

he shall then be entitled *to have as [*432] many counts taxed as there shall be causes of action specified in the affidavit. *Ibid.*

118. And if there shall have been a trial or inquiry, and the defendant shall procure a certificate from the judge, certifying the counts on which the plaintiff recovered, or from the sheriff or clerk, certifying the counts on which the damages were assessed, then only the counts specified in the certificate shall be taxed against the defendant, the affidavit of the plaintiff's attorney notwithstanding. *Ibid.*

119. But where the cause of action shall be for goods sold and delivered or services performed, the plaintiff shall be entitled to have a count in an *indebitatus assumpsit*, and a count on a *quantum meruit*, or *quantum valebat*, taxed for each of those respective causes of action. *Ibid.*

120. A defendant in a suit for an attorney's bill, cannot contest the items at the trial, but ought to have the bill taxed. *Scott v. Elmen-dorf*, 12 J. R. 315.

121. As between attorney and client, the former is entitled to costs of the Common Pleas only, where his charges arise from his employment in a suit for the recovery of a sum less than 250 dollars; especially where he brings an action for costs, on the implied *assumpsit* arising from his retainer. *Ibid.*

122. *Electors in the Grand Assise, on a writ of right*, are entitled to the same fees for attending Court, as the sheriff; viz. three dollars *per diem*, for going to and returning from the Supreme Court. *Bryan v. Seely*, 13 J. R. 123.

123. No additional fees can be claimed by witnesses, from the party by whom they have been *subpoenaed*, for their expenses and attendance, at a trial in a Court of Record, than those specified in the fee-bill, as prescribed by the statute. *Fuller v. Maltice*, 14 J. R. 357.

124. Where costs, upon taxation, have been improperly struck out of the bill, the remedy of the party is by an appeal from the taxation; and not by an action against the opposite party to recover the charges so struck out. *Low v. Froeman*, 15 J. R. 238.

125. Where there are several suits depending between the same parties, and which are included together on the same paper, in one affidavit and notice of motion, one bill of costs only is allowed to be taxed, on the granting the motion. *Jackson, ex dem. Burnett, v. Keller*, 18 J. R. 310.

126. But where the titles of several causes, in which the names are different, are included in the same affidavit or notice, the clerk, on entering defaults, is entitled to his fees in each cause. *Boyce v. Thompson*, 20 J. R. 274.

127. The fees paid for *exemplifications of records*, produced in evidence at the trial of a cause, may be taxed. *Jackson, ex dem. Bond, v. Root*, 18 J. R. 336.

(b) *Notice of taxation.*

128. If costs be not taxed on the day for which notice is given, and the opposite party does not appear, the taxation may be made on

a subsequent day, without further notice. *Cooper v. Astor*, 1 J. C. 32.

*129. Notice of taxation must be served on the attorney, not on the counsel in the cause. *Jackson*, ex dem. *Lewis*, v. *Larroway*, 2 J. C. 114. S. C. C. C. 124.

COSTS ON AN APPEAL FROM CHANCERY. See *tit. CHANCERY*, V.

— an order of Justices.

See *POOR*.

— ON A *CERTIORARI* TO A JUSTICE'S COURT. See *CERTIORARI TO A JUSTICE'S COURT*, VI.

— IN CHANCERY. See *CHANCERY*, XVI.

— IN A JUSTICE'S COURT. See *COURTS OF JUSTICES OF THE PEACE*.

— ON ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS. See *EXECUTORS AND ADMINISTRATORS*.

COVENANT.

- I. *What is a covenant.*
- II. *How a covenant is to be construed.*
- III. *Performance of a covenant.*
- IV. *Breach of a covenant.*
- V. *Covenants in a deed of land; (a) Express covenants; (b) Implied covenants; (c) Breach; (d) Measure of damages in an action of covenant for a breach of the covenants in a deed.*
- VI. *Action of covenant.*

I. *What is a covenant.*

1. No particular technical words are requisite to make a covenant, but any words which import an agreement between the parties to a deed, will be sufficient for that purpose. *Hallett v. Wylie*, 3 J. R. 44.

2. A. assigns a lease, in consideration of £12, the assignment to be void on the payment of £12, by a certain day; otherwise, the assignee to sell the premises assigned, and pay himself the £12. This is not a covenant to pay, and no action will lie upon it, but the assignee's remedy is to sell the term. *Salisbury v. Philips*, 10 J. R. 57.

II. *How a covenant is to be construed.*

3. Covenants are to be construed according to the spirit and intent. *Quackenboss v. Lansing*, 6 J. R. 49.

4. A covenant, by several persons, may be taken distributively, though there be no express words of severalty. *Ernst v. Bartle*, 1 J. C. 319.

5. A covenant to convey the title, means the legal estate in fee, free from [*434] all valid claims, liens, or encumbrances whatever. *Jones v. Gardner*, 10 J. R. 266.

6. So, if the covenantor tender a deed, executed by himself and wife, but not acknowledged by the wife, it is not a performance of the covenant. *Ibid.*

7. A covenant to convey a farm of land, means the whole farm, and will not be satisfied by a conveyance of part only. *Ibid.*

8. A covenant to execute and deliver a good and sufficient deed, means an operative conveyance, or one that transfers a good and sufficient title to the lands conveyed. *Clute v. Robison*, on appeal, 2 J. R. 595. [See *AGREEMENT*, IV. pl. 86. *Van Eps v. Schenectady*, 12 J. R. 436.]

9. W. covenanted, that in case the title to a lot of land, conveyed to him by F. should prove good and sufficient in law against all other claims, that he would pay to F., three months after he should be well satisfied that the title was undisputed and good against all other claims, &c. W. cannot exonerate himself from payment, by a mere allegation of dissatisfaction, but he should show some lawful encumbrance or claim existing against the title; it is for the law to determine when he ought to be satisfied; and he ought to be satisfied with an award of the *Onondaga* commissioners in favor of his title. *Folliard v. Wallace*, 2 J. R. 395.

10. Where some of the heirs of A. deceased, having purchased of his widow her right of dower to the estate, for which they gave a bond to the widow, agreed to let in the other heirs to an equal participation of the benefit of the purchase, on their paying their proportion of the purchase money; and the other heirs covenanted to pay; their proportion of the obligation to the widow; this was held a mutual covenant between the heirs, and that the word *widow* was used only to designate the obligation intended. *Gardner v. Gardner*, 10 J. R. 47.

11. In a lease from the corporation of New-York, in 1806, the lessee covenanted to pay all duties, taxes, assessments, impositions, and payments, as should, during the term, be issued, or grow due and payable out of and for the demised premises, &c.; held, that the lessee was liable for the payment of an assessment imposed on the premises, to defray the expense of opening and improving a street, by an ordinance of the corporation, under the act, (Sess. 26. c. 70. s. 15.) relative to the police and health of the city. *Corporation of New-York v. Cashman*, 10 J. R. 96. *S. P. Oswald v. Gilbert*, 11 J. R. 443.

12. Where, by a bill of sale, B. granted, bargained, and sold a negro woman slave, named, &c. being of sound mind and limb, and free from all disease; held, that these were not words of description, but an averment of a fact, and amounted to an express covenant or warranty, as to the soundness of the slave. *Cramer v. Bradshaw*, 10 J. R. 484.

13. T. sold to B. a promissory note, to be collected by him at his own risk and costs, as respected the ability of the maker, and T. covenanted to pay B. 2,000 when required, in case B. should take all and every legal step, to prosecute to effect the maker and payee, to wit, if B., or no one in his name, nor in the name of the payee, could not recover judgment legally against the maker on the said note, or against the payee, in case he had discharged the note, (as he might do

since, according to the laws of *Massachusetts*, in which the covenant was made, the suit on the note must be brought in the name of the payee, who, by discharging the maker, would render himself liable to the holder,) *at the time of making the said covenant, previous to the bringing of a suit against the maker; held*, that the payee, not having discharged the note before the date of the covenant, or before the commencement of a suit against the maker, the covenant was performed by bringing a suit against the maker alone, although the note was, pending such suit, discharged by the payee. *Betts v. Turner*, 1 J. C. 65. in which judgment was given for the plaintiff. [See S. C. 2 C. C. E. 305. (edition of 1810) in which it is said that judgment was given for the defendant, the opinion of *Kent, J.*, who dissented, being erroneously stated as that of the Court.]

14. Where a bond, payable by instalments, was assigned, with a covenant from the assignor, that in case the obligor should become insolvent, or not be able to pay the said bond, and if the said assignee should use all due diligence, and take all legal measures, by prosecution at law, to recover the same, and that immediately after the several instalments should become due, and should not be able to compel payment, the assignor would pay the amount of the bond, or such part thereof as should then remain due; *held*, that the assignee was not bound to wait until the last instalment became payable before he could maintain an action; that the due diligence required by the covenant was satisfied, by the assignee's prosecuting all ordinary legal measures with good faith; that the obligor having been proceeded against as an absconding debtor, was sufficient evidence of his insolvency, and the assignee need not show that he had received anything in the distribution of his effects; and that it was not necessary for the assignee to take notice that any instalment had become due previous to that for which he brings his action. *Ten Eyck v. Tibbits*, 1 C. R. 427.

15. A covenant in a lease on the part of the lessor, to let the lot, at the expiration of the term, to the lessee, without mentioning any price for which it was to be let, is not a covenant for a perpetual lease; and can, at best, be extended only to a single renewal for the same term for which the original lease was given. *Abel v. Radcliff*, 13 J. R. 297.

16. But it is not even capable of being so construed; but is altogether void for uncertainty. *Ibid.*

17. A. conveys land to B. with covenants, and B. conveys it to C., and takes a mortgage to secure the purchase money; C., (the mortgage being unsatisfied,) cannot relieve A. from the covenants, in his deed, for by the mortgage the seisin was revested in B. *Kane v. Sanger*, 14 J. R. 89.

18. A covenant that the grantor is seised of an indefeasible estate, &c., without any manner of condition, to alter, charge, determine, or defeat the same, is not only a covenant of seisin, but also, in effect, a covenant against encumbrances. *Stanard v. Eldridge*, 16 J. R. 254.

*19. The covenant of seisin extends only to a title existing in a third person, and which might defeat the estate granted by the defendant. *Fitch v. Baldwin*, 17 J. R. 161.

20. The plaintiff claimed title to lands under the *Saratoga* patent, and the defendant, who claimed the same lands, under the *Kayaderoseras* patent, executed a release to the plaintiff of the same land to which he claimed title. In an action brought by the plaintiff, for a breach of the covenant of seisin in the defendant's deed, on the ground, that the land was, in fact, within the *Saratoga* patent, and therefore, the defendant was not seised, &c.; *held*, that the plaintiff, by accepting the conveyance from the defendant, was estopped from alleging, that the land released to him did not lie in the *Kayaderoseras* patent, or that the defendant was not seised of the land in consequence of the prior seisin of the plaintiff under the *Saratoga* patent, which was the oldest. *Ibid.*

21. B. being possessed of a term of years, in *England*, of which 1690 years remained unexpired, assigned the same to P. for 1600 years, at a yearly rent. P. sold and assigned the same to the defendant, who covenanted to perform all the covenants, &c. contained in the indenture of demise, from B. to P., and on the part of P. to be performed, &c.; P. brought an action of covenant against the defendant, to recover rents due and unpaid to B. for 24 years, and the defendant pleaded that before any rent accrued or became due and payable to the lessor, he assigned all his interest, term, &c. to G., who entered into possession of the premises, and was accepted by B. as his tenant; *held*, on demurrer, that the plea was bad; that the covenant on the part of the defendant was a positive and express covenant to pay the rent, as it should become due, to the lessor, and for which the plaintiff remained liable on his covenant to B. by privity of contract, notwithstanding the assignment by the defendant to G., and the acceptance of him by B. as tenant. *Port v. Jackson*, 17 J. R. 239. S. C. in error, 17 J. R. 479.

22. It is not necessary, in such case, that the plaintiff should allege in his declaration or replication, that he had been obliged to pay the rent to B., or had been damaged, for the defendant's covenant was broken by the non-payment of the rent, and *non damnificatus* is no answer to the declaration, and the plaintiff is, therefore, entitled to recover the whole rent in arrear and unpaid, for which he was liable on his covenant with B. *Ibid.*

23. When the covenants are dependent, the payment of the money and the conveyance of the land must be simultaneous; and there must be a capacity to convey the land existing at the time in the party who is to execute the deed. *Robb v. Montgomery*, 20 J. R. 15.

24. But where the covenants are independent, and the payment of the money is to precede the conveyance, it is no excuse for the non-payment of the money, that the other party has not a present existing capacity to convey a good title. *Ibid.*

25. But if the party who is to pay, offer to do so, on receiving a good title, the other party must give him a good title, or the contract will be rescinded. *Ibid.*

*26. The defendant covenanted [*437] to pay to the plaintiff 2,500 dollars, in instalments; and the plaintiff, in consideration of the payments being punctually made, at the times, &c., covenanted to convey in fee simple to the defendant certain lots of land; and the parties further agreed, that if the first instalment was paid at the time it became due, and the defendant wished to have a deed, and would give a bond and mortgage of the premises conveyed, to secure the other instalments, the plaintiff would then give a deed with warranty, and take a mortgage. Before the time limited for the payment of the first instalment, the plaintiff sold and conveyed the land in fee simple to B., and assigned to him the contract made with the defendant. In an action to recover the instalments; *held*, that the covenants were mutual and independent; that the defendant was bound to aver, in his plea, a demand of a deed from the plaintiff, and an offer on his part to execute the bond and mortgage; that the contract was not rescinded on the part of the plaintiff; nor had he incapacitated himself from performing the contract, as B. might be compelled in the Court of Chancery to perform it. *Ibid.*

27. By an agreement under seal, for the sale and purchase of land, the defendant covenanted to pay 250 dollars, as the consideration money, on the 1st of January, 1818, and the plaintiff covenanted, that, upon the performance of the defendant's covenant, he would "execute to him, his heirs and assigns, a good warranty deed of conveyance of the land;" *held*, that the covenants were dependent; that the words "a good warranty deed of conveyance," referred to the instrument of conveyance only, not to the title; that a plea, therefore, that the plaintiff was not seised, &c., or that he had no title, was not good, in avoidance of an action to recover the purchase money; for in an action on a deed or specialty, a mere failure of consideration is no defence at law. *Parker v. Parmele*, 20 J. R. 130.

28. But a plea, that the plaintiff did not, on the day appointed, nor any time since, tender, or offer to execute, a good warranty deed of conveyance of the premises to the defendant, is a good bar; for the vendor cannot maintain an action for the purchase money, without having executed or tendered a conveyance. *Ibid.*

29. The defendant, after granting a tract of land, described by metes and bounds, added, "containing 600 acres, and the same is hereby covenanted and warranted to contain, at least, 500 acres," and then covenanted generally, that he was seised, &c., being the usual general covenants with warranty; *held*, that the general covenants in the deed were restricted by the special covenant as to the quantity of land. *Whallon v. Kauffman*, 19 J. R. 97.

See CONDITION.

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III. Performance of a covenant.

30. The conveyance of a title admitted to be doubtful, is not a *good performance of a covenant, to execute a good and sufficient deed. [*438] *Clute v. Robison*, on appeal, 2 J. R. 595.

31. But if the party covenanting to convey, has a good and perfect title, at the time of the decree, or the coming in of the master's report, it is sufficient; and he may be allowed then to perform his contract, and save the forfeiture of his bond, on making compensation for the delay of the performance. *Ibid.*

32. And where a bond has been given for the performance of the covenant, the rule of compensation is the interest on the bond, to be calculated to such time as the Court shall, under the circumstances of the case, decree. *Ibid.*

33. A covenant to give a good and sufficient deed of land to the defendant, is performed by the plaintiff's delivering a deed sufficient in law to pass any title, which he may have in the premises, but without covenant or warranty; and the plaintiff, in an action of covenant, on the agreement, for the consideration money, having averred that he had given a deed to the defendant, a plea, that the plaintiff was not seised, and had no power to sell and convey, is bad. *Gazley v. Price*, 16 J. R. 267. [See *Van Eps v. Corporation of Schenectady*, 12 J. R. 442. *Ketchum v. Everton*, 13 J. R. 359.]

34. Where A. covenanted to convey to B, by a good warranty deed, a lot of land; and B. covenanted to pay A. 400 dollars in money, and 150 dollars in obligations, on the delivery of the deed, these are dependent covenants, and to be performed simultaneously; and B. having tendered 400 dollars in money, two promissory notes executed by a third person, payable to him or bearer, for 150 dollars, but not endorsed by him, which A. took up and kept, throwing down, at the same time, a deed, which B. refused to accept, but which he afterwards received; *held*, that this was a performance of the covenant on the part of B. *Harding v. Kretzinger*, 17 J. R. 293.

See AGREEMENT IV. TENDER.

Averting performance. See PLEADINGS.

When a forfeiture given by a covenant, in case of non-performance, will be construed a penalty, or liquidated damages. See DAMAGES, III.

IV. Breach of a covenant.

35. Under a covenant not to cut timber, but from lands which then were, or should thereafter be, cleared, a breach assigned, in cutting timber on lands which the defendant had not cleared, is bad; for it might have been from land cleared by others. *Treadwell v. Steele*, 3 C. R. 169.

36. Where the defendant sold the plaintiff a slave, and covenanted to warrant and for-

ever defend the sale of the said slave to the plaintiff, against all persons lawfully claiming any estate, right or title, to the slave, &c.; it is a sufficient breach, that the person so sold as a slave was not a slave, but free at the time of sale. *Quackenboss v. Lansing*, 6 J. R. 49.

[*439] *V. *Covenants in a deed of land*; (a) *Express covenants*; (b) *Implied covenants*; (c) *Breach*; (d) *Measure of damages, in an action of covenant, for a breach of the covenants in a deed.*

(a) *Express covenants.*

37. Where a grant contains a covenant of seisin, and also a warranty against all claims, except the lord of the soil, the two covenants must be taken together, and the exception in the last is applicable to both. *Cole v. Hawes*, 2 J. C. 203.

38. Where a lessee assigns the leasehold premises, *to have and to hold the same, in as ample a manner, to all intents and purposes, as the assignor might or could hold the same*, and covenants, *that he had good and lawful right to bargain and transfer the premises, as is above written*, and that the same were free from all arrearages of rent, and other encumbrances, &c.; the covenant is qualified, and limited to the acts of the assignor himself, and does not amount to a warranty of the landlord's title. *Knickerbacker v. Killmore*, 9 J. R. 106.

39. Where the deed contains a covenant for such further assurance as should be reasonably devised by the grantee, or his counsel, the grantee having devised such further assurance, is bound to give notice thereof to the grantor. *Miller v. Parsons*, 9 J. R. 336.

40. Whatever the further assurance may be, it must have been reasonably devised, and not differing from the nature or purport of the original bargain. *Ibid.*

41. If an assurance, *in pais*, be advised, the grantee is bound to present it, or give due notice of the nature of it, to the grantor, and allow him a reasonable time to consider of it; and, without taking these steps, the grantee cannot bring an action for a breach of the covenant. *Ibid.*

42. A grantor, conveying with covenant of seisin, is not bound to deliver the title deeds to the grantee. *Abbott v. Allen*, 14 J. R. 248.

(b) *Implied covenants.*

43. A conveyance in fee does not, *ipso facto*, imply a covenant of title. *Frost v. Raymond*, 2 C. R. 188.

44. The word *dedi* implies a warranty, in a conveyance in fee. *Ibid.* *S. P. Kent v. Welch*, 7 J. R. 258.

45. The words *concessi* or *feoffavi* import a warranty, in an estate for years, but not in an estate in fee. *Frost v. Raymond*, 2 C. R. 188.

46. The words *bargain, sell, alien, and convey*, in no case imply a covenant. *Ibid.*

47. The implied warranty in the word *give*, is good only for the life of the grantor. *Kent v. Welch*, 7 J. R. 258.

48. If the deed contain an express covenant of warranty, it will qualify and restrain the implied warranty. *Ibid.*

49. An express covenant in a deed takes away all implied covenants. *Vanderkarr v. Vanderkarr*, 11 J. R. 122.

*50. A covenant of warranty does [*440] not imply a covenant of seisin. *Ibid.*

51. Nor under such covenant can it be assigned as a breach, that there was no such land as the grantor undertook to sell. *Ibid.*

(c) *Breach of a covenant in a deed of land.*

52. Covenants for quiet enjoyment, and a general warranty, are only broken by a lawful eviction of the grantee. *Greenby v. Wilcocks*, 2 J. R. 1. *S. P. Folliard v. Wallace*, *id.* 395. *S. P. Kent v. Welch*, 7 J. R. 258. *S. P. Sedgwick v. Hollenback*, 7 J. R. 376. *Vanderkarr v. Vanderkarr*, 11 J. R. 122.

53. The covenant for quiet enjoyment goes to the possession, and not to the title; and is broken only by an entry and expulsion from, or some actual disturbance in, the possession. *Waldron v. McCarty*, 3 J. R. 471. *Kortz v. Carpenter*, 5 J. R. 120. *Whitbeck v. Cook*, 15 J. R. 483.

54. So, where there was a previous mortgage on the land, which, after the conveyance, was sold, under a decree of the Court of Chancery, and bought in by the grantee; *held*, that he could not maintain an action against the grantor, on the covenant for quiet enjoyment. *Waldron v. McCarty*, 3 J. R. 471.

55. A covenant *to indemnify and save harmless from all demands, dues, and damages whatsoever, which might happen or arise, on account of a certain mortgage*, is tantamount to a covenant for quiet enjoyment against the mortgage, and the plaintiff must show an eviction under the mortgage. *Van Slyck v. Kimball*, 8 J. R. 198.

56. An entry by the covenantor himself, tortiously and without title, is a breach of the covenant for quiet enjoyment. *Sedgwick v. Hollenback*, 7 J. R. 376.

57. If the covenantor be not seised, in fee, of the whole of the premises conveyed, but other persons are seised in fee of an undivided part of them, it is a breach of the covenant of seisin. *Ibid.*

58. An outstanding mortgage, where there has been no foreclosure or possession taken by the mortgagee, is not a breach of the covenant of seisin. *Ibid.*

59. Neither is an outstanding judgment against the covenantor, a breach of the covenant of seisin. *Ibid.*

60. If the grantor be not seised at the time of executing the deed, the covenant of seisin is broken immediately. *Greenby v. Wilcocks*, 2 J. R. 1. *S. P. Hamilton v. Wilson*, 4 J. R. 72.

61. It is not a breach of the covenant of seisin, that the land conveyed contains a less quantity of acres than it is described in the deed as containing. *Mann v. Pearson*, 2 J. R. 37.

62. In an action for a breach of the covenant of seisin, the rights of the parties must be determined, according to the existence and extent of those rights, when the action was commenced; so that the vendor cannot shelter himself under a title acquired subsequently to bringing the action. *Morris v. Phelps*, 5 J. R. 49.

63. Where there is an outstanding encumbrance on the land, the purchaser need not wait until he is evicted, but may satisfy the [*441] encumbrance, and then resort to his action on the covenant against encumbrances. *Delavergne v. Norris*, 7 J. R. 358. *S. P. Stanard v. Eldridge*, 16 J. R. 254.

64. A grantor covenanted that the grantee should peaceably and quietly hold the premises, without any let, suit, &c. of the grantor, or of any person lawfully claiming under him; and that free from all former encumbrances, of what nature or kind soever, made by the grantor; held, that a judgment against the grantor, outstanding at the time of executing the deed, was a breach of the covenant; and that the grantee, having satisfied the judgment, without waiting until he was evicted, was entitled to recover the amount paid, from the grantor. *Hall v. Dean*, 13 J. R. 105. *Aliter*, if for a breach of the covenant for quiet enjoyment only. See *ante*, pl. 52, 53, 54, 55.

65. A recovery in ejectment against the covenantee, is not a breach of the covenant for quiet enjoyment, but there must be an actual ouster of possession. *Kerr v. Shaw*, 13 J. R. 236.

66. A covenant of seisin, if broken at all, must be so at the instant it is made. *Abbott v. Allen*, 14 J. R. 248. *S. P. Greenby v. Wilcocks*, 2 J. R. 1. *Ante*, pl. 60.

67. And the grantee is not bound to wait until he has discovered the real state of the title; but if he suspects it to be defective, may bring his action for a breach of the covenant at once, which is the only mode of compelling the grantor to explain his title. *Ibid*.

68. It is not a breach of a covenant that the grantor was the lawful owner of the land, was well seised, and had full power to convey, &c., that part of the land was a public highway, and was used as such; a public highway being a mere easement, and the seisin and right to convey still continuing in the owner of the land over which the highway is laid out. *Whitbeck v. Cook*, 15 J. R. 483.

69. A mortgagor in possession before foreclosure, being regarded as seised of the land, if he conveys it with covenant of seisin, the mere existence of the mortgage is not a breach of the covenant. *Stanard v. Eldridge*, 16 J. R. 254.

(d) *Measure of damages in an action of covenant for a breach of the covenants in a deed.*

70. If the plaintiff, when he sues on a covenant against encumbrances, has extinguished the encumbrance, he is entitled to recover the price he has paid for it. *Delavergne v. Norris*, 7 J. R. 358. *S. P. Stanard v. Eldridge*, 16 J. R. 254.

71. But if the encumbrance is still out-

standing, he can recover but nominal damages. *Ibid*. *S. P. Stanard v. Eldridge*, 16 J. R. 254.

72. If a *bona fide* vendor of lands covenant that he is seised in fee, and has good right to convey, and that the grantee shall hold the land, free from lawful disturbance or eviction, and the vendee be evicted; in an action of covenant, by the vendee against the vendor, the value of the land at the time of the sale, and not of the eviction, is the measure of damages; and the defendant is liable to refund the purchase money, together with interest, to be calculated from the time that the plaintiff loses the mesne profits; and the costs (including reasonable *fees of [*442] counsel) which the plaintiff sustained in the action wherein he was evicted; but not the costs of the suit for mesne profits. *Staats v. Executors of Ten Eyck*, 3 C. R. 111. *Pitcher v. Livingston*, 4 J. R. 1. *S. P. Bennet v. Jenkins*, 13 J. R. 50.

73. And the vendee is not entitled to recover any thing for the buildings or other improvements which he may have erected on the land. *Pitcher v. Livingston*, 4 J. R. 1.

74. On failure of title to part of the land, the sale will not be rescinded, so as to give the vendee a right of action to recover back the whole consideration money; but he is only entitled to recover damages in proportion to the extent of the defect of title, or the value of the part lost; and the measure of the damages is the value of the part for which the title has failed, taken in proportion to the price of the whole. *Morris v. Phelps*, 5 J. R. 49.

75. The costs which the vendee was put to, in defending the action wherein he was evicted, must make part of the damages, in an action by him against the vendor, for a breach of covenant. *Waldo v. Long*, 7 J. R. 173.

76. The grantee, on being evicted, is entitled only to six years' interest, although he has been a longer time in possession, on the consideration money; [for the party evicting can only recover mesne profits for that length of time.] *Caulkins v. Harris*, 9 J. R. 324. *Ante*, pl. 72.

77. D. and J. being seised of land, as devisees for life, and also, seised in fee, as heirs of the deviser, of two sixths of the same land, having conveyed the land in fee, by a deed, with covenants of seisin, &c.; held, that the grantees could recover damages for a breach of the covenant of seisin, in proportion only as the title had failed; that is, *four sixths* of the consideration money, with interest, deducting the value of the life estate in the four sixths, but without allowing interest during the lives of the defendants, as, during that time, the plaintiff could not be called upon for the mesne profits. *Guthrie v. Pugsley*, 12 J. R. 126.

78. And in this case, a venire was awarded to assess the damages on the principles established by the Court. *Ibid*.

79. A., the grantee, under a deed with covenant for quiet enjoyment, of a lot of 600 acres of land, conveyed to B., C., D. and E., each 100 acres, with warranty, and the remaining 200 acres to F.; and one half of the lot was afterwards recovered in an action of ejectment, by

persons having paramount title; *held*, that A. was entitled to recover against his grantor for the eviction of B., C., D. and E., as he was thereby deprived of his remedy on the bonds and mortgages given by them for the consideration, but not the costs of the ejectment suits, which had been paid by the grantor, nor for the part conveyed to F., as that deed was without warranty; and judgment was given for A. for one sixth of the consideration expressed in the original deed, with six years' interest. *Kane v. Sanger*, 14 J. R. 89.

80. In an action for the breach of a covenant contained in an agreement, the plaintiff cannot recover back from the defendant money paid to him to induce him to enter into the agreement, it being still [*413] subsisting and unrescinded; and especially where the plaintiff, in the same action, recovers damages for a breach of the covenant. *Shepard v. Ryers*, 15 J. R. 497.

81. The plaintiff and defendant, being joint proprietors of a tract of land, of which the plaintiff had conveyed a part by deed with covenant for quiet enjoyment and warranty, agreed to make partition of the tract in such manner, that the part conveyed by the plaintiff should be set off in his portion; and they appointed three persons to make the partition, and covenanted to execute releases to each other. The partition having been made, the defendant refused to execute a deed or releases; *held*, that the plaintiff, in an action for a breach of the covenant, was not entitled to recover as damages any part of the consideration expressed in the deed to his grantee, who had never been evicted, the plaintiff's liability being merely contingent, and he could have no claim against the defendant for damages, to which he might possibly be made liable to his grantee. *Ibid*.

VI. Action of covenant.

82. Covenant lies, by executors and administrators, on an express covenant, for rent accrued during the life of the testator. *Executors of Van Rensselaer v. Executors of Platner*, 2 J. C. 17.

83. But not for rent afterwards becoming due. *Ibid*.

84. It does not lie by the devisees of the lessor, against the executors of the lessee, for rent accrued since the death of the testator. *Devisees of Van Rensselaer v. Executors of Platner*, 2 J. C. 24.

85. It lies against executors and administrators of a grantee, in fee, where the grantee covenants for himself, his executors, &c. to pay a rent in fee, for the rent, although the land goes to the heirs. *Executors of Van Rensselaer v. Executors of Platner*, 2 J. C. 17.

86. If the grantor be not seised at the time of executing the conveyance, the covenant of seisin is immediately broken, and no action can be brought by the assignee of the grantee against the grantor; for, after the covenant is broken, it is a chose in action, and incapable of assignment. *Greenby v. Wilcox*, 2 J. R. 1.

See Abbott v. Allen, 14 J. R. 248. *Ante*, pl. 52, 53, 54, 66, 67.

87. So, it cannot be brought by the heirs of the grantee against the grantor; for the grantees had an immediate and perfect right of action in his life-time, which goes to his personal representatives on his death, and does not descend to his heirs. *Hamilton v. Wilson*, 4 J. R. 72.

88. Where a covenant is assigned, notice of the breach, from the assignee, is sufficient to support the action. *Van Vechten v. Graves*, 4 J. R. 403.

89. By an agreement under seal, between A. and B., a controversy between them was submitted to arbitration, and it was agreed that the sum to be awarded by the arbitrators in favor of B. should be credited on a note which A. held against B.; *held*, that B. could not [*444] maintain an action for a breach of the covenant, in not crediting the amount of the award on the note, without averring that the note had been assigned before it fell due. *Frost v. Clark*, 12 J. R. 374.

90. The covenant and award, in such case, operates as a receipt *pro tanto*, of the amount of the note, and whenever the balance was paid, the note, in judgment of law, would be satisfied. *Ibid*.

91. Covenant does not lie on an agreement of partnership, to compel the payment of a balance due to the partnership from one of the partners. *Nivin v. Spickerman*, 12 J. R. 401.

92. An action for a breach of covenant running with the land, must be brought by the assignee of the land, or of part of it, *pro tanto*, if the breach were subsequent to the assignment, unless the grantor conveyed with warranty. *Kane v. Sanger*, 14 J. R. 89.

93. The general rule is, that where covenants run with the land, if the land is assigned or conveyed before the covenants are broken, the assignee, or grantor alone, can bring the action of covenant to recover damages; but if the grantor or assignor is bound to indemnify the grantee or assignee against such breach of covenant, then the assignor or grantor may bring the action. *Ibid*.

94. In an action for a breach of a covenant for quiet enjoyment, the defendant pleaded *non est factum*, with notice denying any eviction; *held*, that the defendant was bound to prove that there was no eviction, as the pleadings merely put the deed in issue. *Ibid*.

95. Where a husband and wife execute a deed, in which both covenant to the grantee, the wife cannot be joined with the husband in an action for a breach of the covenant, as her execution and acknowledgment of the deed have no further effect than to pass her interest in the land, and do not bind her by the covenants contained in the deed. *Whitbeck v. Cook*, 15 J. R. 483.

96. In an action for a breach of covenant, contained in the deed of the defendant to the plaintiff, the defendant cannot avail himself of any irregularity in the sale of the premises, by the master in Chancery, under a de-

cree of foreclosure and sale under a mortgage; for the plaintiff, not being a party to the suit, is to be regarded as a *bona fide* purchaser, and not affected by any irregularity in the proceedings in that Court. *De Forest v. Leete*, 16 J. R. 122.

97. In an action for a breach of the covenant against encumbrances, under a general assignment of a breach, the plaintiff cannot give evidence of his having bought in an encumbrance, and showing a breach of the covenant; he is entitled only to nominal damages. The fact of the plaintiff having discharged the encumbrances should be specially alleged, for it is not a damage necessarily arising from the act complained of, and, consequently, implied by law; but is a particular damage, which ought to be stated, to prevent surprise. *Ibid*.

98. An averment in the declaration, that a deed was given, implies that it was accepted by the grantee. *Gazly v. Price*, 16 J. R. 267.

99. Where the assignee of a term for years, covenants to perform all the covenants, &c. in the lease, on the part of the lessee to be performed, &c., in an action of covenant by the lessee or assignor, against him, for rent due and unpaid to the original lessor, it is not necessary *for the plaintiff to allege that he had been obliged to pay the rent to the lessor, or had been damnified; and *non damnificatus*, therefore, is no answer to the declaration; for the covenant being positive and express, it is broken by the rent remaining unpaid. *Port v. Jackson*, 17 J. R. 239. S. C. in error, 17 J. R. 479.

100. Where the covenants are dependent, a plea by the defendant, in an action against him and for the purchase money, that the plaintiff did not at the time appointed, nor any time since, tender, or offer to execute, a good warranty deed of conveyance, according to the terms of the contract, is a good plea in bar. *Parker v. Parmele*, 20 J. R. 130.

Pleading in covenant. See further, *tit.* PLEADINGS.

See AGREEMENT. CONDITION. SHIPS AND SEAMEN. SALE OF CHATTELS.

COVENANT TO STAND SEISED TO USES.

1. No use can be raised on a covenant to stand seised, in favor of a *stranger*, or one not of the *blood* of the covenantor. *Jackson*, ex dem. *Houseman*, v. *Sebring*, in error, 16 J. R. 515.

2. Though the covenantee is a mere *trustee* for the relations or blood of the covenantor, it makes no difference. *Ibid*.

3. H., a married woman, being seised in fee of certain lands, joined in a deed with her husband, reciting that she inherited the premises, which she wished to settle in the manner therein after mentioned, *therefore, in consideration of the premises, and for divers other good consid-*

erations, they granted, bargained, sold, &c. to D. (a stranger) his heirs and assigns, forever, all, &c. in *trust*, to hold the same during the joint lives of H. and her husband, and to pay them the rents and profits, &c.; and in case the husband should die, leaving her surviving, to convey the same to her; but in case she should die without lawful issue, leaving her husband surviving her, then, in trust to convey the premises to her said husband, and to her mother, as tenants in common, in fee simple; and D. covenanted to perform the trusts. H., the wife, died without lawful issue, leaving her husband and mother surviving, to whom D. afterwards conveyed the premises in pursuance of the trust; *held*, that the deed from H. and her husband to D. was void as a *bargain and sale*, for want of a pecuniary consideration; and that it could not operate as a covenant to stand seised to the uses expressed in the deed, because D., the grantee, being a mere *stranger*, there was no consideration of *blood* or *marriage* between him and the grantors. *Ibid*.

4. A *bargain and sale*, for a pecuniary consideration, of a fee, to commence in *future*, will operate as a covenant to stand seised to the use of the party within the consideration, according to the intention of the party, without any technical or formal words, for that purpose. *Jackson*, ex dem. *Wood*, v. *Swart*, 20 J. R. 85.

*5. W. being seised of land, he, [*446] together with his wife, for the consideration of 500 dollars, conveyed the land to his son, his heirs and assigns, forever, "*reserving to themselves the use of the premises during their natural lives*;" *held*, that the deed could not operate, as a reservation or exception, in favor of the wife who had survived her husband; but that it was valid as a covenant to stand seised to the use of the grantor himself during life, and after his death to the use of his wife for life. *Ibid*.

6. A deed for natural love and affection, and also 50 pounds from A. to B., *habendum* to A. for life, and after his death, to B., his heirs and assigns, forever, is valid as a covenant to stand seised to the use of A., the grantor, for life, and after his death to the use of the grantee and his heirs. *Jackson*, ex dem. *Staats*, v. *Staats*, 11 J. R. 337. S. P. *Jackson*, ex dem. *Trowbridge*, v. *Dunstable*, 1 J. C. 91.

COURT OF ERRORS.

1. A cause cannot be set down for hearing in the Court of Errors, until cases are delivered. *Hallett v. Jenks*, 2 C. C. E. 86.

2. A copy of the rule to answer the petition of appeal, or to join in error, or notice thereof, must be served on the solicitor of the respondent, or on the attorney for the defendant in error; and in case no solicitor or attorney be employed, the service of the rule or notice must be on the respondent, or defendant in error, personally. *Waters v. Travis*, 8 J. R. 566.

3. Where a decree of reversal had been entered by default, without service of a copy, or notice of the rule to answer the petition of appeal, the decree was set aside for irregularity; although the decree had been entered up, and the record remitted. *Ibid.*

4. Whether the Court of Errors will hear arguments *ex parte*, or enter a decree by default, as of course? *Quære. Ibid.*

5. Where a respondent presented a petition to the Court of Errors, stating that he was poor and unable to employ counsel, the Court assigned him counsel. *Ibid.*

6. Though it is a rule, that an objection not taken in the Court below, cannot be taken in the Court of appellate jurisdiction; yet that rule is intended to be applied only to objections which the party, by his silence, may be deemed to have waived, and which, when waived, will leave the merits of the cause to rest with the judgment; it does not apply to an objection which, if taken, would have destroyed the foundation of the action. *Palmer v. Lorillard*, in error, 16 J. R. 348.

7. Where the plaintiff suffered a judgment to pass against him by default, on demurrer, in a case, involving precisely the same question which had been before argued and decided by the Court in another cause, between different parties; and, by mutual consent, a case was made and brought to the Court of Errors on a writ of error, the Court of Errors refused to hear the cause, and ordered the writ of error to be quashed. *Henry v. Cuyler*, 17 J. R. 469.

*8. No question not considered [*447] and decided in the cause in the Court below, can be heard in the Court of Errors, which possesses only appellate jurisdiction. *Ibid.*

9. A writ of error will not lie upon an order or decision of the Supreme Court, on a motion made to set aside an execution. *Brooks v. Hunt*, 17 J. R. 484.

10. But even if a writ of error would lie in such a case, yet, if the plaintiff in error has applied for and obtained a writ of *audita querela*, it is a waiver of his right to bring a writ of error; for an *audita querela* is a regular suit, in which the parties may plead and take issue on the merits, and upon the judgment thereon, or writ of error lies. *Ibid. See further, tit. CHANCERY, V.*

11. A writ of error will not be dismissed, on the ground that no transcript of the record had been returned and filed, without a regular notice of the motion for that purpose. *Webb v. Brown*, 19 J. R. 453.

12. Where a writ of error was returned at the last session of the Court, and the transcript of the record had not been filed, nor errors assigned, and no sufficient excuse shown for delay, the writ was dismissed, with the usual taxable costs. *Ibid.*

13. That the counsel of one of the parties is engaged as counsel in another Court, is not sufficient ground for putting off the argument of a cause. *Starr v. Benedict*, 19 J. R. 455.

For the GENERAL RULES regulating the proceedings in this Court, on writs of error
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and appeals, (passed September 18, 1818,) see 16 J. R. 603.

See further as to appeals, tit. CHANCERY, V.; and as to proceedings on writs of error, see tit. ERROR.

COURT (SUPREME.)

1. The Supreme Court has the same power over the proceedings of a recorder of a city, while acting as commissioner, under the 8th section of the act, (Sess. 24. c. 75. 1 N. R. L. 321.) as when acting as recorder. *Learned v. Duval*, 3 J. C. 141.

2. In all cases of practice not provided for by the rules of this Court, it follows the practice of the King's Bench in England. *Dubois v. Philips*, 5 J. R. 235.

3. The Supreme Court has a general superintending power to award a *certiorari*, not only to inferior Courts, but to persons invested by the legislature with power over the property and rights of others, for the purpose of supervising their proceedings, even in cases where they are authorized finally to hear and determine. *Le Roy v. Corporation of New York*, 20 J. R. 430.

See tit. CHANCERY, XXXVII. pl. 1152.

**See AMENDMENT. ATTACHMENT. BAIL. CERTIORARI. COSTS. [*448] ERROR. HABEAS CORPUS. INDICTMENT. INFORMATION. MANDAMUS. PRACTICE. QUO WARRANTO.*

COURTS OF OYER AND TERMINER.

1. Proceedings removed from the *Oyer and Terminer* into the Supreme Court, cannot be sent back to that Court. *The People v. Townsend*, 1 J. C. 104. S. C. C. C. 68. *See People v. McKay*, 18 J. R. 212.

2. The trial, in such case, may be either at bar or at the circuit. *Ibid.*

3. But, it seems, that in capital cases, the cause cannot be sent down to the circuit. *Ibid. (See Ludlow ads. The People, C. C. 34.)*

4. Whether a *certiorari*, to remove an indictment for felony, can be allowed, otherwise than on motion in open Court, and special cause shown? *Quære. Ludlow ads. The People, C. C. 34.*

5. Whether a *certiorari*, to remove an indictment from the *Oyer and Terminer*, ought not to be directed to, and returned by, the commissioners, instead of the clerk? *Quære. Ibid.*

COURTS OF COMMON PLEAS.

1. Courts of Common Pleas are Courts of inferior jurisdiction. *The People v. Justices of Delaware*. 1 J. C. 181.

2. Courts of Common Pleas may set aside
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a regular judgment by default, where there has been any fraud, or surprise, especially in a bail bond suit. *Delancey v. Brownell*, 4 J. R. 136.

3. Where no one of the judges is a counsellor of the Supreme Court, and, after verdict, they refuse to give judgment under pretext of irregularity, but in truth because the verdict was against evidence, a *mandamus* lies, to compel them to render judgment. *Haight v. Turner*, 2 J. R. 371.

4. The Mayor's Court of the city of New-York may hold plea of causes arising in any part of the state, and it need not be stated that the cause of action arose within its jurisdiction. *Murray v. Fitzpatrick*, 3 C. R. 38.

5. Where the plaintiff and the defendant met in the county of *Montgomery*, and there came to an adjustment of their accounts, by which a balance was struck in favor of the plaintiff, for money received by the defendant in *Albany*; held, that the Mayor's Court of *Albany* had jurisdiction of the cause, although the implied *assumpsit* arose in another county. *Wetmore v. Baker*, 9 J. R. 307.

*6. A Court of Common Pleas [*449] may compel a plaintiff to be nonsuited against his consent, when in their opinion, the evidence offered by him is not sufficient to support the action, there being no question of fact to be decided. *Pratt v. Hull*, 13 J. R. 334.

7. A Court of Common Pleas has no power to grant a writ of error *coram nobis*. *People v. Court of Common Pleas of Oneida*, 20 J. R. 22.

8. A Court of Common Pleas cannot order a cause, which has been brought before it by appeal from a Justice's Court, under the act, Sess. 44. c. 94. to be referred, on the usual affidavit; but must proceed to hear the cause, and decide on the admissibility of the proof offered in the Justice's Court. *People v. Washington, C. P.*, 20 J. R. 363.

See tit. MANDAMUS, I. COSTS, I. ERROR. BILL OF EXCEPTIONS.

See COURTS OF JUSTICES OF THE PEACE, XIX.

COURTS OF GENERAL SESSIONS OF THE PEACE.

1. A Court of General Sessions is a Court of inferior jurisdiction. *The People v. Justices of Chenango*, 1 J. C. 179. S. C. 2 C. C. E. 319.

2. It cannot grant a new trial on the merits. *Ibid.*

3. It has no jurisdiction in cases where the punishment is imprisonment for life: so, if they proceed to try an indictment for a second offence of grand larceny, it appearing on the indictment to be a second offence, the prisoner may plead to the jurisdiction. *The People v. Youngs*, 1 C. R. 37.

4. On an appeal to the Sessions from an order of two justices, the order is to be considered *prima facie* evidence of the facts stated in

it, and the *onus* of impeaching it is thrown on the appellant. *Sweet v. Overseers of Clinton*, 3 J. R. 23.

5. But now by the statute, (Sess. 36. c. 12. s. 12.) the Sessions must proceed *de novo* in cases of *bastardy*, and the party in whose favor the order was made, must substantiate the facts by evidence, except in case of the death of the mother of the child. (1 N. R. L. 310.)

6. No appeal lies to take the case from the justices, until they have passed judgment upon it. *Ibid.*

7. On an appeal, the Sessions are the judges both of the law and the fact. *Ibid.*

8. And a bill of exceptions does not lie. *Ibid.*

9. But if the Sessions do not return to a *certiorari*, all the facts which were before them, and which are necessary to appear, in order to judge of the law applicable to the case, the Supreme Court will order the Sessions to return them. *Ibid.*

10. A general warrant, or *venire*, under the seal of the Court of *General Sessions, &c., to the sheriff to summon grand and petit jurors for the trial of all causes which are to be tried before the Court of General Sessions of the Peace, returned with the panels of jurors annexed, in the manner directed by the 11th section of the act of February, 1813, (Sess. 36. c. 4.) is sufficient; and there need not be a *venire* in each particular cause. *People v. G. S. of the Peace of Herkimer*, 20 J. R. 310.

11. Where such a *venire* is tested out of term, the Court of General Sessions may amend it, it being a mere clerical mistake. *Ibid.*

12. A person convicted cannot take advantage of such a mistake in the *venire*, in arrest of judgment. *Ibid.*

When a *mandamus* lies to the Sessions, see MANDAMUS, I.

COURT OF GENERAL SESSIONS OF THE PEACE OF THE CITY OF NEW-YORK.

1. The Court of General Sessions of the Peace of the city and county of New-York, having, by statute, (Sess. 36. c. 85. s. 9.) all the powers of a Court of Oyer and Terminer and Jail Delivery, and to try for all crimes, cases affecting life excepted, and to determine and adjudge the same, possesses, also, as an incident to the power to try, the right of discharging the jury, under the circumstances in which a Court of Oyer and Terminer could do. *People v. Goodwin*, 18 J. R. 187.

2. Whether, since the statute, this Court has, also, the power of granting new trials on the merits? *Quære. Ibid.*

3. Where a prisoner, tried at this Court, is brought before the Supreme Court on *habeas corpus* and *certiorari*, and a second trial is

awarded the trial may be before the *Court of Oyer and Terminer*, or at the next *Sittings*, in *New-York or Albany*, under the act, (Sess. 36. c. 66.) *Ibid.*

COURTS OF SPECIAL SESSIONS OF THE PEACE.

1. The record of conviction before the justices, ought to state sufficient to show that they had jurisdiction. *Powers v. The People*, 4 J. R. 292.

2. The value of the thing stolen ought to be stated, and that the party convicted had not given bail, within forty-eight hours after being committed, or consented to a trial before the expiration of that time. *Ibid.*

*3. A Court of Special Sessions of the Peace has jurisdiction of cheats. *People v. Miller*, 14 J. R. 371.

4. In a record of conviction before a Court of Special Sessions, the place where the offence was committed must be stated, that it may appear to have been within the jurisdiction of the Court. *Ibid.*

5. Whether it is necessary to state, that the complaint previous to issuing the warrant on which the defendant was arrested, was made under oath? *Ibid.*

COURTS OF JUSTICES OF THE PEACE.

(See stat. Sess. 36. c. 53. and Sess. 41. c. 94.)

1. Courts of justices of the peace are not Courts of record; they do not proceed according to the course of the common law. *Jones v. Reed*, 1 J. C. 20. *McCarty v. Sherman*, 3 J. R. 429.

2. They are confined strictly to the authority given them by statute, and can take nothing by implication; but must show the power expressly given them in every instance. *Jones v. Reed*, 1 J. C. 20. S. C. 1 C. R. 594. n. (a) *Wells v. Newkirk*, 1 J. C. 228. *Way v. Carey*, 1 C. R. 191.

3. Their proceedings, as far as respects regularity and form, will be reviewed with liberality; technical nicety or legal precision is not required in the pleadings; but it will be sufficient, if there appear a good ground of action, within the justice's jurisdiction, and that the merits of the cause have been tried. *Jones v. Reed*, 1 J. C. 20. S. C. 1 C. R. 594. n. (a) *King v. Fuller*, 3 C. R. 152. *Stillson v. Sanford*, *id.* 174. *Ehel v. Smith*, *id.* 187. *McNeil v. Scofield*, 3 J. R. 436. *Pintard v. Tackington*, 10 J. R. 104. *Baker v. Dumbolton*, *id.* 240.

4. But the Supreme Court will require a compliance, on the part of the justice, with the forms prescribed by the statute; and if they have been departed from, and are not waived, or cured by the statute of jeofails, the

proceedings cannot be supported. *King v. Fuller*, 3 C. R. 152.

5. The act to redress disorders, by common informers, Sess. 11. c. 9. (1 N. R. L. 99.) does not apply to proceedings before a justice. *Day v. Wilber*, 2 C. R. 134.

[See act, Sess. 30. c. 236. s. 45. 53. repealing part of the 11th section of the act, Sess. 36. c. 53. and declaring when the bodies of defendants are to be exempted from imprisonment.

See also, "act to extend the jurisdiction of justices of the peace," passed April 10, 1818, Sess. 41. c. 94. an act to modify the act, in regard to the city of *New-York*, April 21, 1818, Sess. 41. c. 265. and an act relative to issuing process, Sess. 41. c. 269.

See "act to prevent abuses in proceedings before justices of the peace," passed April 7, 1820, Sess. 43. c. 159.]

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*I. Jurisdiction; (a) In respect of the action, and the sum demanded; (b) In respect of the parties to the action.

II. Process, and by whom it may be served.

III. Appearance; (a) Who may appear and advocate the cause; (b) Appearance of an infant.

IV. Discontinuance

V. Declaration; (a) When the declaration will be sufficient; (b) When a defect in the declaration will be cured.

VI. Plea and issue.

VII. Set-off; (a) What demands may be set off, and what will cure an improper set-off; (b) At what time a set-off must be made.

VIII. Plea of a former action; (a) When a former action for the same cause, or a former action, in which the present plaintiff was defendant, and might have set off his demand, is a good bar; (b) How a former action may be taken advantage of, and what evidence is necessary to support the plea.

IX. Plea of title.

X. Adjournment; (a) When an adjournment may be granted, on what security, and for what time; (b) When an improper adjournment amounts to a discontinuance, and what is a waiver of the irregularity.

XI. Trial in a Justice's Court, as to particulars which apply as well where the trial is before the justice alone, as before a jury.

XII. Trial before the justice alone.

XIII. Trial by jury; (a) When a trial by jury may be demanded, on what the jury is to decide, and the effect of such trial on the power of the justice; (b) Venire, and when irregularities in the venire are cured; (c) Challenge; (d) Constable to attend the jury, and his oath; (e) Proceedings of the jury after they have retired, and until

their verdict is recorded; (f) *Verdict, and when irregularities in the verdict will be cured.*

XIV. *Judgment; (a) Judgment after issue joined; (b) Judgment by default; (c) Judgment by confession; (d) What is evidence of the existence of a judgment in a Justice's Court.*

XV. *Costs.*

XVI. *Execution.*

XVII. *At what time an irregularity must be taken advantage of, and when it will be cured, or be deemed to have been waived.*

XVIII. *Attachment against concealed debtors.*

XIX. *Appeals to the Courts of Common Pleas, under the act, (Sess. 41. c. 94.)*

I. *Jurisdiction; (a) In respect of the action, and the sum demanded; (b) In respect of the parties to the action.*

(a) *In respect of the action, and the sum demanded.*

1. A justice has cognizance of an action of trespass on the case, for enticing away the wife of the plaintiff. *Chase v. Hale*, 8 J. R. 461.

*2. An agreement to remove a [*453] fence, and open a road, has no reference to title to land, and the justice has jurisdiction. *Storms v. Snyder*, 10 J. R. 109.

3. If the plaintiff state his demand at an amount above 25 dollars, but only claims damages to 25 dollars, the justice has jurisdiction. *Bowditch v. Salisbury*, 9 J. R. 366.

4. An action on the case lies, in a Justice's Court, against a person regularly subpoenaed as a witness in such Court, and who neglects or refuses to attend. *Hasbrouck v. Baker*, 10 J. R. 248.

5. No action lies, in a Justice's Court, to recover costs which have accrued in the Court of Chancery. *Leonard v. Freeman*, 3 C. R. 171.

6. A justice, independent of the express exception in the statute, has no jurisdiction in an action for a malicious prosecution. *Main v. Prosser*, 1 J. C. 130. *Vanduzor v. Linderman*, 10 J. R. 106.

7. Where there are mutual demands, the justice has jurisdiction to the amount of 200 dollars, provided the balance does not exceed 25 dollars. *Cahill v. Dolph*, 1 J. C. 333.

8. An action for an escape, against a sheriff, is cognizable in a Justice's Court. *Jansen v. Stoutenbergh*, 9 J. R. 369.

9. The assistant Justices' Courts in the city of New-York, have no jurisdiction of actions for malicious prosecutions. *Edwards v. Elbert*, 12 J. R. 466.

10. An action against a constable, for not serving or returning an execution in a Justice's Court, must be debt; and if the action be brought in any other form, the judgment will be reversed. *Pierce v. Sheldon*, 13 J. R. 191.

11. A justice who, in fact, keeps a tavern,

although he has no license for that purpose, is disqualified from trying a cause. *Clayton v. Per Dun*, 13 J. R. 218.

12. And it is immaterial whether the suit was commenced before or after the justice began to keep tavern. *Ibid.*

13. And appearing and going to trial will not, in such case, confer jurisdiction on the justice. *Ibid.*

14. A plaintiff cannot divide an entire contract, for the payment of a sum of money exceeding the amount cognizable before a justice, into several smaller demands, and bring a distinct action for each. *Willard v. Sperry*, 16 J. R. 121.

15. Where a justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non jure*, and void. *Butler v. Potter*, 17 J. R. 145.

16. But if he has jurisdiction, and errs in the exercise of it, his acts are voidable only. *Ibid.*

17. As, where a justice, in a cause of which he had legal cognizance, gave judgment for more than five dollars costs, besides the damages, contrary to the statute, which limits the costs to be recovered to five dollars, the judgment is voidable only; and, therefore, the justice is not liable to an action of trespass and false imprisonment, at the suit of the defendant, who had been imprisoned under an execution issued on such judgment. *Ibid.*

18. That the justice is *half uncle* to the plaintiff's wife, is not a valid objection to his trying the cause; the relationship being too remote *to disqualify him [*454] from acting, especially where there is a trial by jury. *Eggleson v. Smiley*, 17 J. R. 133.

19. The relationship must be so near as to amount, of itself, to evidence of partiality and fraud, to render it improper for the justice to act. *Ibid.*

20. That the justice before whom a suit was brought, was the son-in-law of the plaintiff, and persisted to hear and determine the cause, notwithstanding the defendant objected to his jurisdiction, on the ground of his relationship to the plaintiff, is, of itself, evidence that the trial was not fair and impartial, and sufficient ground for reversing the judgment, especially where the damages are excessive. *Bellows v. Pearson*, 19 J. R. 172. *And see Pierce v. Sheldon*, 13 J. R. 191.

21. Justices' Courts have no jurisdiction of actions of account. *Rickey v. Bosane*, 18 J. R. 131.

22. The Justices' Courts in the city of New-York have no jurisdiction of an assault and battery, &c. committed by a master of a vessel in the merchants' service, on a seaman, in any port within the United States. The words "*foreign port*," in the act establishing those Courts, means a port or place without the United States. *King v. Parks*, 19 J. R. 375.

(b) *In respect of the parties to the action.*

23. Before the act, (Sess. 24. c. 165. s. 18. See 1 N. R. L. 396.) a justice had no juris-

diction in cases of joint debtors, unless all were brought into Court. *Jones v. Reed*, 1 J. C. 20. S. C. 1 C. R. 594. n. (a.)

24. A justice has no jurisdiction where an executor or administrator is defendant. *Wells v. Newkirk*, 1 J. C. 228. *Way v. Carey*, 1 C. R. 191. And his confessing judgment does not give jurisdiction. *Coffin v. Tracy*, 3 C. R. 129.

25. Nor, before the act, (Sess. 31. c. 204.) where they are plaintiffs. *Wells v. Newkirk*, 1 J. C. 228. *Way v. Carey*, 1 C. R. 191.

26. A corporation cannot be sued in a Justice's Court. *Ministers, &c. of Coxsackie Church v. Adams*, 5 J. R. 347. *S. P. Hotchkiss v. Trustees of the Religious Society in Homer*, 7 J. R. 356.

27. But a corporation may sue in a Justice's Court. *Hotchkiss v. Trustees, &c.*, 7 J. R. 356.

28. By the act, (Sess. 28. c. 93. s. 6. See 1 N. R. L. 345.) attorneys may be sued before justices of the peace in the same manner as any other person, except during the sittings of the Court. *Moulton v. Hubbard*, 6 J. R. 332.

29. An attorney who is sued before a justice jointly with another defendant, cannot plead in abatement his privilege, or that the Court, of which he is an attorney, is then sitting. *Tyffany v. Driggs and Lynch*, 13 J. R. 252.

30. A plea in abatement need not be verified by affidavit. *Gilbert v. Vanderpool*, 15 J. R. 242.

II. Process, and by whom it may be served.

31. The issuing the summons or warrant is the commencement of the suit. *Boyce v. Morgan*, 3 C. R. 133.

*32. By the first section of the [*455] act, (sess. 32. c. 186.) a justice of the peace may grant a warrant on the oath of the plaintiff himself, in the cases provided for by the 4th section of the act, (sess. 31. c. 204.) *Terry v. Fargo*, 10 J. R. 114. *Brown v. Hinchman*, 9 J. R. 75, *contra*, is not law. (See 1 N. R. L. 389.)

33. On the return of a summons, served by copy, if the defendant does not appear, the justice may issue a warrant. *Reed v. Gillet*, 12 J. R. 296.

34. A justice cannot, on his own knowledge, issue a warrant, at the suit of a non-resident plaintiff, without oath. *Money v. Tobias*, 12 J. R. 422.

35. A written request to the justice, to let the plaintiff have a warrant, and that the party making the request would be answerable for the costs, is not such security as is required by the statute, to authorize the issuing of a warrant at the suit of a non-resident plaintiff. *Ibid.*

36. A deposit of money with the justice, is sufficient for a non-resident plaintiff, who applies for a warrant. *Wheelock v. Brinckerhoff*, 13 J. R. 481.

37. And in an action of trespass, a deposit of *five dollars* was held to be sufficient. *Ibid.*

38. If a justice delivers a summons in blank,

signed by him, to the party, to be filled up with the names, cause of action, &c. in the presence of the justice, and under his control, it is not a violation of the 4th section of the statute of the 7th of April, 1820, (Sess. 43. c. 159.) *People v. Smith*, 20 J. R. 63.

39. *Aliter*, if the party receiving the blank summons, fill it up, out of the presence of the justice, though before it is delivered to a constable. *Ibid.*

40. Process, improperly issued, as where a warrant is issued when the defendant ought only to be summoned, or a defective process, is cured, if no objection be made to it at the time, but the defendant pleads and goes to trial. *Day v. Wilber*, 2 C. R. 134.

41. Any constable of the county may serve all writs issuing out of a Justice's Court, in any part of the county. *Mills v. Kennedy*, 1 J. R. 502.

42. Though process, issued by a justice, may be altered by his direction, yet, a general authority by him to a constable, to alter the dates of executions instead of renewing them, or to fill up or alter process, is void. *Pierce v. Hubbard*, 10 J. R. 405.

III. Appearance; (a) Appearance by attorney, and who may appear and advocate the cause for the party; (b) Appearance of an infant.

(a) Appearance by attorney, and who may appear and advocate the cause for the party.

43. A constable, who acts as such in a cause, ought not to be counsel or attorney for either party. *Tallman v. Woodworth*, 2 J. R. 385.

44. But if he act as counsel, and also, as constable, attend the *jury, and it does not appear that any objection [*456] was made to him, and no abuse is shown, the Court will intend, in support of the judgment, that the parties consented. *Ibid.*

45. Where the constable who served the summons answered for the plaintiff, and presented to the justice the note on which the suit was brought, and stated the plaintiff's demand, it was held not to be an appearing and advocating the cause within the meaning of the act, (Sess. 31. c. 204. See 1 N. R. L. 399.) *Phinney v. Earle*, 9 J. R. 352. *S. P. Kittle v. Baker*, *id.* 354.

46. Under the act, (Sess. 31. c. 204. since repealed,) the justice could not permit a party to appear by attorney, from his own knowledge of the fact that the party was absent at the time, and out of the country; but must have proof of the fact. *Rosekrans v. Van Antwerp*, 4 J. R. 228.

47. If the parties appeared by attorney, it was error, though it were by mutual consent. *Smith v. Goodrich*, 5 J. R. 353.

48. If the plaintiff in error only appeared by attorney, he could not allege it for error. *Ibid.*

49. Where a plaintiff appears by attorney, if the attorney is called upon to produce his power, the execution of it must be duly proved. *Timmerman v. Morrison*, 14 J. R. 369.

50. The appearance of the defendant, on

the return of process, in order to make an objection to the sufficiency of the return, is no waiver of the irregularity. *Wheeler v. Lampman*, 14 J. R. 481.

51. But after pleading, the objection comes too late. *Ibid.*

52. Where a party appears by attorney, the attorney, as between the parties, is a competent witness to prove the execution of the power to himself. *Caniff v. Myers*, 15 J. R. 246.

(b) *Appearance of an infant.*

53. A justice of the peace may appoint a guardian *ad litem*; and if an infant appears by attorney, it is erroneous. *Mockey v. Grey*, 2 J. R. 192. *Alderman v. Terrell*, 8 J. R. 418.

54. But where the defendant pleaded infancy, and the justice, from examination, was of opinion that he was not an infant, and the jury found that he was not an infant, the infancy of the defendant cannot be assigned for error, it being against the record, and the fact, as found by the jury. *Ingersoll v. Wilson*, 3 J. R. 437.

IV. *Discontinuance.*

55. If the plaintiff, or some person on his behalf, do not appear on the return of process, it is a discontinuance, and if the justice proceed in the cause, it is error. *Sprague v. Shed*, 9 J. R. 140.

56. And this, although on the return of the process, the note, on which the suit was brought, was delivered to the justice, with a request from the defendant endorsed upon it to enter judgment against him. *Ibid.*

57. Where the justice did not open his Court for more than two hours, after the time appointed in the summons, and then [*457] adjourned the cause to another day, when he heard it *ex parte*; held, that this delay amounted to a discontinuance. *McCurty v. McPherson*, 11 J. R. 407.

58. Where, after issue on a plea in abatement, a defendant appears at the time appointed by the adjournment of the cause, and the plaintiff does not appear, but the justice is informed that he is near at hand, and delays calling and nonsuiting him, on the motion of the defendant, who soon after leaves Court, and the plaintiff in about an hour appears, and the justice proceeds to hear and decide the cause; this is not such an unreasonable delay as will work a discontinuance of the cause. *Wilde v. Dunn*, 11 J. R. 459.

59. A delay in proceeding to trial, occasioned by the justice being engaged in the trial of another cause, does not work a discontinuance. *Chamberlain v. Lovet*, 12 J. R. 217.

60. In those cases in which it has been decided, that if the trial does not proceed in a reasonable time after the hour appointed, the cause is to be considered as out of Court, the delay had was not accounted for, or the party had sustained an injury, without his own wilful default. *Ibid.*

61. Where a justice suspended the trial,

after it had been commenced, for twenty hours, in order to allow one of the parties to produce further proof; it was held, to be an abuse of discretion, and the judgment was reversed. *Green v. Angel*, 13 J. R. 469.

62. Where the trial of a cause, after being commenced, has been suspended for a time, and when resumed, the plaintiff does not appear, it is a discontinuance. *Ibid.*

63. Where a cause is adjourned to a future day, at a certain hour, when the defendant appears; but the justice does not arrive until an hour afterwards, and in about twenty minutes the plaintiff appears, and the defendant on seeing the plaintiff goes away, declaring that the cause was out of Court, though apprised by the justice, that he should call the cause immediately, the delay, under the circumstances of the case, did not amount to a discontinuance; and a judgment having been rendered for the plaintiff on a hearing *ex parte*, the Court refused to set it aside. *Balkwin v. Carter*, 15 J. R. 496.

64. So, where the parties appeared at the hour appointed by the adjournment, and the justice, for his own convenience, and with the consent of the defendant, delayed the trial, and when he was ready to try the cause, informed the defendant that he intended to bring it on, and the defendant voluntarily absented himself; held, that the delay did not amount to a discontinuance, and that the judgment on an *ex parte* hearing, was not erroneous. *Myer v. Fisher*, 15 J. R. 504.

When the cause is discontinued by an erroneous adjournment, *see post* X.

*V. *Declaration*; (a) *When the* [*458] *declaration will be sufficient*; (b) *When a defect in the declaration will be cured.*

(a) *When the declaration will be sufficient.*

65. The declaration should state the cause of action with certainty, that the Court may know whether the justice had jurisdiction or not. *Houghton v. Strong*, 1 C. R. 486.

66. Where the plaintiff declares generally, and at the same time hands the justice a book account, the account will be taken as a part of the declaration. *Ehel v. Smith*, 3 C. R. 187.

67. After process, to answer to A. B. alone, a declaration, by A. B., *qui tam*, &c. is good. *Day v. Wilber*, 2 C. R. 134.

68. In an action, *qui tam*, the plaintiff declared, as well for himself as the people, &c. of a plea that the defendant render to the plaintiff 25 dollars, which from him he unjustly detains, &c.; this is substantially correct. *Hasbrouck v. Weaver*, 10 J. R. 247.

69. If the plaintiff allege that he let the defendant have a horse, in consideration of which the defendant let him have another, it shows, with sufficient certainty, an exchange, and not a bailment. *King v. Fuller*, 3 C. R. 152.

70. Declaration for damages on account of defendant's not fulfilling a contract for a certain lot of lease land, lying in G., is good enough. *Petrie v. Woodworth*, 3 C. R. 219.

71. That the defendant *did sell to A. B., and receive pay for, one half pint of whiskey*, which was drank in the defendant's house, who had no license, &c., is a sufficient charge of the offence. *Picket v. Weaver*, 5 J. R. 122.

72. The declaration may state debts or demands to the amount of 200 dollars, provided it concludes with demanding damages to 25 dollars only. *Tuttle v. Maston*, 1 J. C. 25. *Cahill v. Dolph*, 1 J. C. 333. *Stillson v. Sanford*, 2 C. R. 174.

73. A declaration in *assumpsit* may be demurred to for not stating any time, or not averring a request. *Timmerman v. Morrison*, 14 J. R. 369.

(b) *When a defect in the declaration will be cured.*

74. After pleading, the defendant cannot take advantage of a variance between the process and declaration. *Day v. Wilber*, 2 C. R. 134.

75. *It seems*, that a variance between the summons and declaration, as to the action, is not fatal. *Baker v. Dumbolton*, 10 J. R. 240.

76. A judgment will not be reversed merely on the ground that the process was in one form of action, and the declaration in another, though the objection to the variance was taken in time, and overruled by the justice. *Bowen v. Ferne*, 16 J. R. 161.

77. If the defendant agree to postpone a formal objection to the declaration, until the jury are sworn, it is a waiver of it. *Baker v. Dumbolton*, 10 J. R. 240.

*78. Where no objection is made [*459] at the time to the form of the declaration, the defendant cannot take advantage of any defect, on the return to a *certiorari*. *McNeil v. Scofield*, 3 J. R. 436.

79. A variance between the process and declaration must be objected to, before joining issue and going to trial. *Bloodgood v. Overseers of Jamaica*, 12 J. R. 285.

80. Misjoinder of action, if not objected to before the justice, cannot be taken advantage of on the return of a *certiorari*. *Canyfield v. Monger*, 12 J. R. 347.

81. Where the plaintiff brings an action of trespass on the case, and fully sets forth his cause of action, to which the defendant pleads, he cannot, afterwards, object that the action should have been trespass, and not on the case. *Lambert v. Hoke*, 14 J. R. 383.

82. So, that the plaintiff has declared, both on a contract and for a *tort*, must be objected to at the time of declaring. *McNeil v. Scofield*, 3 J. R. 436.

83. On a declaration for a penalty, after verdict, it will be intended, that the offence proved, was such as warranted the penalty declared for. *Ely v. Van Buren*, 3 C. R. 218.

84. If the plaintiff declares for only part of the penalty, it will be intended that he waived the residue, and it is not an objection for the defendant to make. *Ibid.*

85. If, on the appearance of the parties, no objection is taken to the declaration, every informality is cured; and, after verdict, the

Court will intend that the substance of it was proved. *Ibid.*

86. A statement of matter not actionable, but for which no damages appear to have been given, is not error. *Ibid.*

87. In *assumpsit*, for work and labor, want of an averment in the declaration, that the work had actually been performed, after verdict and judgment, was intended to have been supplied by proof. *Owens v. Morehouse*, 1 J. R. 276.

VI. Plea and issue.

88. Special pleading in a Justice's Court is to be discountenanced. *Kline v. Husted*, 3 C. R. 275.

89. The joining a formal issue is not material. *Cahill v. Dolph*, 1 J. C. 333. *S. P. Stillson v. Sanford*, 3 C. R. 174.

90. In an action against a tavern-keeper, for not entertaining the plaintiff, the defendant pleaded not guilty, and set off a trespass by the plaintiff in breaking a door, &c., and that he was a person of bad reputation; after judgment for the defendant, this Court considered the set-off as a reason or justification intended to support the plea of not guilty. *Goodenow v. Travis*, 3 J. R. 427.

91. In an action of covenant, the defendant is entitled to *oyer*, if demanded, before he can be called on to plead. *Niven v. Spickerman*, 12 J. R. 401.

*VII. Set-off; (a) *What demands* [*460] *may be set off, and what will cure an improper set-off*; (b) *At what time a set-off must be made.*

(a) *What demands may be set off, and what will cure an improper set-off.*

92. Every demand arising on a contract, although unliquidated, must be set off. *McCumber v. Goodrich*, 1 J. R. 56.

93. Accounts or demands, as in cases of set-off in other Courts, in order to be set off in a Justice's Court, must have existed at the commencement of the suit. *Cobb v. Curtiss*, 8 J. R. 470.

94. So, where A., for a certain sum, agrees to discontinue a suit, which he had against B., in a Justice's Court, but, notwithstanding, prosecutes the suit to judgment; in an action by B., against A., for a breach of this agreement, A. cannot object, that it might have been set off in the former action. *Ibid.*

95. In an action for a *tort*, the defendant cannot set off. *Keeler v. Adams*, 3 C. R. 84.

96. As in *trover*. *Moore v. Davis*, 11 J. R. 144. *Dygart v. Coppernoll*, 13 J. R. 210.

97. A cause of action founded on a deceit, cannot be set-off in an action on a contract. *Dean v. Allen*, 8 J. R. 390.

98. A set-off is not strictly admissible in trespass; and consequently, if the plaintiff in trespass also bring an action of *assumpsit*, a set-off by the defendant, in the action of *assumpsit*, cannot be rejected, because he did not

plead it to the previous action of trespass. *Allen v. Horton*, 7 J. R. 23.

99. In an action on a promissory note, the defendant pleaded, that while one I. was the owner and possessor of this note, he sued him before a justice, and I. neglected to set off the note. It appeared, that the note was offered as a set-off, but was objected to by the defendant, and rejected by the justice, because, before it became due, and previous to its transfer, the plaintiff had agreed to receive payment in ashes. It was held, that the defendant, after having objected to the admissibility of the set-off, could not take advantage of a want of it; and, that the set-off made by I. was, under the circumstances, properly rejected. *Phinney v. Earle*, 9 J. R. 352.

100. An illegal set-off must be objected to at the time of pleading it; after it has been passed upon by the jury, it is too late to make the objection. *King v. Fuller*, 3 C. R. 152. *S. P. Wilson v. Larmouth*, 3 J. R. 433.

101. If the defendant cannot substantiate the whole of the set-off offered by him, the justice ought not wholly to reject it; but, if any part is proved, it ought to be allowed, and if the balance found for the defendant exceed 25 dollars, judgment ought to be given against the plaintiff. *Smith v. Burke*, 10 J. R. 110.

102. Where an attachment has been issued under the act relative to Justices' Courts, and a judgment obtained thereon; and the defendant, afterwards, bring an action against the plaintiff, the latter cannot set off such judgment, it being presumed that the [*461] judgment was satisfied *by the property taken under the attachment. *Miller v. Starks*, 13 J. R. 517.

103. A judgment recovered before another justice, but which had been removed into the Supreme Court, by *certiorari*, cannot be set off. *Willard v. Fox*, 18 J. R. 497.

(b) *At what time a set-off must be made.*

104. The defendant must set off his demand the very first opportunity, or he loses his right, and his demand is forever extinguished. *Serjeant v. Holmes*, 3 J. R. 428.

105. So, where two suits by the same plaintiff, against the same defendant, were pending at the same time, and the defendant suffered judgment to pass against him in the first suit, he cannot make his set-off in the second suit, but it ought to have been done in the first one. *Ibid.*

106. Where the defendant, who was sued before a justice on a note, neglected to set off a demand for damages, for the breach of an agreement, though he had not then paid, or suffered any actual damages, but the agreement was broken; it was held, that he could not afterwards (having been obliged to pay a certain sum by way of damages, in consequence of the plaintiff's non-performance of his agreement) sue for or recover the damages for the breach of the agreement. *McKerras v. Gardner*, 3 J. R. 137.

107. The defendant must plead, or give notice of his set-off, at the time of joining issue;

and if he neglects to do so, he cannot afterwards make the set-off at the trial. *Waring v. Lockwood*, 10 J. R. 108.

108. Where a defendant pleads to the jurisdiction of the justice, because the accounts between the parties exceed two hundred dollars, but does not exhibit or set off his account, and fails in substantiating his plea, he cannot, afterwards, at the trial, produce his account as a set-off. *Sellick v. Fox*, 12 J. R. 205.

[By the act, passed April 21, 1818, (Sess. 41. c. 269.) in all cases where a summons has been issued, if the defendant proves, to the satisfaction of the justice, that he has a demand against the plaintiff, and that he is about to depart out of the county, the justice shall issue a warrant to bring the plaintiff forthwith before him, and shall proceed to try and determine the cause, as if no summons had been issued.]

VIII. *Plea of a former action*; (a) *When a former action for the same cause, or a former action, in which the present plaintiff is defendant, and might have set off his demand, is a good bar*; (b) *How a former action may be taken advantage of, and what evidence is necessary to support the plea.*

(a) *When a former action for the same cause, or a former action in which the present plaintiff was defendant, and might have set off his demand, is a good bar.*

109. Where a demand has been once submitted to a jury, and [*462] passed upon by them, it is a complete bar to another action for the same cause. *Curtis v. Groat*, 6 J. R. 168.

110. A verdict on which no judgment has been entered is a bar to another action for the same cause. *Feller v. Mulliner*, 2 J. R. 181. *S. P. Hess v. Beekman*, 11 J. R. 457.

111. A verdict in a former action for the same cause, for costs alone, without damages, is a bar. *Young v. Overacker*, 2 J. R. 191.

112. If the same cause of action for which the present suit was brought, was in the former action stated *inter alia*, but not passed upon by the jury at the trial, who made up their verdict without paying any regard to it, it is, notwithstanding, a good bar. *Brockway v. Kinney*, 2 J. R. 210.

113. So, where one of the charges in the plaintiff's demand had been submitted to the jury in a former suit, but no damages had been given for it, and the jury, in the second suit, gave a verdict for the whole demand, including this charge as well as others, the whole verdict and judgment will be set aside, as the Court cannot say what part of it was given for the improper charge. *Irwin v. Knox*, 10 J. R. 365.

114. In an action for a deceit in the sale of a certain improvement or patent right, the defendant set up in defence a former trial and judgment in an action brought by him before a justice, against the plaintiff, on a promissory note, given for the purchase money, in which

suit the present plaintiff set up the deceit in the sale, as a defence against the note, and the same was considered by the justice, and a judgment given, for the plaintiff for the amount of the note; *held*, that the first trial and judgment were a complete bar to the second suit for the deceit. *Jones v. Scriven*, 8 J. R. 453.

115. If the grounds on which the present action are brought, are such as would, in a former suit, by the present defendant against the present plaintiff, have been a sufficient defence, but which the latter could not then, for want of proof, make out, the former suit is, notwithstanding, a good bar. *White v. Ward*, 9 J. R. 232.

116. Whether the former action were commenced by a summons or warrant, makes no difference. *Wentworth v. Barnum*, 10 J. R. 38.

117. A nonsuit in a former action is no bar to a new action for the same cause. *Youle v. Brotherton*, 10 J. R. 363.

118. In an action by the payee of a promissory note against the maker, the defendant pleaded, that the note had been endorsed by the payee, and that the endorsee had sued the defendant on the note before another justice; but it appearing that, in that suit, the maker objected to the title of the endorsee, or to some defect in the endorsement, in consequence of which no recovery was had on the note; *held*, that the plea was no bar, and that the defendant could not, in this suit, set up the endorsement as good, which he had in the former suit shown, or attempted to show, to be bad. *McDonald v. Rainor*, 8 J. R. 442.

119. Where a suit was brought on a note to A., or bearer, and the defendant pleaded a former suit on the same note, brought against him by A., and a judgment in favor of the defendant; *held*, not to be a bar to the second suit, unless the defendant also [*463] proved, that A. was the rightful owner or possessor of the note. *Hutchins v. Fitch*, 4 J. R. 222.

120. It is a good plea in bar, that the defendant had previously commenced an action against the plaintiff, before another justice, in which the plaintiff ought to have set off his demand. *Douglas v. Hoag*, 1 J. R. 283.

121. If the set-off, which forms the subject matter of the present suit, were improperly rejected in the former action, the judgment in that action is, notwithstanding, until reversed, a bar. *Lawrence v. Houghton*, 5 J. R. 129. *S. P. McLean v. Hugarin*, 13 J. R. 184.

122. An illegal set-off in a former action, if not objected to at the time, and passed upon by the jury, is a bar to an action brought by the party who made the set-off. *King v. Fuller*, 3 C. R. 152.

123. A plea of a former action and trial between the same parties, in which the present plaintiff set off his demand, is not good, if the debt on which the demand was founded, was not then actually due, and the set-off for that reason rejected. *Bull v. Hopkins*, 7 J. R. 22.

124. In an action for deceit, a plea of a

former suit by the defendant, against the plaintiff, on a contract, in which the present plaintiff neglected to set off his demand, is no bar. *Dean v. Allen*, 8 J. R. 390.

125. Where the former action was trover, the neglect of the defendant in that action to set off his demand is no bar to an action for that demand. *Moore v. Davis*, 11 J. R. 144.

126. The plaintiff brought an action in a Justice's Court, for an assault and battery, in which, after a trial, judgment was rendered against him. He, afterwards, brought an action of trespass on the case, for the same injury, before another justice; *held*, that as the former action for the assault and battery was not within the jurisdiction of the justice, the judgment was a nullity, though unreversed, and was no bar to a subsequent action on the case. *Blin v. Campbell*, 14 J. R. 432.

(b) *How a former action may be taken advantage of, and what evidence is necessary to support the plea.*

127. A former trial and judgment cannot be taken advantage of, unless pleaded, or given notice of at the time of joining issue. *Fowler v. Hail*, 10 J. R. 111. *S. P. Dexter v. Hazen*, 10 J. R. 246.

128. A certificate of the judgment, under the hand and seal of the justice before whom the former action was tried, and the handwriting proved by a witness, is, if objected to, insufficient; but it should be proved by the justice himself, or a sworn copy of his minutes should be produced. *McCarty v. Sherman*, 3 J. R. 429.

129. Where the defendant pleaded a former action brought by him before the justice, and a recovery, when the plaintiff ought to have set off his demand, and the only evidence of the former action was a statement by the justice to the jury, to which the plaintiff did not object; *held*, that although the statement of the justice was not legal evidence, yet, as the plaintiff did not object, he was concluded by it. *Lawrence v. Houghton*, 5 J. R. 129.

*130. But where the evidence of [*464] the justice was objected to on the trial, the Court reversed the judgment. *White v. Hawth*, 5 J. R. 351.

131. The defendant pleaded a former trial before the same justice, for the same cause, and the justice stated, from his knowledge, that the plaintiff was nonsuited at such former trial, and that it was no bar; if the defendant do not deny the statement, but go to trial, he will be concluded as to the fact. *Blanchard v. Richly*, 7 J. R. 198.

132. Where on a plea of a former judgment in which the present plaintiff, being defendant, ought to have set off his demand, the justice by whom that judgment was rendered appears as a witness, and produces his minutes of the judgment, in which there is an ambiguity as to the form of action, the evidence of the justice is inadmissible to show that it was on a contract, if it appears, that he has in his possession the original declaration in the cause,

for that is higher evidence. *Dygart v. Coppernoll*, 13 J. R. 210.

133. Where the return to a *certiorari* stated the certificate of a former trial, authenticated according to the act, but not appearing to be under the seal of the Common Pleas, but stated only "witness my hand and seal;" *held*, that it was to be inferred, that the certificate was under seal. *M'Lean v. Hugarin*, 13 J. R. 184.

IX. Plea of title.

134. A plea of title is not valid, unless reduced to writing. *Sage v. Barnes*, 9 J. R. 365.

135. A plea of title is an admission of the trespass, and, on the removal of the cause, the defendant cannot plead the general issue. *Strong v. Smith*, 2 C. R. 28.

136. In action of trespass on land, the defendant cannot, after pleading the general issue, interpose a plea of title; nor can he, under the general issue, give evidence of title. *Quimby v. Hart*, 15 J. R. 304.

Further, as to the effect of a plea of title, and what may be given in evidence on the removal of the cause, see TRESPASS.

X. Adjournment; (a) *When an adjournment may be granted, on what security, and for what time;* (b) *When an irregular adjournment amounts to a discontinuance, and what is a waiver of the irregularity.*

(a) *When an adjournment may be granted, on what security, and for what time.*

137. In the case of a non-resident plaintiff suing by warrant, the justice cannot adjourn the cause for more than three days without his consent. *Candee v. Goodspeed*, 2 C. R. 245.

138. The discretion given to a justice by the 2d section of the act, (Sess. 31. c. 204.) to adjourn a cause, is not an arbitrary discretion, but ought to be soundly and judiciously exercised. *Rose v. Stuyvesant*, 8 J. R. 426.

*139. The justice may, on the [*465] return of a summons, at the request of the plaintiff, adjourn the cause for six days, without requiring an oath of the absence of material witnesses. *Kittle v. Baker*, 9 J. R. 354.

140. On the return of the summons, the parties joined issue, and a *venire* was awarded at the instance of the plaintiff, and the justice adjourned the cause for six days, when the defendant appeared and demanded an adjournment, which the justice refused, unless he would pay the costs of the *venire*; *held*, that the defendant was entitled to the adjournment, which the justice had no right to refuse on that ground. *Hemstreet v. Youngs*, 9 J. R. 364.

141. Where a defendant is brought up on a warrant, and issue is joined between the parties, the justice may, on the request of the defendant, under the first section of the act, ad-

journ the cause for one day, or for a less time than three days. *Bowditch v. Salisbury*, 9 J. R. 366.

142. Where the justice has once adjourned the cause for three months, at the request of the defendant, he cannot grant a second adjournment, at the request of the same party. *Townsend v. Lee*, 3 J. R. 435.

143. Where a person is brought before a justice on a warrant, and prays for an adjournment, and bail is taken for his appearance at the day, there must be a personal appearance of the party, and not by attorney; otherwise the bail will be liable for the amount recovered by the plaintiff. *Ibid*.

144. A justice cannot, under the 2d section of the act, or at the instance of the plaintiff, adjourn a cause for a longer time than six days, without the consent of the parties. *Palmer v. Green*, 1 J. C. 101. *S. P. Gamage v. Law*, 2 J. R. 192. *S. P. Colden v. Dopkin*, 3 C. R. 171. *Dunham v. Heyden*, 7 J. R. 381.

145. But if, after an adjournment for ten days, the defendant appears and examines a witness, it is a waiver of the irregularity. *Ibid*.

146. A justice cannot, on his own motion, adjourn a cause more than once, and that only for a time not exceeding six days, after the return of process. *Gamage v. Law*, 2 J. R. 192. See *Kilmore v. Sudam*, 7 J. R. 529.

147. If an attorney of the defendant offer to make affidavit of the absence of a material witness, and request an adjournment, the justice ought to receive such affidavit, unless some special cause to the contrary be shown. *Seers v. Grandy*, 1 J. R. 514.

148. Where, at the request of a defendant, who had been taken on a warrant, and with the consent of the plaintiff, the cause was adjourned to another day, when the parties appeared, and the defendant requested a second adjournment, on account of the absence of a material witness; *held*, that the justice was bound, on the defendant's offering to give security, to grant a further adjournment, and that the time might extend to three months, as this was not a case within the 7th section of the act, (Sess. 24. c. 165. 1 N. R. L. 389.) allowing an adjournment for twelve days only. *Easton v. Coe*, 2 J. R. 383.

149. The security to be taken by the justice, for the defendant's appearance, in case of granting him an adjournment, must either be a *recognizance, or, at [*466] least, a written engagement of the bail; if merely verbal, it is void by the statute of frauds. *M'Nutt v. Johnson*, 7 J. R. 18.

150. The defendant was sued by warrant, but it did not appear from the return whether he was, in fact, proceeded against as a freeholder, or person having a family, and that the requisite evidence was given to authorize the issuing a warrant; and the defendant prayed for an adjournment for want of a material witness, and offered security to appear and stand trial; but the justice refused to grant an adjournment, unless the defendant would make oath that the witness was material; which being refused, the justice proceeded, and gave judgment for the plaintiff; *held*, that the de-

defendant was entitled to an adjournment, under the act, (s. 4.) and the judgment of the justice was reversed. *Sebring v. Wheeldon*, 8 J. R. 458. *S. P. Cross v. Moulton*, 15 J. R. 469.

151. If a party has had one adjournment after issue joined, he cannot, on tendering security, have a second adjournment, without showing that he had used due diligence to procure his witnesses, or some special cause for their non-attendance, or for the adjournment. *Powers v. Lockwood*, 9 J. R. 133.

152. After issue joined, and the cause having been once adjourned at the request of the defendant, for more than thirty days, on giving security, on the expiration of the adjournment the parties appeared, and the defendant showed due diligence in subpoenaing his witnesses, and made oath that a material witness, who had been subpoenaed, did not attend, and prayed a second adjournment, which was refused by the justice, unless the defendant would pay the extra costs, which not being done, the cause was heard *ex parte*, and decided; *held*, that the defendant, having given security, and shown due diligence, was entitled to a second adjournment. *Beckman v. Wright*, 11 J. R. 442.

153. Whether a justice has power, in any case, to exact costs, on granting a favor to a party in a cause? *Quare. Ibid.*

154. A justice may refuse to grant a second adjournment to a defendant, for the purpose of procuring witnesses, where he shows no excuse for not having procured them after the first adjournment. *St. John v. Benedict*, 12 J. R. 418. *S. P. Farrington v. Payne*, 15 J. R. 432.

155. Where an adjournment has been granted, at the request of the plaintiff, and day for the trial agreed on by the parties, the defendant is not, therefore, excluded, if he shows sufficient cause, from asking a further adjournment. *Annis v. Chase*, 13 J. R. 462.

156. The admission of the affidavit of any other person than the party himself, for the purpose of obtaining a second adjournment, on account of the absence of material witnesses, rests in the sound discretion of the justice. *Kilmer v. Cray*, 13 J. R. 228.

157. A justice has some discretion in granting an adjournment, on the application of the defendant, in order to enable him to procure testimony; and if the plaintiff will admit the matters expected to be proved by the absent witness, the adjournment may be refused. *Brill v. Lord*, 14 J. R. 341.

158. And after such admissions are offered and accepted, the defendant *is [*467] precluded from asking for an adjournment, to procure the testimony of the same witness to the facts. *Ibid.*

159. When a cause has been once adjourned by consent of parties, a second adjournment cannot be granted at the instance of the plaintiff. *Payne v. Wheeler*, 15 J. R. 492.

160. It is too late to ask for an adjournment after the jury are sworn and empanelled. *Pink v. Hall*, 8 J. R. 437.

(b) *When an irregular adjournment amounts to a discontinuance, and what is a waiver of the irregularity.*

161. An adjournment, improperly made, amounts to a discontinuance of the suit. *Gamage v. Law*, 2 J. R. 192.

162. If, on the return day, the parties appear, but the justice does not attend, and sends a note, without signing it, adjourning the Court, it is not an adjournment of which the parties are bound to take notice; the cause is discontinued, and all subsequent proceedings are null. *Wiest v. Critsinger*, 4 J. R. 117.

163. A justice adjourned the cause, and the defendant appeared at the time and place appointed, and having waited nearly three hours, went away; the justice shortly after came, and proceeded to hear the cause on the part of the plaintiff, and gave judgment against the defendant; as the party is bound to wait but a reasonable time, the cause became discontinued by the delay of the justice, and the judgment was erroneous. *Taft v. Grosfent*, 5 J. R. 353.

164. Where a justice adjourns a cause, on the mere suggestion of the plaintiff that the defendant had agreed to an adjournment, and on the affidavit of the plaintiff of the absence of a material witness, without showing due diligence to procure her attendance, the adjournment is unauthorized, and amounts to a discontinuance. *Proudfit v. Henman*, 8 J. R. 391.

165. Where a justice has a discretion as to adjourning a cause, nothing but an abuse of such discretion will be regarded as error. *Pease v. Gleason*, 8 J. R. 409.

166. If a party appear and go to trial on the merits, it is a waiver of any objection to an adjournment irregularly granted. *Dunham v. Heyden*, 7 J. R. 381. *Willoughby v. Carleton*, 9 J. R. 136.

167. An adjournment for more than six days cannot be objected to as erroneous, by the party at whose instance it was granted. *Peck v. M'Alpine*, 3 C. R. 166.

168. The right of a justice to adjourn a cause, on his own motion, must be claimed and exercised at the return of the process; and if the first adjournment is made by consent of parties, the justice cannot adjourn the cause a second time, on his own motion; but the plaintiff having consented to a second adjournment, and the defendant making no objection, the adjournment was *held* to have been made by consent of both parties. *Kilmore v. Sudam*, 7 J. R. 529.

169. If the justice improperly refuse to adjourn a cause on the request of the defendant, and the defendant afterwards voluntarily confesses judgment, this is a waiver of the previous irregularity. *Hill v. Downer*, 11 J. R. 461.

*XI. *Trial in a Justice's Court, as [*468] to particulars which apply, as well where the trial is before the justice alone as before a jury.*

170. The justice may continue his Court from one day to the next, when the exigencies

of the case require it, of which the parties are bound to take notice, and to attend accordingly. *Day v. Wüber*, 2 C. R. 134.

171. And if the defendant neglects or refuses to attend, the justice may proceed in the trial without him. *Ibid.*

172. The justice who tries the cause must swear the witnesses. *Perry v. Weyman*, 1 J. R. 520.

173. The justice before whom the cause is tried, cannot himself be sworn as a witness by another justice. *Ibid.*

174. But if, from the return, it does not appear that any objection was made, it will be intended that he was admitted by consent. *Cobb v. Curtiss*, 8 J. R. 470.

175. Where a person, who is security for the defendant, is a material witness for the defendant, he ought to be discharged, and new security taken, so that the defendant may have the benefit of his testimony. *Irvine v. Caryell*, 8 J. R. 407.

176. If the justice examine one of the parties, as a witness, *de bene esse*, it is error, though it is stated in the return, that he afterwards disregarded the evidence as improper. *Haswell v. Bussing*, 10 J. R. 128.

177. If the justice on his own statement, (not under oath,) that the note, on which the action was brought, having been delivered to him, could not be found, admit *parol* evidence of its contents, it is erroneous. *Cary v. Campbell*, 10 J. R. 363.

178. There can be no demurrer to evidence in a Justice's Court. *Reynolds v. Bedford*, 3 C. R. 140.

179. The plaintiff has a right to withdraw, and submit to a nonsuit. *Platt v. Storer*, 5 J. R. 346.

180. If a justice try the cause at a place different from that mentioned in the summons, it is an irregularity, for which the judgment will be reversed. *Stewart v. Meigs*, 12 J. R. 417.

181. Where the subscribing witnesses to a deed, produced in the cause, reside without the jurisdiction of the justice, or beyond the control of his subpoena, it is sufficient to prove the hand-writing of the witnesses. *Cook v. Husted*, 12 J. R. 188.

182. And the declaration of the plaintiff to a witness, who also was so informed from others, that the witnesses did reside in another county, is sufficient evidence of the fact, to authorize the justice to admit the other evidence of the execution of the deed. *Ibid.*

183. In an action of debt on a judgment of a Justice's Court, it is not necessary to show that the person or justice before whom the judgment was obtained, was a magistrate, or that he had not been superseded at the time the judgment was rendered. *Reed v. Gillet*, 12 J. R. 296.

184. And if the record of the judgment is proved by the testimony *of the [*469] justice, not on oath, without objection at the time, it is sufficient. *Ibid.*

185. A former trial cannot be given in evidence under the general issue, unless by con-

sent; but if the defendant offered other matter of defence, which was entered into at large, and it does not appear that injustice has been done, the judgment, on that account, will not be reversed. *Brown v. Wilde*, 12 J. R. 455.

186. If an improper question has been put to a witness, and answered, but it is immediately corrected by the justice, the judgment will not be reversed for that cause. *Brown v. Conwell*, 12 J. R. 384.

187. Where a defendant is ready in Court to prove his defence, at the time the plaintiff closes his case, he ought to be allowed to enter into it, though he was not present when the trial commenced. *Atwood v. Austin*, 16 J. R. 180.

XII. Trial before a justice alone.

188. A justice cannot decide on his own previous knowledge, but only on evidence produced before him in Court. *Burlingham v. Deyer*, 2 J. R. 189. *S. P. Locke v. Smith*, 10 J. R. 250.

189. Where there is a trial of a cause before a justice without a jury, the plaintiff may elect to become nonsuit any time before it is finally submitted for the judgment of the Court; but not after the cause is under advisement, though before four days have elapsed. *Hess v. Beekman*, 11 J. R. 457.

190. So, the justice, on the trial before him, may nonsuit the plaintiff, if in his opinion the testimony offered by the plaintiff does not support the action. *Clements v. Benjamin*, 12 J. R. 299.

191. Where a plaintiff's witness is examined, in part, and then the cause is adjourned, on account of his sickness, it is the duty of the plaintiff to produce the witness again, at the day, or show good reason why the witness is not there; otherwise the justice may reject the evidence given on his unfinished examination. *Ibid.*

192. In an action to recover the amount of a bank note, paid by the defendant to the plaintiff, on the ground that the note was forged, the justice is not authorized to give judgment for the plaintiff, on his own bare inspection of the note. *Wheeler v. Lampman*, 14 J. R. 481.

*XIII. Trial by jury; (a) When [*470] a trial by jury may be demanded, on what the jury is to decide, and effect of such trial on the power of the justice; (b) Venire, and when irregularities in the venire are cured; (c) Challenge; (d) Constable to attend the jury, and his oath; (e) Proceedings of the jury after they have retired, and until their verdict is recorded; (f) Verdict, and when irregularities in the verdict will be cured.

(a) When a trial by jury may be demanded, on what the jury is to decide, and effect of such trial on the power of the justice.

193. A venire cannot be awarded on a judgment by default, or where the defendant does not plead. *Manny v. Dobie*, 3 C. R. 219.

194. The mere inspecting the note, on which the action is founded, by the justice, is not such a commencement of the trial as to preclude the party from demanding a jury. *Olney v. Bacon*, 1 J. R. 142.

195. Where a *venire* has been issued, the justice cannot proceed to try the cause without a jury. *Sebring v. Wheedon*, 8 J. R. 460. *Day v. Wilber*, 2 C. R. 134.

196. Under the "acts to extend the jurisdiction of justices of the Peace," (Sess. 41. c. 94, passed April 18, 1818,) when the demand exceeds 25 dollars, either party has a right to demand that the jury should consist of *twelve*; but he must make his demand for that purpose, before the *venire* issues, in order that *twenty* may be summoned; if he waits until the *venire* is returned with *twelve* jurors, six of whom are sworn, he is too late. *Strong v. Beardslee*, 18 J. R. 130.

197. Where a jury is demanded, and a *venire* issued, at the instance of one of the parties, the *costs* of the *venire* abide the event of the trial. *Rickey v. Boume*, 18 J. R. 131.

198. Where a *venire* is demanded by either party, the justice may deliver it himself to the constable, to be executed; but if he delivers it to the party, and he does not appear at the time to which the cause is adjourned for trial, and the *venire* is not returned, the justice may consider the suppression of the *venire* by the party, as a waiver of the trial by jury, and proceed to hear and decide the cause himself, as if no *venire* had been demanded or issued. *Coon v. Snyder*, 19 J. R. 384.

199. Improper evidence should not be permitted to go to the jury; and it is not sufficient afterwards, to direct them to disregard it. *Penfield v. Carpenter*, 13 J. R. 350.

200. Where improper evidence is produced by one of the parties, and afterwards legal testimony of the same fact is produced by the opposite party, the error is cured. *Miller v. Starks*, 13 J. R. 517.

201. When the justice has submitted the cause to the jury, he cannot take it from them, and nonsuit the plaintiff. *Young v. Hubbell*, 3 J. R. 430.

202. The jury decide both the law and the fact. *McNeil v. Scofield*, 3 J. R. 436.

203. A justice has no right, during the trial, before him, to permit the parties [*471] to treat the jury with liquor. *Kellogg v. Wilder*, 15 J. R. 455.

(b) *Venire, and when irregularities in the venire are cured.*

204. In an action against joint debtors, a *venire* mentioning only the defendant brought into Court, without taking notice of the other, is sufficient. *Hutchins v. Fitch*, 4 J. R. 222.

205. If the *venire* be not returned at the time appointed for trial, it is not a reason for nonsuiting the plaintiff, but another *venire* may be issued. *Blanchard v. Richly*, 7 J. R. 198.

206. If, where the first *venire* has not been returned, the party does not demand another *venire*, but goes to trial, it is a waiver of the trial by jury. *Ibid.*

207. Where the first *venire* has not been carried into effect, the justice may issue another *venire*, without the former having been returned. *Day v. Wilber*, 2 C. R. 134. *S. P. Sebring v. Wheedon*, 8 J. R. 460.

208. And it will be considered as the process of the party at whose instance the first *venire* was issued, who, consequently, cannot object to the form of it. *Day v. Wilber*, 2 C. R. 134.

209. The justice may award a *tales de circumstantibus*, in case of a default of the jurors summoned on the *venire*. *Zeely v. Yansen*, 2 J. R. 386.

210. A defective *venire* is cured, if the party makes no objection at the time, but proceeds to trial. *Day v. Wilber*, 2 C. R. 134. *S. P. Kline v. Husted*, 3 C. R. 275.

211. The party at whose instance a *venire* is issued, cannot allege error in it. *Day v. Wilber*, 2 C. R. 134.

212. A *venire* in a Justice's Court must be executed by a constable of the town from which the jury is summoned, and in which the cause is tried. *Louw v. Davis*, 13 J. R. 227.

213. But, it seems, that a *venire* directed to any constable of the county, if it is executed by a proper constable, is a mere defect in form, for which the judgment will not be reversed. *Ibid.*

(c) Challenge.

214. Aliens, though freeholders and inhabitants of the town, are not qualified to serve as jurors, as they are not good and lawful men, within the meaning of the act, sess. 24. c. 165. s. 12. *Borst v. Beecker*, 6 J. R. 332.

215. It is a cause of challenge to the array, that the jury were summoned by a constable who acts as advocate of the party. *Watkins v. Weaver*, 10 J. R. 107.

216. But if the defendant expressly assent to their being summoned by such constable, he cannot afterwards challenge the array on that ground. *Ibid.*

217. It is good cause of challenge to a juror, that he is not a freeholder of the town in which the cause is tried. *Streeter v. Hearsey*, 11 J. R. 168.

*218. A justice has no power, [*472] on his own mere motion, without any exception being taken by either party, to challenge the panel of jurors, and issue a new *venire*. *Cross v. Moulton*, 15 J. R. 409.

219. Where jurors are challenged, on the ground that they are not freeholders, the fact may be tried by the examination of the jurors themselves under oath. *Ogden v. Parks*, 16 J. R. 180.

(d) Constable to attend the jury, and his oath.

220. If it appear from the record, that a person, not a constable, was sworn to attend the jury, the judgment will be reversed. *Staley v. Barhite*, 2 C. R. 221. *S. P. Beckman v. Wright*, 11 J. R. 442. *Coughnet v. Eastenbrook*, 11 J. R. 532.

221. Where the jury do not retire from the Court to consider of their verdict, it is unnecessary that a constable should be sworn to attend them. *Fink v. Hall*, 8 J. R. 437.

222. If the return to a *certiorari* set forth the oath administered to a constable to keep the jury, erroneously, it will be fatal. *Day v. Wilber*, 2 C. R. 134. *S. P. Reynolds v. Bedford*, 3 C. R. 140.

(c) *Proceedings of the jury after they have retired, and until their verdict is recorded.*

223. The law, as to trial by jury in other Courts, applies to Justices' Courts. *Blackley v. Sheldon*, 7 J. R. 32.

224. So that the jury may change their verdict before it is recorded; they may be polled; they may come into Court to hear further evidence; or the justice may send them back to reconsider their verdict. *Ibid.*

225. After the jury had retired to deliberate on their verdict, they sent for the justice, and asked him whether they could add any thing to the charge of the plaintiff, to which the justice answered "no," and left them without any thing further being said; this is not an irregularity for which the verdict will be set aside. *Thayer v. Van Fleet*, 5 J. R. 111.

226. After the jury had retired to deliberate on their verdict, they sent to the justice, requesting that a witness, who had been previously sworn in the cause, might be sent to them, or that they might come into Court, in order to ask the witness some questions, and the justice asked the parties if they would go to the jury, that the witness might be examined, which the defendant refused; but the justice permitted the witness to go into the jury room, and stood at the door while he was examined, and then retired with the witness: the jury having found a verdict for the plaintiff, this was held not to be a sufficient irregularity to set aside the verdict. *Henlow v. Leonard*, 7 J. R. 200.

227. After the jury had retired to deliberate on their verdict, they requested the justice to inform them whether a certain point of evidence had been given, and the justice answered their inquiry; this was held erroneous, and the judgment was reversed, it not [*473] appearing that it was done with the consent, or in the presence of the parties. *Bunn v. Croul*, 10 J. R. 239. *S. P. Tylor v. Betsford*, 13 J. R. 487.

228. If the parties agree that the jury may retire to consider of their verdict, without a constable to attend them, it will amount to a waiver of any objection to the verdict, on the ground of irregularity in the conduct of the jury, in drinking, and admitting other persons in the room, while they were consulting on their verdict. *Tower v. Hewett*, 11 J. R. 134.

(f) *Verdict, and when irregularities in a verdict will be cured.*

229. A verdict of *no cause of action* is, substantially, a verdict for the defendant; and although informal, the justice is bound to ren-

der judgment accordingly. *Feller v. Mulliner*, 2 J. R. 181.

230. Verdict for the defendant, for six cents damages and six cents costs, will be considered as a general verdict for the defendant, and the damages and costs will be rejected. *Goodenow v. Travis*, 3 J. R. 427.

231. Where the jury, in the Court below, had found eight cents for the defendant, on a plea of payment, the Supreme Court intended a set-off to help it out. *Carna v. Penfield*, cited 2 C. R. 138.

232. A verdict for more damages than the party has claimed in his declaration or set-off, is merely a defect of form, for which a judgment will not be set aside. *Wilson v. Lar-mouth*, 3 J. R. 433.

233. The jury in a Justice's Court cannot find a special verdict; nor can the justice render a judgment on such verdict. *Wylie v. Hyde*, 13 J. R. 249.

234. Where a jury has been empannelled before *Sunday* commences, their verdict may be received on *Sunday*; but the justice cannot enter a judgment on that day. *Hoghtaking v. Osborn*, 15 J. R. 119.

XIV. *Judgment; (a) Judgment after issue joined; (b) Judgment by default; (c) Judgment by confession; (d) What is evidence of the existence of a judgment in a Justice's Court.*

(a) *Judgment after issue joined.*

235. A judgment, rendered after issue joined, on the non-appearance of the defendant, must specify it to have been made on *hearing the proofs and allegations, &c.* *Stocking v. Driggs*, 2 C. R. 96.

236. A justice is bound to give judgment on a verdict; for he can neither arrest the judgment, nor award a new trial. *Feller v. Mulliner*, 2 J. R. 181. *Hess v. Beckman*, 11 J. R. 457.

237. Where a suit is brought by an executor or administrator, before a justice, and the defendant pleads a set-off, and a balance is found in his favor, the judgment for the defendant is absolute and peremptory against the plaintiff, who becomes thereby personally charged for the judgment, *de bonis propriis*. *Smith v. Lockwood*, 10 J. R. 366.

238. If the jury find a verdict of damages for the defendant, in a case in which he is not entitled to damages, the justice may enter a *remittitur damna*, and give judgment for the defendant generally. *Burger v. Kortright*, 4 J. R. 414.

239. Though the plaintiff proves damages, above the sum of 25 dollars, yet if judgment is given for 25 dollars only, it is regular. *Potnam v. Shelop*, 12 J. R. 435.

240. Where two persons are sued by warrant, and one only appears, and the justice gives judgment against both, the judgment is erroneous. *Richard v. Walton*, 12 J. R. 434. Whether the justice could have given judgment against the one only who appeared? *Quære.*

241. Where the plaintiff below was non-suited, but no costs awarded, the Court considered the judgment as incomplete, and refused to affirm or reverse it. *Monnell v. Welter*, 2 J. R. 8.

242. Where evidence is given on both sides, so that the question is, at least, doubtful, the judgment will not be reversed, though the verdict appear to be against the weight of evidence. *Brown v. Wilde*, 12 J. R. 455.

243. Nor will a judgment be reversed, because the justice had before expressed an opinion in the cause. *McDowell v. Van Deusen*, 12 J. R. 356.

244. In a judgment for the defendant, it is improper to include costs which accrued on the part of the plaintiff. *Penfield v. Carpenter*, 13 J. R. 350.

245. Where, after issue joined, the justice adjourns the cause to another day, and he waits a full hour after the time appointed for the appearance of the parties, that is a reasonable time, and he may proceed to call them, and give judgment against the party neglecting to appear. *Shufelt v. Cramer*, 20 J. R. 309.

(b) Judgment by default.

246. If the defendant makes default, on the return of the summons personally served, the justice cannot give judgment for the plaintiff, without proof of his demand; but it must be proved in the same manner as if the defendant had appeared, and denied it. *Cudner v. Dixon*, 10 J. R. 106.

247. Where the Court is held in a different place from the one mentioned in the summons, and the defendant does not appear, judgment by default is erroneous. *Case v. Van Ness*, 1 J. C. 243. *Stewart v. Meigs*, 12 J. R. 417.

248. If the defendant, having been personally served with a summons, do not appear on the return, he cannot afterwards be admitted to plead, but can only be allowed to give evidence in mitigation of damages. *Snell v. Loucks*, 11 J. R. 69.

249. If the justice mislead the defendant, by informing him that the cause is discontinued and afterwards gives judgment against him, in his absence, the judgment is erroneous. *Tyler v. Olney*, 12 J. R. 378.

250. If the defendant, who has been served with a summons, appears before the justice has entered upon the trial of the merits of the cause, the justice has no authority to enter his default for not appearing when called. *Sweet v. Coon*, 15 J. R. 86. *S. P. Bowen v. Bell*, 19 J. R. 330.

[*475] *(c) Judgment by confession.

251. A justice cannot enter judgment against a defendant, unless he appears in person, or by attorney, and confesses judgment, or on his being duly summoned. *Martin v. Mass*, 6 J. R. 126.

252. A written authority from the defendant to the justice, to confess judgment, is insufficient. *Ibid.*

253. If the defendant, by writing, authorize

the justice to enter up judgment against him, for whatever demand the plaintiff might have against him, to the satisfaction of the justice; the authority being revocable, if the defendant revoke it, the justice cannot enter up judgment on the demand of the plaintiff, but should have a trial to ascertain the amount due. *Gale v. Chace*, 3 J. R. 147.

254. Where a cause, having been adjourned, became discontinued, by the non-appearance of the plaintiff at the day appointed, and more than a month afterwards, a person who had been authorized by the defendant to appear for him, at the adjourned day, and confess a judgment, came before the justice, and without the knowledge of the defendant, confessed a judgment in favor of the plaintiff, as of the day to which the cause was adjourned; held, that this judgment being void, the defendant might avail himself of the irregularity, in an action brought upon it. *Hubbard v. Spencer*, 15 J. R. 244.

255. A judgment can, in no case, be entered by confession against a defendant, unless on his appearance in Court, in person, or by attorney, or when he has been duly summoned; although the defendant authorize the justice, by a writing under seal, to enter up judgment against him, and the signature is duly proved before the justice. *Bromaghin v. Thorp*, 15 J. R. 476.

(d) What is evidence of the existence of a judgment in a Justice's Court.

256. The certificate of a justice, of a judgment recovered before him, is *prima facie* evidence of the existence of the judgment; and, if not objected to by the defendant, on the trial, the Supreme Court will, on *certiorari*, consider it sufficient to support the second judgment. *Kellogg v. Mauney*, 2 J. R. 378.

257. But if the certificate be objected to, it ought to be proved by the justice himself, who gave the judgment, or a sworn copy of his minutes should be produced. *McCarty v. Sherman*, 3 J. R. 429. And see *Reed v. Gillet*, 12 J. R. 296.

258. Though the proceedings and judgment in a Justice's Court are not strictly and technically a record, yet parol evidence of them is not admissible; but the written evidence or minutes of the proceedings must be produced, and they may be verified by the testimony of the justice. *Posson v. Brown*, 11 J. R. 166.

259. Parol evidence is inadmissible to contradict the certificate of a justice, as to proceedings before him. *McLean v. Hugarin*, 13 J. R. 184.

260. It is sufficient evidence of a judgment recovered before a justice who is since dead, to prove the death of the justice, and to produce *the original [*476] minutes of the judgment in the hand-writing of the justice, with proof to verify the minutes. *Baldwin v. Prouty*, 13 J. R. 430.

261. A judgment in a Justice's Court is equivalent to a specialty, and *debt*, not *assumpsit*.

it, is, therefore, the proper action on such judgment. *James v. Henry*, 16 J. R. 233.

See ante, VIII.

XV. Costs.

262. In all cases, in which a debt or damages are recoverable, costs are given of course. *Blake v. Millsbaugh*, 1 J. R. 316.

263. If a justice allows fees for subpoenas on more than four witnesses, the judgment will be reversed. *Feld v. M'Vickar*, 9 J. R. 130.

264. A justice cannot dismiss a suit, or stay proceedings, because the costs of a former action, for the same cause, are unpaid. *Youle v. Brotherton*, 10 J. R. 363.

265. In a judgment for the plaintiff for costs, the costs of subpoenas issued on behalf of the defendant cannot be included. *Bronson v. Mann*, 13 J. R. 460. *S. P. Tymmerman v. Morrison*, 14 J. R. 369. *S. P. Williams v. Sherman*, 15 J. R. 195.

266. Nor, where the judgment is for the defendant, can costs, which accrued on the part of the plaintiff, be included. *Penfield v. Carpenter*, 13 J. R. 350.

267. A witness, attending from a foreign county, is only entitled to 25 cents per day; and he cannot maintain an action for additional compensation against the party who subpoenas him. *Fuller v. Matrice*, 14 J. R. 357.

XVI. Execution.

268. A justice has no authority to discharge a prisoner on execution, without a special power for that purpose from the plaintiff in the suit. *Van Slyck v. Taylor*, 9 J. R. 146.

269. And if a constable, who has the prisoner in custody, discharge him by order of the justice, who has no such authority from the plaintiff, he is liable to an action for an escape. *Ibid.*

270. If a constable, having taken goods in execution, deliver them to A., on his giving a receipt, promising to redeliver them on demand, and the constable does not demand and sell them within the thirty days, he loses, by his neglect, all claim and title to the possession of the goods. *Brown v. Cook*, 9 J. R. 361.

271. Where a prisoner in execution on final process issued from a Justice's Court, makes and produces to the sheriff an affidavit, under the act, that he has a family, is not a freeholder, and has been in prison for more than thirty days, the sheriff is bound to discharge him, without inquiring into the truth of the affidavit. *Lohnis v. Jones*, 11 J. R. 174.

272. And if the prisoner have [477] given a bond for the jail liberties, such discharge is not a breach of the condition. *Ibid.*

273. Where a person becomes security for a defendant, in order to obtain a stay of execution, and the justice, with the assent of the surety, enters a judgment against him jointly with the defendant, such judgment is valid, by way of security, the statute not having de-

clared the manner in which it is to be taken. *Lovett v. Green*, 12 J. R. 204.

274. A justice may renew an execution issued by him, without a return of *nulla bona* endorsed thereon. *Wickham v. Miller*, 12 J. R. 320.

275. It is unnecessary for the justice to issue a new writ, but an endorsement on the original writ, "execution renewed," will be sufficient. *Ibid.*

276. And such endorsement is evidence that the officer had satisfied the justice, that there was no goods on which he could levy. *Ibid.*

277. The priority of executions, in a Justice's Court, depends not on the time of delivering the execution to the constable, but on the time of actual levy. *Wylie v. Hyde*, 13 J. R. 249.

278. It is sufficient if the constable levy on an execution, and advertise within twenty days after he has received the execution, but sells after the expiration of the twenty days, provided the sale is made before the return day of the writ; and such sale will be valid against an intermediate levy and sale on another execution. *Ibid.*

279. The advertisement may be made on a day subsequent to the levy, provided both are within the twenty days. *Ibid.*

280. A person who has a family, but is not a freeholder, is exempted from imprisonment on an execution issuing out of a Justice's Court, although he resides in a different county from that in which the judgment is rendered. *Spafford v. Griffen*, 13 J. R. 328.

281. But the justice's refusal to endorse the defendant's exemption is no ground for reversing the judgment. *Ibid.*

282. Where the execution is against the body of the defendant, though the constable has thirty days within which to serve it; yet if he arrests the defendant within that time, it will be an escape, if he suffers him to go at large, and which will not be excused by his having the defendant in custody at the expiration of the thirty days. *Pulver v. M'Intyre*, 13 J. R. 503.

283. The action against a constable for not returning an execution must be debt. *Pierz v. Sheldon*, 13 J. R. 191.

284. In an action of debt against a constable for not returning an execution, under the 13th section of the act, (Sess. 36. c. 53.) the plaintiff is not entitled to interest, on the balance due on the execution, the remedy given by the statute being in the nature of a penalty. *Thomas v. Weed*, 14 J. R. 255.

285. Where the defendant claims exemption from imprisonment, on the ground that he has a family, and is not a freeholder, according to the provisions of the act, he must offer proof of the fact at the hearing of the cause; it is too late after judgment has been rendered against him. *Degear v. Nellis*, 14 J. R. 382.

286. It seems, that the justice is bound to receive proof offered by the plaintiff to disprove the defendant's claim to exemption from imprisonment. *Ibid.*

[*478] *287. A person who has been imprisoned more than thirty or sixty days, as the case may be, on an execution on a judgment recovered before a justice, and recorded with the clerk of the county, under the act extending the jurisdiction of justices of the peace, (Sess. 41. c. 94.) is entitled to his discharge on the usual affidavit as to his imprisonment, according to the provisions of the act of the 5th of April, 1813, called the "25 dollar act," all the provisions of which act are applicable to the act mentioned, except so far as it has otherwise directed. *Matter of Harwood*, 15 J. R. 397.

*288. A prisoner in execution on a judgment, under the "act to extend the jurisdiction of justices of the peace," (Sess. 41. c. 94.) for above the sum of 25 dollars, is entitled to be discharged, on making an affidavit, in the manner required by the act, sess. 36. c. 53, that he is a freeholder, and has a family, and has remained in prison for more than thirty days. *Coman v. Merrill*, 19 J. R. 277.

*289. And it is sufficient if the affidavit states, that he had a family at the time, without saying that he had a family when the judgment was rendered against him. *Ibid*.

*290. The party in whose favor a judgment is given, if he intends to have execution against a defendant, being a freeholder, or inhabitant having a family, before the expiration of thirty days, must take the oath required, at the time the judgment is rendered by the justice, so as to give the other party the full benefit of a stay of execution for thirty days, on giving security. *Sellick v. Brown*, 19 J. R. 271.

*291. A creditor, who has recovered a judgment in a Justice's Court, and taken a bond with security, according to the provision of "the act to extend the jurisdiction of justices of the peace," (Sess. 41. c. 94. s. 8.) must sue out execution after three calendar months, from the date of the judgment, and have a return of *non est inventus* thereon, before he can maintain an action on the bond; for the surety has no mode of complying with the alternative in the condition of the bond, but by a surrender of the debtor to the constable having an execution. *Tuttle v. Kip*, 19 J. R. 194.

*292. The surety cannot surrender the principal in such a case, against his consent, or without an execution. *Ibid*.

*293. The common law practice of Courts of record, as to surrender of bail, does not apply to a Justice's Court. *Ibid*.

*294. By the terms "goods and chattels," in the act, (Sess. 36. c. 53. s. 11.) is meant *personal and moveable property*, not chattels which savor of the *realty*, and are of a permanent nature. *Putman v. Westcott*, 19 J. R. 73.

*295. *Leasehold property*, or a term for years, cannot, therefore, be sold under an execution issued by a Justice's Court. *Ibid*.

*296. If an execution is not returned at all by a constable, the common law right of the plaintiff to bring an action of debt on the judgment, remains unimpaired. *Hale v. Angel*, 20 J. R. 342.

*297. The provision of the act of the 5th of Vol. I.

April, 1813, (Sess. 36. c. 53.) giving an action against a constable who neglects to return an execution, extends to cases arising under the act extending the jurisdiction of justices of the peace, (Sess. 41. c. 94.) with this difference, that under the latter act, the constable has *forty* days within which to levy and return the execution. *Gardner v. Jones*, 20 J. R. 356.

*XVII. *At what time irregularity* [*479] *must be taken advantage of, and when it will be cured, or be deemed to have been waived.*

*298. If the justice overrules a challenge to a juror, and the party goes to trial on the merits, it is no waiver of the exception, nor does it preclude him from taking advantage of it in error. *Blake v. Millspaugh*, 1 J. R. 216.

*299. If the defendant was not present at the trial, he cannot be deemed to have waived any objection to the competency of the proof. *M. Nutt v. Johnson*, 7 J. R. 18.

*300. In an action on a promise to pay the debt of another, which was void, as well because no consideration was shown as because it was not in writing, the defendant, by not having objected to the evidence at the trial, is not precluded from taking advantage of it, and the Court will, on *certiorari*, reverse the judgment. *Pease v. Alexander*, 7 J. R. 25.

*301. In proceedings against joint debtors, the statute merely requires, that the judgment be against both joint debtors, and is silent as to the intermediate proceedings; and the mentioning the name of the joint debtor in them is form only, and the omission is cured by verdict. *Hutchins v. Fitch*, 4 J. R. 222.

*302. A defect of jurisdiction in a justice is not cured by the defendant's appearing and going to trial. *Low v. Rice*, 8 J. R. 409.

*303. If the defendant below do not appear, he cannot, on *certiorari*, take advantage of a variance between the process and declaration. *Owens v. Morhouse*, 1 J. R. 276. *S. P. Ford v. Gardner*, 1 J. C. 243.

*304. Where no exception is made to the form of the oath administered by the justice, at the time of trial, it cannot afterwards be alleged for error. *Brownell v. Slocum*, 3 J. R. 430.

*305. When the plaintiff declared by a different name from the one mentioned in the summons, but the identity of the person was ascertained, and the defendant did not appear, but suffered judgment by default; *held*, that he should have appeared, and taken advantage of the variance before the justice, but could not avail himself of it afterwards. *Ford v. Gardner*, 1 J. C. 243.

*306. If, in an action of escape, against a constable, the execution was proved by *parol*, and no objection was made at the time, it cannot afterwards be alleged for error. *Van Slyck v. Taylor*, 9 J. R. 146.

*307. If the plaintiff reads in evidence an act of the legislature from a newspaper, which is admitted by the justice, and the defendant afterwards reads an *un*amplified copy of the

same act, he cannot allege for error the admission of the act read by the plaintiff, though not legal evidence. *Hearsey v. Pruyn*, 7 J. R. 179.

308. If the defendant neglects to take an exception, in the first instance, to a variance between the process and declaration, but joins issue, and goes to trial on the merits, it is a waiver of all objection to the process or pleading. *Bloodgood v. Overseers of Jamaica*, 12 J. R. 285.

*309. Though one of the jurors [*480] who tried the cause was related to the plaintiff; yet if he was not challenged at the trial, the objection cannot be afterwards made, there appearing to be no unfairness in the trial. *Eggleston v. Smiley*, 17 J. R. 133.

See CERTIORARI TO A JUSTICE'S COURT, V.

What cures, or is a waiver of an objection to the process. See ante, II.

_____ of an erroneous appearance. See ante, III.

_____ of an objection to the declaration. See ante, V.

_____ to the set-off. See ante, VII.

_____ to an adjournment. See ante, X.

_____ to the venire, proceedings before the jury, and verdict. See ante, XIII.

_____ to the evidence. See ante, VIII. XI.

XVIII. Attachment against concealed debtors.

310. By the satisfactory proof required by the statute in order to authorize the justice in issuing an attachment, is meant legal evidence, and not the oath of the creditor. *Van Steenberg v. Kortz*, 10 J. R. 167.

311. But, if issued on the oath of the party, the proceedings are not void, but erroneous only. *Ibid.*

312. Where the proceedings are regular, the justice cannot supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process. *Field v. M'Vicker*, 9 J. R. 130.

313. An attachment at the instance of a *bona fide* creditor, and in a case warranted by law, creates a *lien* upon the goods attached, not only against the acts of the debtor himself, but against a subsequent attachment or execution of any other creditor; but the *lien* will be lost if the creditor does not prosecute his suit to judgment and execution with all due diligence. *Van Loan v. Kline*, 10 J. R. 129.

314. The proof, on which the attachment may be issued, must be such as would be received in the ordinary course of legal proceedings, otherwise the justice will be liable as a trespasser. *Vosburgh v. Welsh*, 11 J. R. 175.

315. A mere return to an execution, that the defendant could not be found, is not the satisfactory proof required. *Ibid.*

316. A mere error in judgment, as to the

legality of the proof offered, would not make the justice a trespasser by issuing the attachment. *Per Thompson*, Ch. J. *Ibid.*

317. The justice cannot act upon his own knowledge or mere belief on the subject, however well founded it may be. *Per Thompson*, C. J. *Ibid.*

318. Where a person was passing through a county, other than that in which he resided, and a justice of that county issued an attachment against him, under the 23d section of the act, (1 N. R. L. 398,) the *proof on which the writ issued, being [*481] that a warrant had been issued by the justice against him, the service of which had been avoided, and a copy of the attachment was served by leaving it at a shop at which the defendant had been a short time before; *held*, that the provisions of the act were not applicable to such a case; and that the proof on which the attachment was issued, and of its service, was insufficient. *Dudley v. Staples*, 15 J. R. 196.

319. A return to an attachment, stating merely that the constable had levied on certain goods, enumerating them, is erroneous: it should further state, that a copy of the attachment had been left at the dwelling-house or other last place of abode of the debtor. *Wulford v. Sperry*, 16 J. R. 121.

XIX. Appeal to the Courts of Common Pleas under the act of the 10th April, 1818. (Sess. 41. c. 94. s. 17, 18, 19, 20.)

320. Where a cause is removed from a Justice's Court, by *appeal*, to a Court of Common Pleas, pursuant to the act to extend the jurisdiction of justices of the peace, (Sess. 41. c. 94. s. 17, 18, 19, 20.) the return of the justice is conclusive only as to those particulars, which, by the 18th section of the act, he is required to return; and it cannot be received as evidence, on the trial before a jury in the Court of Common Pleas, of any other facts. *Rawson v. Adams*, 17 J. R. 130.

321. But where the justice, in his return, further stated, that the parties before him mutually admitted certain facts, which he specified; *held*, that these admissions might be considered as embraced in the words of the act requiring the justice to state "the demands of the parties and the issue joined;" and that the return so far was admissible evidence. *Ibid.*

322. By the word "witnesses," in the 18th section of the act, is intended not merely *persons* called to testify, and sworn or rejected in a technical sense, but evidence; and that, therefore, the justice must, in his return, state not only the *names* of the *persons* offered or sworn as witnesses, but also, the *documentary* or *written* evidence admitted, or offered and rejected by him; otherwise, on the trial of the appeal in the Court of Common Pleas, any *documentary* evidence not stated in the return could not be admitted, it being the intention of the act to confine the parties, after the appeal, to the same issue, and the same evidence taken in the Court below, excepting such evidence as may have been offered and

improperly rejected by the justice. *M'Chesney v. Lansing*, 18 J. R. 388.

323. The 17th section of the act, which gives the party aggrieved an appeal where the judgment is for more than 25 dollars, refers to cases in which a judgment is given after trial of an issue of fact, and not to the case of a judgment on demurrer, or issue at law. *Peters v. Parsons*, 18 J. R. 140. *S. P. Breese v. Williams*, 20 J. R. 280.

324. Where there is an appeal from a Justice's Court, after a trial of an issue of fact, there should be a new trial by jury, [*482] upon the testimony of the same witnesses, of such issue, taken upon proper pleadings in the Court of Common Pleas. *Breese v. Williams*, 20 J. R. 280.

325. The practice of the Court of Common Pleas of Washington county, of proceeding on such appeals by a general assignment of errors, is incorrect and improper. *Ibid.* *S. P. Reab v. Moor*, 19 J. R. 337.

326. A Court of Common Pleas cannot order a cause brought before them on an appeal from a Justice's Court, to be referred, but must proceed to hear the cause and decide on the proofs offered in the Justice's Court. *People v. Washington*, C. P. 20 J. R. 363.

327. On such appeal, the appellee is entitled to costs, in all cases where the verdict is found in his favor. *Merritt v. Lefevre*, 19 J. R. 265.

328. No appeal lies to a Court of Common Pleas unless the amount of the verdict or judgment rendered exceeds the sum of 25 dollars. *Matter of David Marsh*, 19 J. R. 171.

329. If the appellant, on the trial of the appeal in the Court of Common Pleas, obtains a verdict for more than fifty dollars, he is entitled to judgment for the amount of the verdict, though the sum exceeds the amount to which the jurisdiction of the Justice's Court is limited. *Palmer v. Wylie*, 19 J. R. 276.

330. If a party in a Justice's Court serves a notice on the opposite party, to produce a written instrument or paper at the trial, or that parol evidence will be given of its contents, and parol evidence is given accordingly, such notice is available to the party giving it, on an appeal to the Court of Common Pleas, so as to entitle him to give the parol evidence in that Court, if the writing is not produced. *Reab v. Moore*, 19 J. R. 337.

["An act for the better and more speedy recovery of debts, of the value of fifty dollars," was passed April 12, 1824, (Sess. 47. c. 238.) which, after reenacting the principal sections of the former acts of the 5th April, 1813, and of the 10th April, 1818, and adding new provisions, repeals those acts, and the several acts supplementary to, or amendatory thereof. It abolishes the writ of *certiorari*, or writ of false judgment, by which the proceedings were removed to the Supreme Court, and gives the party aggrieved, a remedy by appeal to the Court of Common Pleas of the county, or Mayor's Court of the city, which is to proceed and hear and determine the cause on appeal, and issue execution, &c.; so that the remedy by *certiorari* no longer exists, except

as to the Justice's Court in the city of New-York. The 12th and 13th sections allow justices to render the judgment on the confession of a defendant to the amount of 250 dollars. By the 35th section, the number of chattels of a defendant exempted from execution or distress, is enlarged: and by the 42d section, no female is to be imprisoned on any execution issued under the act. The 45th section provides that judgments for more than 25 dollars, the transcripts of which have been filed in the office of the clerk of the county, according to the 20th section, may be removed by a *scire facias*, issued out of the Court of Common Pleas, when no execution had been issued within a year and a day, &c.]

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*CIRCUIT COURTS OF THE UNITED STATES.

(a) Evidence of proceedings in; (b) Removal of causes to; (c) When they have exclusive jurisdiction.

(a) Evidence of proceedings in.

1. A record of a Circuit Court of the United States, under the seal of the Court, but certified by the clerk as a copy, is evidence. *Peppoon v. Jenkins*, 2 J. C. 119.

(b) Removal of causes to.

2. To entitle a defendant to remove a cause from the Supreme Court of this state, into the Circuit Court of the United States, pursuant to the act of Congress, (Cong. 1. sess. 1. c. 20. s. 12.) he must file his petition for removal at the time of putting in special bail. *Redmond v. Russel*, 12 J. R. 153.

3. Giving notice, at the time of putting in bail, of his intention to present his petition at the next term, and filing it then, is not sufficient. *Ibid.*

4. If an alien defendant file his petition, &c., to remove his suit into a Circuit Court of the United States, at the time of filing special bail, he is in season, though the bail may have been excepted to. *Arjo v. Monteiro*, 1 C. R. 248. *S. P. Bird and others ad. Murray*, C. C. 58.

5. If the landlord of a tenant in ejectment be an alien, he is, at the time when he is let in to defend, in season to petition for the removal of his cause into the Court of the United States. *Jackson, ex dem. Cantine, v. Stiles*, 4 J. R. 493.

6. Where actions of ejectment, after a judgment against the casual ejector, are removed from the Supreme Court of this state into the Circuit Court of the United States, the former Court will order all further proceedings on such judgment to stay, until the further order of the Court. *Ibid.*

7. The affidavit, on which a motion is made to remove a cause into the Circuit Court of the United States, must state expressly that one

of the parties is a citizen of another state. *Corp v. Vermilye*, 3 J. R. 145.

8. The pendency of a suit between the same parties, for the same cause, in the Circuit Court of the *United States*, of another circuit or state, cannot be pleaded in abatement of a suit in the Supreme Court of this state. *Walsh v. Durkin*, 12 J. R. 99.

See further, *tit. CHANCERY, LIV. (C.)*

(c) *When they have exclusive jurisdiction.*

9. The state Courts have no jurisdiction in causes arising under the laws of the *United States*, respecting patent rights. *Parsons v. Barnard*, 7 J. R. 144.

*10. Whether the state Courts [*484] have jurisdiction in the case of a person enlisted in the army of the *United States*, and applying for a *habeas corpus*? *Dubitatur. Matter of Ferguson*, 9 J. R. 239.

COURTS MARTIAL OF THE UNITED STATES.

1. Courts Martial are Courts of special and limited jurisdiction. *Mills v. Martin*, 19 J. R. 7.

2. Where the defendant justifies under the judgment and process of such a Court, he must show affirmatively that it had jurisdiction. *Ibid.*

3. And if the Court has no jurisdiction, its proceedings are void. *Ibid.*

4. *Replevin* lies for property taken under a warrant issued by such a Court. *Ibid.*

5. The militia of the several states are not subject to martial law, unless they are in the actual service of the *United States*. *Ibid.*

6. The acts of Congress, in regard to the militia, and establishing rules and articles of war, relate only to the government, trial, and punishment of officers and soldiers in the actual service and employment of the *United States*. *Ibid.*

7. A militia-man, therefore, who has refused to obey the orders of the governor or commander-in-chief of a state, issued in compliance with the requisition of the president of the *United States*, for calling out a certain portion of the militia, and who had not rendezvoused, or been mustered, and in the pay of the *United States*, is not amenable to a Court Martial of the *United States*, but only to a Court instituted under the authority of the state government. *Ibid.* *S. P. Rathbun v. Martin*, 20 J. R. 343.

8. In an action of *replevin*, the defendant, being a deputy marshal of the *United States*, avowed and justified the taking of the plaintiff's goods, by virtue of a warrant issued to the marshal of the district, to collect a fine imposed upon him by the judgment of a Court Martial, described as follows: "A general Court Martial, composed of officers of the militia of the state of *New-York*, in the service of the *United*

States, (naming them, being six in number,) duly organized and convened, by general orders, issued pursuant to the acts of Congress of *February 28th*, 1795, and of *February 2d*, 1813, for the trial of those of the militia of the state who had failed, neglected, or refused to rendezvous and enter the service of the *United States*, in obedience of the orders of the commander-in-chief of the militia of the state of *New-York*, issued in compliance with the requisition of the president of the *United States*, made pursuant to the acts of Congress of *February 28*, 1795, *February 2*, 1813, and *April 18*, 1814;" and alleged, that the plaintiff, being a private in the militia, neglected or refused to rendezvous; and, on the 16th *May*, 1818, was regularly tried by the said general Court Martial, and duly convicted of the said delinquency, &c. Held, that the avowry was bad, not only because the [*485] Court Martial had no jurisdiction, but because (1) it was composed of six, instead of thirteen officers, without alleging that any emergency existed, which rendered a less number necessary; (2) because the reference to the acts of Congress, under which the Court was said to be organized, was too general; (3) because it did not aver by whom the general orders were issued; (4) because it did not state that the proceedings of the Court Martial were reported to the officer appointing the Court, and were confirmed by him, before the sentence was executed. *Ibid.*

CURTESY.

1. Where a *feme covert* is the owner of wild and uncultivated land, she is considered, in law, as in fact possessed, so as to enable her husband to become a tenant by the curtesy. *Jackson, ex dem. Beckman, v. Sellick*, 8 J. R. 262.

2. An actual entry, or *pedis positio*, by the wife or husband, during the coverture, is not requisite to the completion of a tenancy by the curtesy. *Ibid.*

DAMAGES.

- I. *How damages are to be assessed.*
- II. *What may be shown in mitigation of damages.*
- III. *Liquidated damages, or penalty.*

I. *How damages are to be assessed.*

1. In an action for a breach of contract, in not carrying goods, by reason of which they were sent by another conveyance, and lost; the damages are not to be estimated according to what they would have sold for, had they arrived at their destination, but according to their value at the place of departure. *Smith v. Richardson*, 3 C. R. 219. But see *Brackd v. M. Vair*, 14 J. R. 170.

2. The value of a chattel at the time of its

conversion, is not always the rule of damages; for where its value is uncertain, or fluctuating, the plaintiff may recover the price of it at the time he calls upon the defendant to restore it. Per *Kent, J. Cortelyou v. Lansing*, 2 C. C. E. 200.

3. In trespass, against a collector of the customs, for the unlawful seizure of a vessel, it was held, that the difference between the price for which the vessel would have sold, at the time of her seizure, and the price she actually sold for, at public auction, immediately after her restoration, together with the actual expenses incurred, constituted a just and proper measure of damages to the plaintiff, as assessed by the jury. *Woodham v. Gelston*, 1 J. R. 134.

4. In actions for torts, the jury may take into consideration the evil example of the defendant's conduct, for increasing the damages. *Tillotson v. Cheetham*, 3 J. R. 56.

5. Where a person, here, purchases goods in England, and is sued here, the creditor can recover the amount at the par of exchange only, and is not entitled to any allowance for the rate of exchange, or for the price of bills on England. *Martin v. Franklin*, 4 J. R. 124.

6. Where it is covenanted between the lessor and lessee, that, at the expiration of the term, the buildings and improvements on the demised premises should be valued by a certain number of persons, to be chosen by the parties, which valuation the lessor would pay to the lessee; if, on the expiration of the term, the lessor refuses to agree on the appraisers, and the lessee appoints them, and has the buildings, &c. appraised, the valuation thus made, being *ex parte*, is not conclusive as to the amount of damages, but they are to be ascertained by the jury. *Holliday v. Marshall*, 7 J. R. 211.

7. An admission by the counsel for the plaintiff, at the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages; and, therefore, evidence on the part of the defendant, in the nature of a justification, is inadmissible by way of mitigation of damages. *Hoyt v. Gelston*, 13 J. R. 141. S. C. in error, *id.* 561.

8. The measure of damages in trover is the value of the goods at the time and place of conversion. *Kennedy v. Strong*, 14 J. R. 128.

9. In an action for the breach of a contract to transport goods from A. to B., the difference between the value of the goods at A., and their increased value at B., is a proper measure of damages. *Bracket v. McNair*, 14 J. R. 170. See *ante*, pl. 1. and see *Watkinson v. Laugh-ton*, 8 J. R. 213.

10. In an action of trover, for the illegal capture and detention on the high seas of a cargo bound to New-York, the proper rule of damages is the value of the cargo, at the time and place of capture, allowing for the same, the New-York prices, with such additional damages as would be equal to the interest thereon, deducting a reasonable premium of insurance from the place of capture to New-York; such part of the cargo, or of the avails

thereof, as had been restored, going in mitigation of damages. *Hallett v. Novion*, 14 J. R. 273.

[But the judgment of the Supreme Court was afterwards reversed in the Court of Errors, on the ground that the Court had no jurisdiction of such a case; (S. C. 16 J. R. 327.) and whether a Court of Admiralty would adopt the rule of damages so laid down by the Supreme Court, is uncertain.]

11. In trespass for cutting down timber, the plaintiff is entitled, under the statute, (Sess. 36. c. 56. s. 29.) to treble damages and treble costs. *Morris v. Brush*, 14 J. R. 328.

12. In an action of trespass for beating the plaintiff's horse to death, the jury may give damages beyond the value of the horse, or what is called smart money, there being proof of great and wanton cruelty on the part of the defendant. *Wort v. Jenkins*, 14 J. R. 352.

*13. In replevin, where the defendant makes avowry, justification or cognizance, if the same be found for him, or the plaintiff be nonsuited, or otherwise barred, the defendant is entitled to damages under the act, (Sess. 36. c. 96. s. 4.) and the decrease in value of the goods from the time of the replevin, and the interest on their entire value, form a proper measure of damages. *Rowley v. Gibbs*, 14 J. R. 385.

14. In an action for the non-delivery of goods pursuant to a contract of affreightment, the measure of damages is the value of the goods, at the port of destination. *Amory v. M'Gregor*, 15 J. R. 24. See *ante*, pl. 9.

15. But interest ought not to be allowed in such case, unless there has been fraud or gross misconduct on the part of the defendant. *Ibid.*

16. D., for the consideration of five dollars, promised to forbear the payment of a note given by S., for six months; D. did not forbear, but sued S. on the note, within the time stipulated. In an action for a breach of the promise; held, that A. was entitled to recover back the five dollars, and the costs paid by him in the suit on the note, but not any consequential damages, or for the trouble and inconvenience he had been put to, in raising the money to pay the note. *Deyo v. Waggoner*, 19 J. R. 241.

When a verdict will be set aside for excessiveness of damages. See NEW TRIAL.

II. What may be shown in mitigation of damages.

17. In an action for a breach of a promise of marriage, the defendant may show, in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety and virtue, without any limitation as to time. *Johnston v. Caulkins*, 1 J. C. 116.

18. In an action for a libel, can the defendant give in evidence, under the general issue, the general character of the defendant, in mitigation of damages? *Quere. Foot v. Tracy*, 1 J. R. 46.

19. In an action of assault and battery, the

defendant cannot give in evidence, in mitigation of damages, the acts or declarations of the plaintiff, at a different time, or any antecedent facts, which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating or provoking. *Lee v. Woolsey*, 19 J. R. 319.

20. The *provocation*, to entitle it to be given in evidence, in mitigation of damages, must be so recent and immediate, as to induce a presumption that the violence done, was committed under the immediate influence of the feelings and passions excited by it. *Ibid*.

III. Liquidated damages, or penalty.

21. A. B. entered into a written agreement, by which A. agreed to convey to B. 700 acres of land, to be appraised, in part payment for a farm, valued at 3,750 dollars, which B. agreed to sell to A.; and it was covenanted, that in case either party failed to fulfil the agreement, *the party failing to perform should forfeit and pay to the party who should fulfil the agreement, the sum of 2,000 dollars, as damages; held, that the 2,000 dollars were to be considered as a penalty, and not as liquidated damages. *Dennis v. Cummins*, 3 J. C. 297.

22. Where A., in consideration of 500 dollars, covenanted to convey to B. 50 acres of land, by a good warranty deed, on or before, &c., or in lieu thereof, to pay him 800 dollars; held, that B. was entitled to recover, on a breach of the covenant, 800 dollars, with interest; the same being in the nature of liquidated damages, and not a penalty. *Slosson v. Beadle*, 7 J. R. 72.

23. Where the parties, by covenant, bind themselves to each other in the sum of 500 dollars, which they consent to fix and liquidate as the amount of damages to be paid by the failing party, for his non-performance of the agreement; the sum thus agreed to be paid is to be considered as liquidated damages. *Hasbrouck v. Tappen*, 15 J. R. 200.

24. Where a party insists on the payment of stipulated damages, as a discharge, it must appear that the damages stipulated are in lieu of a performance of the contract, the payment of which is an alternative for his election. *Gray v. Crosby*, 18 J. R. 219.

DAMAGES on a bill of exchange. See *BILLS OF EXCHANGE AND PROMISSORY NOTES*, IX. — for the breach of a covenant in a deed of land, see *COVENANT*, V. 70—81.

— in an action for an escape, see *ESCAPE*, II.

DEBT.

I. Debt on bond.

II. Debt on judgment.

I. Debt on bond.

1. In an action on a bond, conditioned for the payment of money, the plaintiff can re-

cover against the obligor, or his bail, under the penalty, no more than the amount of the condition, with interest. *Treadwell v. McKee*, 2 J. C. 340. See *Troup v. Wood*, 4 J. C. R. 228.

2. Interest is recoverable beyond the penalty of a bond, but the recovery depends on principles of law, and not on the discretion of the jury. *Smedes v. Hooghtaling*, 3 C. R. 48.

3. If judgment be signed for the penalty of a bond, the breach being in the non-payment of interest, execution will be stayed on payment of interest and costs, the judgment to stand as security for the debt. *Bowne v. Hallet*, 1 C. R. 518.

*And see *BOND. CONDITION*. [*489] *DAMAGES*, III.

Assigning breaches on a bond conditioned for the performance of covenants. See *PLEADING*.

Debt on bail bond. See *BAIL*.

— bond for the gaol liberties. See *SHERIFF*.

— in an action for an escape. See *ESCAPE*, II.

II. Debt on judgment.

4. Debt lies on the decree of a Court of Chancery in another state, for the payment of money only by the defendant, without any acts to be done by the plaintiff. *Post v. Nease*, 3 C. R. 22.

5. And if the money be decreed to be paid to several persons jointly, they may have a joint action for it. *Ibid*.

6. An action cannot be sustained on a judgment in another state, recovered in an action commenced by an attachment of goods, without any personal summons or actual notice to the defendant. *Kilburn v. Woodworth*, 5 J. R. 37.

7. And the principle is the same, where the defendant is sued here as bail in an action commenced in another state. *Robinson v. Executors of Ward*, 8 J. R. 86. *S. P. Pawlings v. Bird's Executors*, 13 J. R. 192. *Andrews v. Montgomery*, 19 J. R. 162.

8. No action lies upon a judgment obtained in another state against a person resident in this state, in an action commenced by the service on the defendant, while in this state, of a rule to show cause; such service being void, as well on general principles as by the statute, (Sess. 22. c. 3.) although the rule to show cause was in the nature of a *scire facies* to charge the defendant *de bonis propriis*, grounded on a judgment obtained against him in a representative capacity. *Fenton v. Garlick*, 8 J. R. 194.

9. Debt, not assumpsit, lies on a judgment, fairly and regularly obtained in another state, before a Court having jurisdiction of the subject, and of the person of the defendant; such a judgment, since the decision of the Supreme Court of the United States, in *Mills v. Duryee*, (7 *Cranch's Rep.* 481.) being regarded, not as *prima facie* evidence merely, but

conclusive evidence of a debt of record. *Andrew v. Montgomery*, 19 J. R. 162.; and the proper plea in such action of debt, is *nul tiel record*. *Ibid*. *Contra*, *Hitchcock v. Fitch & Aikin*, 1 C. R. 460. *Hubbill v. Coudrey*, 5 J. R. 132. *Taylor v. Bryden*, 8 J. R. 173. and *Pawlings v. Bird's Executors*, 13 J. R. 192. which, so far as they contradict the principle of the case of *Mills v. Duryee*, are overruled. See also *Borden v. Fitch*, 15 J. R. 121.

10. In an action on a foreign judgment, the plaintiff is bound to produce and prove the record. *Rush v. Cobbett*, 2 J. C. 256.

See ASSUMPSIT, I. 10.

Debt for an escape, see ESCAPE, III.

— on recognizance, see BAIL, III.

— on statute, see ACTION ON STATUTE, &c.

Pleading in debt, see PLEADINGS.

[*490] *DEED.

- I. Parties to a deed.
- II. Consideration of a deed.
- III. What passes by a deed, and what estate vests in the grantee.
- IV. Description of the lands granted.
- V. Exception or reservation in a deed.
- VI. Date of a deed, execution, and delivery.
- VII. How to be construed.
- VIII. Registry of deeds; (a) Acknowledgment, proof, and registering; (b) Priority of conveyances.
- IX. When a deed is valid, and for what it may be avoided.
- X. Cancelling a deed.

I. Parties to a deed.

1. A grant, to be valid, must be to a corporation, or to some certain person named, who can take by force of the grant, and hold in his own right, or as trustee. *Jackson*, ex dem. *Cooper*, v. *Cory*, 8 J. R. 385.

2. A grant to the people of the county of O. is void. *Ibid*.

3. The act, (Sess. 24. c. 180.) enabling supervisors of counties to take conveyances of land, applies only to conveyances made to the supervisors by name. *Ibid*.

4. Under a grant to A., B. and C., for themselves and their associates, being a settlement of friends, the legal estate vests only in the three persons named. *Jackson*, ex dem. *Potter*, v. *Sisson*, 2 J. C. 321.

5. So, a grant to the inhabitants of a town not incorporated, is void. *Hornbeck v. Westbrook*, 9 J. R. 73.

6. So, a proviso or reservation to the inhabitants of R., in a deed from A. to B., is void. *Ibid*.

7. A person who is not a party to a deed, cannot take any thing by it, unless it be by way of remainder. *Ibid*.

8. The grantor cannot covenant with a stranger to the deed. *Ibid*.

9. A deed from the trustees of a town, dated

in 1714, was held to be valid, though the grantors were not trustees in that year, but in 1717; as it is a sound principle, *ut res magis valeat quam pereat*, that if the grantors were at one time jointly seised in fee, and competent to convey, as the deed purports, the deed is to be deemed to have been made at such time, unless the contrary be shown by unequivocal proof. *Jackson*, ex dem. *Hardenberg*, v. *Schoonmaker*, 2 J. R. 230.

II. Consideration of a deed.

10. A certain sum of money in hand paid, is a sufficient consideration, without specifying the sum. *Jackson*, ex dem. *Hardenberg*, v. *Schoonmaker*, 2 J. R. 230.

11. Where the consideration is expressly stated in a deed, and it is *not said also, and for other considerations, [*491] proof of any other consideration is inadmissible. *Maigley v. Hauer*, 7 J. R. 341.

12. If the consideration is not truly stated in the deed, the party must seek relief in equity, on the ground of fraud or mistake. *Ibid*.

13. A deed of bargain and sale, in which the only consideration expressed is, that the grantee shall support the grantor during his natural life, is void; for the deed not being executed by the grantee, and there being no covenant or agreement on his part to support the grantor, there is nothing to bind him to do it; and the deed is merely conditional and without consideration, as it leaves it to the option of the grantee to support the grantor, or to suffer the deed to become void, by withdrawing his support. *Jackson*, ex dem. *Allen*, v. *Florence*, 16 J. R. 47.

14. A deed of bargain and sale, without a consideration, is inoperative. *Ibid*.

15. Whether any other than a pecuniary consideration will support it? *Quare*. *Ibid*.

16. Parol evidence is admissible to show, that the consideration expressed in a deed to have been received by the grantor, was not, in fact, received by him. *Bowen v. Bell*, 20 J. R. 338.

III. What passes by a deed, and what estate vests in the grantee.

17. If the right and title of the grantor in a particular patent, be conveyed, without specifying the precise quantity or bounds, and the grantor has a legal title to, and possession of part, but another part is in the actual occupation of a person claiming adversely; the deed will be good for so much as the grantor might lawfully convey. *Van Dyck v. Van Beuren*, 1 J. R. 345.

18. A grant in fee, by husband and wife, of lands of the wife, but which is not acknowledged by the wife, passes only the husband's interest, that is, an estate for his life, which, after his death, reverts to the wife, or her heirs. *Jackson*, ex dem. *Sinsabaugh*, v. *Sears*, 10 J. R. 435.

19. Where a deed contains no words of inheritance, the grantee takes only a life estate, and, after his death, the land reverts back to

the grantor. *Jackson*, ex dem. *Ludlow*, v. *Myers*, 3 J. R. 388.

20. Conveyances by authority of a statute, pass no other or different right, than that which the grantor before possessed. *Jackson*, ex dem. *Cooper*, v. *Cory*, 8 J. R. 385.

21. Where a grantor conveys with warranty, the deed will pass any title subsequently acquired by the grantor. *Jackson*, ex dem. *Benson*, v. *Matsdorf*, 11 J. R. 91.

22. No title, not *in esse*, will pass by a deed, unless it contains a warranty, in which case it will operate as an estoppel. *Jackson*, ex dem. *M'Crackin*, v. *Wright*, 14 J. R. 193.

23. A fee of one parcel of land, as a road, not mentioned in a deed, cannot pass as appurtenant to another parcel. *Jackson*, ex dem. *Yates*, v. *Hathaway*, 15 J. R. 447.

24. A mere easement may, without express words, pass as an incident to the principal object of the grant. *Ibid.* Per *Platt*, J.

[*492] *IV. Description of the lands granted.

25. A grant of lands by metes and bounds, together with *all ways, passages, easements, &c.* will not comprehend a different parcel of land, held by a distinct title, and not described in the deed, though used as a way. *Jackson*, ex dem. *Jones*, v. *Striker*, 1 J. C. 284.

26. If a lot of land be granted, specifying its number in a certain patent, and referring to a map on which it is laid down, the whole lot will pass, although described in the deed to contain a less number of acres than it actually does. *Jackson*, ex dem. *Staring*, v. *Defendorf*, 1 C. R. 493.

27. Containing *so many acres, be the same more or less*, are merely words of description. *Mann* v. *Pearson*, 2 J. R. 37.

28. If, in the description, there are particulars sufficiently ascertained to designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the deed. *Jackson*, ex dem. *Rogers*, v. *Clark*, 7 J. R. 217.

29. But where the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree with every particular of the description. *Ibid.*

30. The premises intended to be conveyed were described as lot No. 1, of the smaller lots into which lot No. 3, of the subdivision of lot No. 10, in the 12th general allotment of the patent, &c., and there was a mistake in inserting the 12th instead of the 21st general allotment; but as the lot intended to be conveyed was sufficiently designated by the former part of the description, as well as by the courses and distances; held, that the premises, being in the 21st general allotment, passed by the deed. *Ibid.*

31. If the words, *with the dwelling-house thereon*, be inserted in the description, when, in fact, there is no dwelling-house on the premises claimed under the deed, it is merely a false circumstance, which does not control the rest of the description, or defeat the grant. *Ibid.*

32. Words of general description in a deed or mortgage of land are sufficient to pass the grantor's estate; thus, a grant of lands in the patent of B., and of all other lands in the province of New-York, belonging to the grantor, will pass the residue of his lands in New-York. *Jackson*, ex dem. *Livingston*, v. *De Lancy*, 11 J. R. 365. S. P. S. C. 13 J. R. 537.

33. But it seems, that in a sheriff's deed the land must be defined. *Ibid.* S. P. S. C. 13 J. R. 537. S. P. *Jackson*, ex dem. *Carman*, v. *Rosevelt*, 13 J. R. 97.

34. Where one of the boundaries of the premises described in the deed is a line to be run up a creek, the line must be run through the middle of the creek, according to its turnings and windings. *Jackson*, ex dem. *Trustees of Kingston*, v. *Louw*, 12 J. R. 252.

35. Where land is leased, and is described by metes and bounds, and as containing a certain number of acres, the description by *metes and bounds*, controls the *quantity*, and the lessee is entitled to hold all the land embraced by the description, though exceeding the number *of acres expressed in [*493] the deed. *Jackson*, ex dem. *Livingston*, v. *Barringer*, 15 J. R. 471.

36. So, where there is a lease of the farm on which A. B. now lives, to contain eighty acres, and the farm actually contains more than eighty acres, the lessor cannot recover the surplus from the lessee, especially when he has been in possession, and paid rent for a length of time. *Ibid.*

37. If a person on whose land a highway is laid out, convey the land on each side of it, describing it by such boundaries as do not include the road, or any part of it, the road does not pass to the grantee, as it is excluded by the description in the deed; and being a distinct parcel of land, it cannot pass as an incident. *Jackson*, ex dem. *Yates*, v. *Hathaway*, 15 J. R. 447.

38. Where land is described as bounding along a highway, or upon a highway, or as running to a highway, it may be intended that the parties intended the middle of the highway. *Ibid.* Per *Platt*, J.

39. Where there is a known and well-ascertained place of beginning in the description in a deed, that must govern, and the grant be confined within the boundaries given. *Jackson*, ex dem. *Craigie*, v. *Wilkinson*, 17 J. R. 146.

40. As, where the premises conveyed by M to C. were described as follows, "to be ad-measured, according to the following bounds and lines, to wit, beginning at the south-west corner of a tract of land, &c. granted to W., &c., thence extending east along the southern boundary of the said tract six miles; thence southerly, so far as by lines drawn from those two points, parallel to the eastern and western boundaries of the said tract of W. &c. will include 33,750 acres of land." And by a prior grant to W. and others, M. had cut off two miles of his land east of the south-west corner of the tract mentioned, so as to narrow the base to four miles; held, that the lines could not be extended so far south upon other land granted by M. to C., so as to give the quantity of acres, in-

tended to be conveyed, though the deed to O. described the premises thereby granted as "beginning at the south-west corner of a certain tract of 33,750 acres, granted or to be granted by M. to C." *Ibid.*

41. Where a soldier endorsed a conveyance on his discharge, in which he described the premises, as follows: "the six hundred acres of land due me from the public, as a soldier in Col. Lamb's regiment of artillery," when, in fact, he was not a soldier in that regiment, but in the first, or Col. Van Schaick's regiment; held, that the description was sufficient, and that the words, "Col. Lamb's regiment of artillery," might be rejected as surplusage. *Jackson, ex dem. Bond, v. Root*, 18 J. R. 60.

42. Where the premises in a deed were described as lot No. 51, in the second division of a patent, "bounded as follows, beginning at a stake and stones," &c., giving the monuments, courses and distances; and it was proved that the grantor, at the time, owned lot No. 50, in the same patent, and that the monuments, courses and distances corresponded with those found on the land, and that unless this land was conveyed by the deed, it would be inoperative and of no effect; held, that the words, "lot No. 51," might be rejected as surplusage, the description of the premises being sufficiently certain without them. [*494] *Jackson, ex dem. McNaughton, v. Loonis*, 18 J. R. 81. S. C. in error, 19 J. R. 449.

43. If there is a contradiction in a description, that part of it is to be taken which gives most permanency and certainty to the location. *Ibid.*

44. Where the description of the land conveyed is illegible, or so as to be rendered uncertain what is conveyed, the deed is so far inoperative. *Jackson, ex dem. Swain, v. Ransom*, 10 J. R. 107.

45. But where a lot of land was described in figures, which the plaintiff read 174, and the defendant 84, and from the examination of the whole deed, the Court and jury were satisfied that it was 174, held that it was sufficiently certain. *Ibid.*

46. Where the premises in a deed, being a lot of land described by the number, and also, as having been granted by letters patent to W. &c. and by him conveyed to the grantor, "as by reference to that deed, will more fully appear," and in the last deed the number was 84, and in the deed referred to 174; held, that omitting the number in the last deed, the premises were described with sufficient certainty to pass the lot mentioned in the deed as lot 174. *Ibid.*

V. Exception or reservation in a deed.

47. An exception shall be taken most favorably to the grantee, and if it be not set down or described with certainty, the grantee shall have the benefit which may arise from such defect. *Jackson, ex dem. Klock, v. Hudson*, 3 J. R. 375. *S. P. Jackson, ex dem. Butler, v. Gartner*, 8 J. R. 304.

48. A grant of land was made, excepting and reserving all streams, and the soil under

them, with the right to erect mills and mill dams, and further excepting and reserving the land which may be overflowed, in consequence of such dams: the latter reservation is, until the grantor has exercised his right to erect mills and mill dams, in the mean time, inoperative; and, considered strictly as an exception in the deed, is void for uncertainty. *Thompson v. Gregory*, 4 J. R. 81.

49. Such a reservation is an incorporeal hereditament, and can pass only by grant. *Ibid.*

50. Where, in a sale by virtue of a power contained in a mortgage, a drain of ten feet in width was excepted, it was intended, after a lapse of sixteen years from the time of sale, that the drain had antecedently existed, and was founded in usage, or was an exception in the previous deeds of the land. *Bergen v. Bennett*, 1 C. C. E. 1.

51. A covenant or reservation to a stranger to the deed, is void. *Hornbeck v. Westbrook*, 9 J. R. 73.

52. An exception in a deed of all places which may be found convenient for erecting mills on a certain creek, &c., extends only to natural mill seats, and not artificial ones, such as where the water is brought to the mill by means of sluices. *Jackson, ex dem. Snyder, v. Lawrence*, 11 J. R. 191.

53. A proviso in a deed from the trustees of the town of R. (authorized by the patent to convey to H.) that the inhabitants of R. (who were not a body corporate) shall be allowed to cut and carry away "wood from any part of the land not enclosed, [*495] is void. *Hornbeck v. Sleight*, 12 J. R. 199.

54. W. being seised of land, he, together with his wife, for the consideration of 500 dollars, conveyed the same to their son, his heirs and assigns, forever; reserving to themselves the use of the premises, during their natural lives; held, that the deed could not operate as a reservation or exception in favor of the wife, who had survived W.; but that it was valid and effectual as a covenant to stand seised to the use of the grantor himself during life, and after his death to the use of his wife for life. *Jackson, ex dem. Wood, v. Swart*, 20 J. R. 85.

VI. Date of a deed, execution and delivery.

55. The date is no part of the substance of a deed, and need not be inserted, and a mistake therein will not vitiate the deed. *Jackson, ex dem. Hardenberg, v. Schoonmaker*, 2 J. R. 230.

56. The real date of a deed is the time of its delivery. *Ibid.*

57. No estate of freehold, either for life, or in fee, can pass but by an instrument under seal. *Jackson, ex dem. Gouch, v. Wood*, 12 J. R. 73. *S. P. Jackson, ex dem. Wadsworth, v. Wendell*, 12 J. R. 355.

58. Several persons may bind themselves by one seal. *Ludlow v. Simond*, 2 C. C. E. 1. *Markay v. Bloodgood*, 9 J. R. 285.

59. A seal is an impression upon wax or wafer, or some other tenacious substance capable of being impressed. *Warren v. Lynch*, 5 J. R. 239.

60. A scrawl with a pen, of L. S., at the end of the name, is not a seal. *Ibid.*

61. The instrument, in this case, which was in the form of a common negotiable promissory note, was dated at *Petersburgh* in *Virginia*, (where there is a statute, declaring the mark (L. S.) at the end of the name, to be a seal,) and was made "payable in *New-York*;" and although such an instrument might be a valid deed, or specialty, in the place where it was executed, yet as it was to be performed or paid here, it was to be governed by the laws of this state, and to be considered, therefore, as a mere simple contract, on which the action of *assumpsit* would lie. *Ibid.*

62. But where a bond or instrument, with the mark (L. S.) affixed to the obligor's name, instead of a seal, or impression on wax, &c. was executed and payable in *Pennsylvania*, by the law of which state such a form of execution was sufficient to constitute it a valid deed or specialty, it was held, that an action of *debt* upon such instrument was sustainable here. *Meredith v. Hinsdale*, 2 C. R. 362.

[The reasoning of *Livingston, J.*, in this case, in favor of substituting the mark (L. S.) instead of a seal, is to be regarded as his own, not that of the Court. Per *Kent*, Ch. J. 5 J. R. 245. who cites *Adams v. Kerr*, 1 Bos. & Pull. 360. as if he had some doubt of the decision in *Meredith v. Hinsdale*, though he does not express any, but rests his opinion on the fact, that the note, in *Warren v. Lynch*, was "payable in *New-York*," and which distinguished that case from that of *Meredith v. Hinsdale*.]

63. A delivery is essential to the [*496] validity of a deed; and there "can be no delivery, without an acceptance by the grantee. *Jackson*, ex dem. *Eames*, v. *Phipps*, 12 J. R. 418.

64. A deed takes effect from the time of execution and delivery, not from the time of the date. *Jackson*, ex dem. *Grinwald*, v. *Bard*, 4 J. R. 230.

65. A formal delivery is not essential, if there be acts evincing an intent to deliver. *Goodrich v. Walker*, 1 J. C. 250.

66. A deed is duly executed and acknowledged by the grantor, but is retained by him, with the consent of the grantee, as security for the payment of the consideration; this is neither a delivery to, nor acceptance by, the grantee, and nothing passes. *Jackson*, ex dem. *McCrea*, v. *Dunlap*, 1 J. C. 114.

67. A deed executed by a sheriff, for lands purchased at a sale under a *fi. fa.*, and delivered to the attorney of the plaintiff, to be delivered by him to the grantee on the payment of the purchase money, is an *escrow*, and until the condition is performed, the estate continues in the debtor, whose lands had been thus sold by the sheriff. *Jackson*, ex dem. *Gratz*, v. *Cutlin*, 2 J. R. 248.

68. Where A., residing in this state, agreed with B., residing in *Massachusetts*, to give him a deed of the farm of A. as security for a debt, and A., in 1808, executed and acknowledged a deed to B. of the farm, and left it in the clerk's office, on the same day, to be recorded, neither the grantee, nor any person on his behalf, being

present, to receive the deed; and the grantee died in 1809; and in 1810, A. sent the deed to the son and heir of the grantee; held, that there was no delivery of the deed to the grantee. *Jackson*, ex dem. *Eames*, v. *Phipps*, 12 J. R. 418.

69. A deed may be delivered by words, or by acts without words, and the delivery may be either to the grantee or a third person, without any special authority, for the use of the grantee. *Verplank v. Sterry*, 12 J. R. 536.

70. If a deed has been once delivered, so as to take effect, a second delivery can be of no avail. *Ibid.*

71. Where a deed is delivered as an *escrow*, and either of the parties dies before the condition is performed, and afterwards the condition is performed, the deed is valid, and takes effect from the first delivery. *Ruggles v. Lounson*, 13 J. R. 285.

72. As, where A. having executed a deed of lands, in consideration of natural love and affection, to two of his sons, and delivered it to C., to be delivered to them, in case A., the grantor, should die without making a will; and A. having died without making a will, C. delivered the deed to the sons; held, that the deed took effect from the first delivery to C. *Ibid.*

73. Where a release of a covenant has been endorsed by the covenantee upon the agreement, and remains after its execution with the covenantee, the legal operation of the release is not destroyed by the want of actual delivery; or, if a formal delivery was necessary, it will be presumed to have been made, and that the release remained with the covenantee, with consent of the covenantor. *Fitch v. Forman*, 14 J. R. 172.

74. Where a deed was deposited by the grantor with W. as an *escrow*, to be delivered to the grantee on his producing a mortgage executed and registered, [*497] and a certificate of the clerk of there being no other encumbrance on record; and on receiving the mortgage, and certificate of the clerk, &c., W. delivered the deed to the grantee, and the mortgage to the grantor; held, that the condition was performed, and the deed well delivered to the grantee; and that it related back, so as to give effect to an intermediate conveyance by the grantee to C., although the clerk made a mistake in the registry of the mortgage, as to the amount of the debt secured, expressing it to be 300 dollars, instead of 3,000 dollars. *Beckman v. Frost*, on appeal, 18 J. R. 544.

Execution of a deed by corporation. See CORPORATION, I.

VII. How to be construed.

75. A deed will be expounded so as to give effect to the intent of the parties. *Jackson*, ex dem. *Culverhouse*, v. *Beach*, 1 J. C. 399. *Jackson*, ex dem. *Ludlow*, v. *Myers*, 3 J. R. 388.

76. So, a release from a trustee to his cestui que trust, reciting the trust, and in consideration of 10 shillings, will, in order to effectuate the intent, be considered a bargain and sale.

Jackson, ex dem. *Culverhouse*, v. *Beach*, 1 J. C. 349.

77. Several instruments or deeds of the same date, between the same parties, and relating to the same subject, may be construed as parts of one assurance. *Jackson*, ex dem. *Trotter*, v. *Dunsbaugh*, 1 J. C. 91. See *Stow* v. *Tyft*, 15 J. R. 458.

78. If a general clause be followed by special words, which accord with the general clause, the deed shall be construed according to the special matter. Per *Kent*, Ch. J. *Munro* v. *Alaire*, 2 C. R. 320.

79. So, where in an assignment made by a debtor, in trust, for several creditors, it was expressed to be an assignment of all the property, goods, chattels, debts, &c. of the debtor, particularly specified in a schedule annexed and referred to; held, that this was not a general assignment of all the debtor's estate, but was to be construed to operate only on the articles specified. *Wilkes* v. *Ferris*, 5 J. R. 335.

80. The construction ought to be made on the entire deed, not on any particular part of it; and such construction should be given, that if possible, every part of the deed may be operative. *Jackson*, ex dem. *Troup*, v. *Blodget*, 16 J. R. 172.

81. If a deed cannot operate in the manner intended by the parties, such a construction should be given, that it may operate in some other manner. *Ibid*.

82. It may be construed most strongly against the grantor. *Ibid*.

83. Where a deed may enure several ways, the grantee shall have his election which way to take it. *Jackson*, ex dem. *Klock*, v. *Hudson*, 3 J. R. 375. *S. P. Jackson*, ex dem. *Troup*, v. *Blodget*, 16 J. R. 172.

84. An uncertainty shall be taken in favor of the grantee. *Jackson*, ex dem. *Buller*, v. *Gardner*, 8 J. R. 394.

*85. But where a grant from [*498] government is susceptible of two constructions, that which is most favorable to the government shall prevail. *Jackson*, ex dem. *Clark*, v. *Reeves*, 3 C. R. 293.

86. The construction of a grant is matter of law, but its legal effect, deducible from its terms, or from matter subsequent, which, by showing the sense of the parties, may authorize a larger or narrower construction, so as to include or exclude the premises in controversy, is a matter of fact for a jury only to decide. *Frier* v. *Jackson*, ex dem. *Van Allen*, in error, 8 J. R. 495.

87. The grant of an undivided moiety, or share, of a stream of water, does not authorize the grantee to appropriate or use the stream to the injury of others jointly interested in it. *Vandenburgh* v. *Van Bergen*, 13 J. R. 212.

88. Where A., a soldier in the revolutionary war, by deed, dated in 1794, without warranty, granted the military right granted to him as bounty for his services in the late war; and afterwards, by an act of the legislature, passed in 1806, 200 acres of land were directed to be granted to A. as a gratuity for his services and sufferings in the revolutionary war, in pursuance of which a patent issued to A.; held, that A's grantee, under the deed of 1794, was not en-

titled to that land, as that deed related only to land to which A. was entitled under the concurrent resolutions of the legislature. *Jackson*, ex dem. *M'Crackin*, v. *Wright*, 14 J. C. 193.

89. Where two instruments, relating to the same subject, are executed at the same time, they are to be taken in connection, as parts of the same agreement; as, where a conveyance of land, and a mortgage to secure the purchase money, are executed at the same time, the effect of the transaction is, that if the price of the land is not paid at the stipulated time, the grantor shall be seised of the land free of the mortgage: and whether such an agreement be contained in one and the same instrument, as it well may be, or in distinct instruments, can make no difference as to the effect. *Stow* v. *Tyft*, 15 J. R. 458.

90. Where the words of an ancient deed are equivocal, the usage of the parties, under the deed, is admissible to explain them. *Livingston* v. *Ten Broeck*, 16 J. R. 14.

91. As, where the grantor, in a deed executed in 1694, gave to the grantee the privilege of cutting timber, to be used for building on the premises, from the woods of the grantor; evidence that the grantee and his heirs, &c. had, with the knowledge of the grantor and his heirs, &c. cut wood for the purpose of erecting fences on the premises, is admissible to show the intention of the parties to apply the word "building" to the making of fences, as well as of barns and houses. *Ibid*.

92. So possession may be resorted to, in explanation of the intention of the parties, where the words of the deed are equivocal. *Ibid*. Per *Spencer*, J.

93. It seems, that the term building is, in common parlance, at this day, applied to the making of fences. *Ibid*.

94. Where a person seised of three undivided fourth parts of a farm, conveys one equal moiety of the farm, describing it by metes and bounds, together with all the estate, right, title, &c. which he hath to [*499] above described premises; these general words are not to be construed as extending the grant beyond the one moiety of the premises. *Jackson*, ex dem. *Stevens*, v. *Stevens*, 16 J. R. 110.

When an instrument will be construed a conveyance in present, or an agreement to convey. See AGREEMENT, I. pl. 12, 13, 14.

VIII. Registry of deeds; (a) Acknowledgment, proof, and registering; (b) Priority of conveyances.

(a) Acknowledgment, proof, and registering.

95. The proof of a deed before a master in Chancery, made by the oath of a subscribing witness, who stated, that he saw the grantor execute the deed, and sincerely believed he was the same person named in the deed, on which the master certified, that he was satisfied of the due execution of the deed, and allowed it to be recorded, was held sufficient to allow the deed, which had been recorded, to

be read in evidence. *Jackson*, ex dem. *Reiley*, v. *Livingston*, 6 J. R. 149.

96. Proof of the execution of a deed cannot be taken, by a judge of this state, out of the jurisdiction of the state. *Jackson*, ex dem. *Wyckoff*, v. *Humphrey*, 1 J. R. 498.

97. Proof of an ancient deed, made prior to the act of 1771, prescribing the mode of proving deeds in the colony of *New-York*, by a surviving grantor in 1750, who swore that the other grantors were dead, and had executed the deed, is sufficient. *Jackson*, ex dem. *Hardenberg*, v. *Schoonmaker*, 2 J. R. 230. See *Jackson*, ex dem. *Woodruff*, v. *Gilchrist*, 15 J. R. 89.

98. A deed for a military lot of land in the county of *Onondaga*, dated in *June*, 1794, and proved the 5th of *September*, 1797, in the manner prescribed by the act of 11th *February*, 1797, relative to the proving and recording of deeds, was held sufficiently proved to be recorded; and a transcript of the record of such deed, so proved, may be read in evidence. *Jackson*, ex dem. *Dunbar*, v. *Todd*, 3 J. R. 300.

99. The certificate of the proof or acknowledgment of a deed, taken before a judge, being necessarily *ex parte*, is not conclusive: but the party affected by the deed may contest its validity, and the force and effect of the formal proof. *Jackson*, ex dem. *Hardenberg*, v. *Schoonmaker*, 4 J. R. 161. *S. P. Jackson*, ex dem. *Tracy*, v. *Hayner*, 12 J. R. 469.

100. In the certificate of the proof of the execution of a deed, before a master in Chancery, or other officer, it is not necessary to state, that the officer personally knew the subscribing witness. *Jackson*, ex dem. *Wood*, v. *Harrow*, 11 J. R. 434.

101. And where the objection was, that it did not appear, that the master knew the witness who made the proof, the Court, on a motion for a new trial, intended that the certificate of the master stated that he had "satisfactory evidence of the person being the subscribing witness." *Ibid.*

102. Where the certificate of a justice of the peace in 1711, of "the acknowledgment of a deed, stated, that A., and B., his wife, came before him "to acknowledge this indenture to be their acts and deed;" held, that the certificate could not be understood to mean that the parties merely came before the justice to acknowledge the deed, or with such intent only; but further that they actually did acknowledge it; and that after so great a lapse of time, the private examination of the wife ought to be presumed, and that the estate acquired under a deed so acknowledged, was confirmed by the act of 1771. *Jackson*, ex dem. *Woodruff*, v. *Gilchrist*, 15 J. R. 89. And see 2 J. R. 230.

103. The statute of 1771, "to confirm certain ancient conveyances," provided, that no claim to any real estate whereof any person was then actually possessed, should be deemed to be void, upon the pretence that the *feme covert* granting the same had not been privately examined: It seems, that in respect to new and unsettled lands, the constructive possession, arising from the right of property, is sufficient to satisfy the words of that act; such a possession being sufficient in other cases. *Ibid.*

104. Whether before the colonial act of 1771, the interest of a *feme covert* in land could, in *New-York*, be conveyed otherwise than by *fine*? *Quære. Ibid.*

105. A deed executed by a *feme covert* is not binding upon her until acknowledged by her according to the statute; and her subsequent acknowledgment of the deed does not relate back to the time of its execution. *Jackson*, ex dem. *Stevens*, v. *Stevens*, 16 J. R. 110.

106. A power of attorney to demand and receive a debt secured by mortgage, and to execute a release and discharge thereof, is not within the act concerning deeds, (Sess. 36. c. 97.) and therefore is not entitled to be read in evidence on the certificate of acknowledgment or proof thereof before a judge; but must be proved by the subscribing witnesses or other evidence of its execution. *Jackson*, ex dem. *Barclay*, v. *Hopkins*, 18 J. R. 487.

107. Though the existence of an absolute deed may be proved by a recital in another deed against the party making such recital; yet it seems, that the existence of an out-standing mortgage cannot be proved by such recital; for if produced, it might appear to have been satisfied, no release being necessary to reconvey the title to the mortgagor. *Jackson*, ex dem. *Randall*, v. *Davis*, 18 J. R. 7.

(b) Priority of conveyances.

108. A subsequent registered deed, will have preference to a prior unregistered deed, where the grantee in the subsequent deed has not notice of the prior one. *Jackson*, ex dem. *Humphrey*, v. *Given*, 8 J. R. 137.

109. If a subsequent purchaser has notice at the time of his purchase, of a prior unregistered deed, it is the same to him as if such deed had been registered. *Jackson*, ex dem. *Bonnell*, v. *Sharp*, 9 J. R. 163. *Jackson*, ex dem. *Gilbert*, v. *Burgott*, 10 J. R. 457. *Jackson*, ex dem. *Fosdick*, v. *West*, 10 J. R. 466.

110. It seems, that implied notice of a prior unregistered deed, will *not be sufficient to set aside a subsequent [*501] deed. *Jackson*, ex dem. *Humphrey*, v. *Given*, 8 J. R. 137.

111. Explicit notice of a prior unregistered deed must be given, in order to destroy the effect of a subsequent registered deed. *Jackson*, ex dem. *Bristol*, v. *Elston*, 12 J. R. 452.

112. If one, affected with notice, conveys to another, without notice, the latter is as much protected as if no notice had ever existed. *Ibid.*

113. Notice to the agent employed to effect the purchase is equivalent to notice to the principal. *Jackson*, ex dem. *Bonnell*, v. *Sharp*, 9 J. R. 163.

114. The question of notice, or fraud, is cognizable at law, as well as in equity. *Jackson*, ex dem. *Gilbert*, v. *Burgott*, 10 J. R. 457.

115. An unregistered deed is always good against the grantor and his heirs. Per *Kent*, Ch. J. *Ibid.* *Jackson*, ex dem. *Fosdick*, v. *West*, 10 J. R. 466.

116. A deed of military lands, recorded in the secretary's office before the passing of the act of the 8th of *January*, 1794, will be void as

to a subsequent purchaser, for a valuable consideration, whose deed is first deposited with the clerk in *Albany*. *Jackson*, ex dem. *Potter*, v. *Hubbard*, 1 C. R. 82.

117. Where a person executes a mortgage which is not recorded, and afterwards executes an absolute deed for the same premises to a bona fide purchaser for a valuable consideration without notice, such bona fide purchaser is protected by the act concerning mortgages, (Sess. 36. c. 33.) and his deed is preferred to the mortgage, though the mortgage is afterwards recorded, and before the deed. *Jackson*, ex dem. *Center*, v. *Campbell*, 19 J. R. 281.

118. But under the fourth section of the act concerning deeds, (Sess. 36. c. 97.) the deed first recorded takes preference; the act declaring deeds not recorded in the counties mentioned fraudulent and void, as against a bona fide purchaser or mortgagee for a valuable consideration, unless first recorded, &c. *Ibid*.

See MORTGAGE. NOTICE. And see tit. CHANCERY, XLIV.

IX. When a deed is valid, and for what it may be avoided.

119. A conveyance or assurance is good, without a warranty, or personal covenants. *Nixon* v. *Hyscott*, 5 J. R. 58.

120. The want, or failure of consideration, cannot be set up, at law, to impeach a specialty. *Frooman* v. *Phelps*, 2 J. R. 177. *S. P. Norton* v. *Sammis*, id. 179. n.

121. The breach of a written warranty, as to the quality of goods sold, cannot be pleaded in discharge of a bond given for the consideration. *Frooman* v. *Phelps*, 2 J. R. 177.

122. Much less, parol representations, made antecedent to the contract, though false and fraudulent. *Ibid*.

123. A deed, after it has been executed, may be altered in a material [*502] *part, with the consent of the parties, without affecting its validity. *Woolley* v. *Constant*, 4 J. R. 54.

124. If a bill of sale of a ship, containing blanks for the recital of the register, is executed and delivered, and afterwards the blanks are filled up, by the consent of the vendor and vendee, it will be good. *Ibid*.

125. An alteration, material or immaterial, made in a deed or will, by a person claiming under it, renders it void. *Jackson*, ex dem. *Malin*, v. *Malin*, 15 J. R. 293.

126. If a material alteration be made by a stranger whether it has the same effect? *Quere. Ibid*.

127. A *rasure* in a deed, if done with the consent of the parties, does not invalidate it. *Penny* v. *Corwith*, 18 J. R. 499.

128. And the fact of erasure, though there be a subscribing witness to the deed, may be proved by any other person. *Ibid*.

129. A deed will not be avoided on the ground of its having been fraudulently obtained, because the grantor was a very ignorant and illiterate man, and could not read writing, and the deed was not read to him, unless he

requested it to be read to him. *Hallenbeck* v. *Dewitt*, 2 J. R. 404.

130. A deed is not void on the ground of fraud or mistake, because the whole of it was not read by the grantor. *Jackson*, ex dem. *Russell*, v. *Croy*, 12 J. R. 427.

131. Where an illiterate person is induced to execute a deed, by a misrepresentation of its nature and contents, the deed is void. *Jackson*, ex dem. *Tracy*, v. *Hayner*, 12 J. R. 469.

132. A mere failure of consideration is no defence at law, against a deed or specialty. *Parker* v. *Parmelee*, 20 J. R. 130.

133. A possession adverse to the grantor, at the time of executing the deed, renders the conveyance void. *Jackson*, ex dem. *Jones*, v. *Brinckerhoff*, 3 J. C. 101. *Jackson*, ex dem. *Dunbar*, v. *Todd*, 2 C. R. 183. *Jackson*, ex dem. *Lathrop*, v. *Demont*, 9 J. R. 55. *S. P. Williams* v. *Jackson*, ex dem. *Tibbitts*, in error, 5 J. R. 489. *Jackson*, ex dem. *Bryant*, v. *Ketchum*, 8 J. R. 479. *Jackson*, ex dem. *Benson*, v. *Matsdorf*, 11 J. R. 91.

134. But the title of the grantor is not thereby extinguished, or divested. *Jackson*, ex dem. *Jones*, v. *Brinckerhoff*, 3 J. C. 101. *S. P. Jackson*, ex dem. *Youngs*, v. *Vredenburg*, 1 J. R. 159. *S. P. Williams* v. *Jackson*, ex dem. *Tibbitts*, in error, 5 J. R. 489.

135. And, it seems, that want of notice in the parties of the adverse possession, will not render the deed operative, (although it may be material under a prosecution for selling a pretended title.) *Jackson*, ex dem. *Lathrop*, v. *Demont*, 9 J. R. 55.

136. If a tenant in possession of land, claiming to hold adversely, after issue joined in an action of ejectment, receive a deed, or release of the premises, from one of the lessors; yet, admitting the sale to be an act of maintenance, (a point not decided,) it is effectual, as between the parties to it, and a bar to the lessor who executed it. *Ibid*.

137. In order to avoid a deed, on the ground of an adverse possession, at the time of its execution, such adverse possession must be [*503] clearly made out, by positive facts, and not be left to inference or conjecture. *Wickham* v. *Conklin*, 8 J. R. 220.

138. An entry and possession under a title derived from a foreign government, is not such an adverse possession as will defeat the operation of a subsequent grant. *Jackson*, ex dem. *Winthrop*, v. *Waters*, 12 J. R. 365.

139. Where a person purchases the possession of an occupant of the land, without color of title, and afterwards conveys the land to another, in fee, this is such an adverse possession as will avoid a grant from the true proprietor. *Jackson*, ex dem. *Bristol*, v. *Elston*, 12 J. R. 452.

140. Possession of land by a purchaser, under a deed, for the entire lot, given without right in the grantor, is adverse to the rightful owners, though tenants in common with the grantor; and a subsequent deed executed by them, during such adverse possession, is inoperative and void; and subsequent releases by them to the grantor of the defendant, or the person under whom he derives title, enure to

the benefit of the defendant. *Jackson, ex dem. Preston, v. Smith*, 13 J. R. 406.

141. A person in possession of land, claiming title, may purchase in an outstanding title to protect his possession. *Ibid.*

142. A conveyance of land, pending an action of ejectment for its recovery by another, is not void for *champerty*, unless the purchaser knew of the pendency of the action. *Clowes v. Hawley*, 12 J. R. 484.

143. Where A. executes a power of attorney, in which he recites his seisin in a lot of land, and authorizes his attorney to sell, which power is recorded, and the attorney agrees with B. to convey to him in fee, this is such an adverse possession as will defeat the operation of a deed from any other person claiming title to the same land, though no deed has been executed to B.; for having paid the consideration money, he is entitled to a deed, and holds adversely to every one. *Jackson, ex dem. Bonnel, v. Foster*, 12 J. R. 488.

144. A sheriff's deed to a purchaser, under an execution, describing the premises sold, as "all the lands and tenements of the defendants, situate, lying and being in the *Hardenbergh* patent," is void for uncertainty. *Jackson, ex dem. Carman, v. Roosevelt*, 13 J. R. 97. See *Jackson, ex dem. Livingston, v. De Lancy*, 13 J. R. 537.

145. Where a deed is good in part, and bad in part, as against the provisions of a statute, it is void *in toto*, and no interest passes to the grantee under the part which is good. *Hyslop v. Clarke*, 14 J. R. 458.

146. A person who has conveyed land, will not be allowed to claim it in opposition to his own deed, though the deed may not amount to an *estoppel*. *Jackson, ex dem. Stevens, v. Stevens*, 16 J. R. 110.

147. It is essential to the validity of a deed, that the grantee is willing to accept it; and though such acceptance will be presumed from the beneficial nature of the transaction, when the grant is not absolute, yet this presumption is very slight, where the grantee receives no benefit under the deed, but is subjected to a duty, as the performance of a trust. *Jackson, ex dem. Pintard, v. Bodle*, 20 J. R. 184.

148. As where P., an insolvent debtor, in *New-Jersey*, in 1798, assigned all his property, under the insolvent act of that [*504] state, to C. and D. in trust for all his creditors, and there was no evidence that the trustees had taken the oath required of them by the act, and they had done no act whatever in execution of the trust for above twenty years; and one of them had declared, in the presence of the other, who did not dissent, that he had never qualified, nor acted, and never intended to act as trustee; *held*, that this was sufficient evidence, that they never had consented to become trustees, or had accepted the deed of assignment, by which, therefore, nothing passed. *Ibid.*

149. No person but the party to a deed, who alleges the fraud to have been practised upon him, or those claiming title under him, will be allowed to impeach or avoid the deed, on the

ground of such fraud. *Jackson, ex dem. Hungerford, v. Eaton*, 20 J. R. 478.

150. Where a person executed a covenant, in which reference was made to a schedule annexed, subscribed by the covenantor, and it appeared, that the schedule annexed was subscribed *Delano & Burnham*, and the agreement was signed *Andrew Burnham*; *held*, that the defendant having admitted, by his covenant, that his name was subscribed to the schedule, was estopped to deny that *Delano & Burnham* did not include his name, or to allege a *misnomer*, in avoidance of his covenant. *Smith v. Burnham*, 9 J. R. 306.

X. Cancelling a deed.

151. If A. convey lands to B. and take from B. a mortgage of the same, and, afterwards, A. and B. cancel and give up their respective deeds, the legal estate (whether by the cancelling the property originally vested was divested or not) is in A. *Jackson, ex dem. Simmons, v. Chase*, 2 J. R. 84.

See further *tit. CHANCERY, XVIII. Deed, A. B.*

DESCENT.

1. A person claiming land by descent, must entitle himself as heir of the person last actually seised in fee. *Jackson, ex dem. Lawrence v. Hilton*, 16 J. R. 96.

2. A., seised in fee of land, devised it for life, and dies, leaving B. his heir at law, who dies before the termination of the life estate; the heirs of B. are not, as such, entitled to the land, after the death of the tenant for life; for B. had not such a seisin as to create a new stock of descent. *Ibid.*

3. Where A. is seised of a reversion expectant on the determination of a life estate of a tenant by the curtesy, as son and heir of B., the wife of the tenant by the curtesy, and in whom was the fee of the land, it does not become a *new stirpes* or stock of descent, but a person claiming the reversion must deduce his title immediately from B., the person *who was last actually seised [*505] in fee of the land. *Bates v. Shraeder*, 13 J. R. 260.

4. Therefore, the eldest son of the eldest uncle of A. will not inherit; but the brothers and sisters of B., and their representatives, are the next of kin, according to the provision of the statute of descents. *Ibid.*

5. Descent is suspended during the continuance of an estate in dower, or by the curtesy, and the heir is not seised, so as to form a new stock of descent, or to constitute a *posterioris fratris*. *Jackson, ex dem. Gomez, v. Hendricks*, 3 J. C. 214.

6. And the inheritance relates back to the person last seised in fee, and if such person died before the passing of the statute of descents, the heir at common law inherits. *Ibid.*

7. If the next heir of the person last seised be an alien, the lands do not escheat, but go to some remoter heir, who is capable of taking

by descent. *Jackson, ex dem. Elmendorf, v. Jackson*, 7 J. R. 214.

8. Where A. died seised of lands, leaving B. and C., children of a deceased sister, and D., the son of a deceased brother, his heirs at law; *held*, that by the 5th canon of the 3d section of the act regulating descents, B., C. and D. must take *per stirpes*, and not *per capita*. *Jackson, ex dem. Roosevelt, v. Thurman*, 6 J. R. 322.

9. A., a soldier, (entitled to military bounty land, under the resolutions of the legislature,) was killed in 1778; B., his brother, was his heir at law, and died about the close of the war, leaving C., his eldest son, and other children. In 1807, a patent for a lot of land was issued to A., the deceased soldier; and in 1809, C. conveyed all his right in the land to D. In an action of ejectment, brought by the heirs of B., *held*, that by the act, (Sess. 36. c. 30. s. 1.) the title to the lot was in A., at the time of his death, without regard to the time when the patent issued; that as, by the seventh section of the act, the rules of descent established by the act of 1786, (Sess. 9. c. 12.) applied retrospectively to the cases within the first section of the former act, the children of B., if he had died before A., would, by the fifth canon of descents, have inherited the land, as tenants in common; and if B., surviving A., had died seised of the premises, all his children would have inherited, under the first canon of descents; and that B., though never actually in possession, was to be deemed as having died seised, (a seisin, in fact, not being required in regard to wild lands,) and thus became a new stock of descent, so that the conveyance of C., (who, if A. was to be deemed the person last seised, would have been his heir at common law,) could operate only on the right he had as one of the co-heirs of B. *Jackson, ex dem. Austin, v. Howe*, 14 J. R. 405.

10. By the statute of descents, (Sess. 9. c. 12.) incorporeal hereditaments descend to all the children, &c. of the intestate, in the same manner as lands and tenements, and not, according to the rule of the common law, as to coparceners, to the eldest alone, on making allowance to the other coparceners, out of the inheritance descended; or, if there were nothing out of which the allowance could be made to all the coparceners, to be enjoyed by them alternately. *Leyman v. Abeel*, 16 J. R. 30.

See further, tit. CHANCERY, XIX. Descent.

[*506]

*DEVISE.

I. *How to be construed*; (a) *What is a devise of real estate in a will*; (b) *Construction of a devise as to the land devised*; (c) *As to the quantity of estate devised*; (d) *As to the designation of the person of the devisee*; (e) *Estate to commence in futuro*; (f) *Condition and conditional limitation*; (g) *Recital in a devise*.

II. *Executory devise*; (a) *When a devise is good as an executory devise, or void as creating an estate tail*; (b) *Devise over after a failure of issue*; (c) *When a limitation is void for repugnancy*; (d) *Contingency on which the devise over is to take effect*; (e) *Interest of the devisee of the particular estate*.

I. *How to be construed*; (a) *What is a devise of real estate in a will*; (b) *Construction of a devise as to the land devised*; (c) *As to the quantity of estate devised*; (d) *As to the designation of the person of the devisee*; (e) *Estate to commence in futuro*; (f) *Condition, and conditional limitation*; (g) *Recital in a devise*.

(a) *What is a devise of real estate in a will*.

1. A., by his last will and testament, directed his executors to pay his debts, and to pay 22 pounds to his wife, &c., and gave legacies to his several children, by name, and ordered his executors to have his real and personal estate appraised; and, if the value of the estate amounted to more than the sums bequeathed, the surplus was to be divided among the legatees, in proportion to what was given to them; and if to less, then a deduction was to be made, in like proportion; provided that his debts and funeral charges should be first paid: and he declared that it was to be understood that each of the heirs and legatees named, were to receive their several sums out of his estate in lands, and goods and chattels, which he left at his decease: and he appointed two of his sons and legatees his executors; *held*, that there was no devise of the real estate; that the executors at most had a power to sell the lands; and if so, the estate, in the mean time, and until it was sold, descended to the heirs at law. *Jackson, ex dem. Hall, v. Burr*, 9 J. R. 104.

2. A. devised to his wife his farm, orchards, &c., during her widowhood; to four of his sons 400 acres of land, &c.; to his five daughters 60 acres of land each; to S. and J., two of his sons, and their heirs, after the death or marriage of his wife, his dwelling-house, orchards, &c., and all his lands, except what he had before given to his sons and daughters; and then devised as follows: *I give and bequeath to Catharine and Sarah, each, the sum of twelve pounds out of my personal estate, and the remainder to be equally divided among my eleven children; and if any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children; held*, that the devise over extended as well to the real, as the personal estate. *Jackson, ex dem. Staats, v. Staats*, 11 J. R. 337.

*3. A devise of land, held by the devisor adversely, is void; but it [*507] descends to his heir. *Smith, ex dem. Roosevelt, v. Van Dursen*, 15 J. R. 343.

(b) *Construction of a devise as to the land devised*.

4. A., being seised of a house, with stables, yards, gardens, &c. and 18 acres of land ad-

joining, by his will devised to his wife as follows: *and also, that large and convenient dwelling-house, together with all the appurtenances and privileges thereunto belonging, and the same which is now improved by me as a boarding-house; held, that not only the barn, stables, and out-houses, but the land, consisting of orchard, pasture, plough, and wood land, all of which had been used by the testator as appurtenant to his boarding-house, and conducive to his support, passed by the will; especially when from the other parts of the devise, such was the evident intention of the testator.* *Jackson, ex dem. White, v. White, 8 J. R. 59.*

5. If a testator devise a certain number of acres out of a larger tract, describing them by courses and distances, and if, by pursuing the boundaries mentioned in the will, the land would be deficient in quantity, the boundary may be enlarged so as to give the devisee his full number of acres. *Jackson, ex dem. Zimmerman, v. Zimmerman, 2 C. R. 146.*

6. G. devised to his wife during her widowhood, *the farm which I now occupy*, and after the re-marriage or death of his wife, to S. and his heirs; *held*, that extrinsic or parol evidence to show that the testator intended to devise the whole of his real estate at W., and which included a farm of 90 acres in the tenure of B., under a lease from the testator for seven years, and that he gave such instructions to the attorney who drew the will, was inadmissible, there being no latent ambiguity in the will, but a mistake. *Jackson, ex dem. Van Vechten, v. Still, 11 J. R. 201.*

7. And that the words *which I now occupy*, could not be considered as an additional description to what was before sufficiently described, and which therefore might be rejected as surplusage, for without those words, there would be no designation or certainty of the thing described. *Ibid.*

8. A. being entitled, as a representative of B., to a lot of military bounty land, the patent for which had not been issued, made his will, and after devising his estate, to his wife and two daughters, devised as follows: "As there is some expectation of something coming to me of my brother B's estate, which is not comprehended in the above, I give it unto my brother C. forever;" *held*, that the latter devise applied to the interest of A. in expectancy in the military bounty land, and was not included in the devise to the wife and daughters. *Jackson, ex dem. Merritt, v. Wilson, 12 J. R. 318.*

9. V. devised to M. one hundred acres of land in a certain patent, where she pleased to take the same, and to her heirs and assigns forever; *held*, that no title to any particular part of the patent vested in M., and she not having made an election in her life time, the right of election was gone, and could not be exercised by her heirs; especially *after a lapse of forty years from the death of the testator. *Jackson, ex dem. Valkenburgh, v. Van Buren, 13 J. R. 525.*

10. M. devised to his son the farm on which he then lived, being in, &c. containing, &c.; *held*, that a lot of land of about 16 acres, with a dwelling thereon not adjoining the farm, and

which had been let for several years, as a separate and distinct lot, did not pass by the devise. *Jackson, ex dem. Harder, v. Moyer, 13 J. R. 531.*

11. Trust estates, under which is included the interest of a mortgagee, who until foreclosure is a trustee for the mortgagor, will pass under the general words of a will, as of *all the real and personal estate* of the testator, unless it can be collected from the expressions in the will, or the purposes and objects of the testator, that his intention was otherwise. *Jackson, ex dem. Livingston, v. De Lancy, 13 J. R. 537.*

12. Where one of the patentees of a tract of land, devised his undivided interest in the patent to his two sons, and devised to all his children a right of common in his undivided lands in the patent, the latter devise is not inconsistent with the former, but valid; and upon a partition of the patent between the representatives of the original patentees, the right of common will be restricted to the interest of the devisor. *Leyman v. Abeel, 16 J. R. 30.*

(c) *As to the quantity of estate devised.*

13. Where a devise contains no words of limitation or perpetuity, the devisee can take only an estate for life. *Jackson, ex dem. Wells, v. Wells, 9 J. R. 222. (See S. C. post, pl. 34.) S. P. Jackson, ex dem. Newkirk, v. Embler, 14 J. R. 198.*

14. The word *estate* passes a fee. *Jackson, ex dem. Decker, v. Merrill, 6 J. R. 185. S. P. Jackson, ex dem. Livingston, v. De Lancy, 13 J. R. 537.*

15. A devise of all one's right carries a fee simple to the devisee. *Newkirk v. Newkirk, 2 C. R. 345.*

16. Where lands are devised in fee, with a limitation over, to which no words of inheritance are annexed, the ulterior devise will, notwithstanding, be in fee. *Jackson, ex dem. Staats, v. Staats, 11 J. R. 337.*

17. W. devised to his wife the use of all his real and personal estate, to use and dispose of at her pleasure, and after her death he gave one third to his daughter S. in fee, and the other two thirds to be disposed of at the pleasure of his wife, after the death of his grandson T.: by these words the fee simple in the two thirds passed to the wife. *Jackson, ex dem. Bush, v. Coleman, 2 J. R. 391.*

18. No technical words are necessary to devise a fee; and where a man devised to his wife *all his estate real and personal*, that he might be in possession of at his decease, *to be at her absolute disposal; held*, that the wife took an estate in fee, not by implication, but by force of the words, all my estate to be at her absolute disposal. *Jackson, ex dem. Herrick, v. Babcock, 12 J. R. 389. [See further WILL, V.]*

19. Where there is a devise for life, in express terms, a power of disposal annexed does not enlarge it into a fee; but where such power is annexed to a general devise, without any specification of the quantity *of interest, the devisee takes a [*509] fee. *Jackson, ex dem. Livingston, v. Robins, 16 J. R. 537. S. C. 15 J. R. 160.*

20. A testator devised as follows: "I do give and bequeath to my son A. the one equal half of my land, beginning, &c., after he has arrived at full age; until that time it shall belong to my wife, to make use of as she thinks proper." The testator, in like manner, devised other parts of his lands, &c., to his sons, without words of inheritance, or the word *estate*, and gave one third of his *personal* estate to his wife, and the remaining two thirds to his daughters; *held*, that A. and the other devisees of the lands took only estates for life. *Ferris v. Smith*, 17 J. R. 221.

21. The words "*my property*," where there are no other words to explain or control them, are sufficient to pass all the real and personal estate of the testator. *Jackson*, ex dem. *Pearson*, v. *Housel*, 17 J. R. 281.

22. If land be devised to another, with directions to him to pay a gross sum out of it, the devisee takes an estate in fee without any other words, though the sum to be paid does not amount to a year's rent of the land, and though the payment may be postponed. *Jackson*, ex dem. *Decker*, v. *Merrill*, 6 J. R. 185.

23. A contingent charge on the estate devised will not carry a fee. *Jackson*, ex dem. *Harris*, v. *Harris*, 8 J. R. 141.

24. A. devised as follows: "As touching such worldly estate wherewith it has pleased God to bless me, I give, devise, and dispose of the same in the following manner and form:" he then enumerates certain specific legacies, and devises to his son, "all this certain lot of land which I now possess, with the farming utensils, &c.," and adds, "all these legacies before mentioned, to be paid on the 1st of May, 1805, and to be raised and levied out of my estate," and then appointed his son H., and another person, his executors: H. takes only an estate for life, for the charge being on the testator's estate generally, it is contingent as to the real estate, that is, the personality must be exhausted before the real estate can be resorted to. *Ibid*.

25. Where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only; but where the charge is on the person of the devisee, in respect to the estate in his hands, he takes a fee, by implication. *Jackson*, ex dem. *Townsend*, v. *Bull*, 10 J. R. 148. *S. P. Jackson*, ex dem. *Ruggles*, v. *Martin*, 18 J. R. 31.

26. But where there is a general charge on the whole estate, a devise of a particular part will not raise a fee by implication. *Ibid*.

27. Where a testator devised to his son a farm, &c., (without words of inheritance, or expressing the quantity of the estate,) the son complying with the direction of the testator to furnish his mother with fire wood and grain of all sorts, for her comfortable support; and in case she should not choose to live in the dwelling-house, (included in the farm devised,) in the event of the son's marriage, that then he should build a house for her, on another part of the testator's land; *held*, that this was a charge on the person of the devisee, in respect to the estate devised, and that he, therefore, took an estate in fee, by implication.

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tion. *Jackson*, ex dem. *Ruggles*, v. *Martin*, 18 J. R. 31.

*28. H., in 1784, devised his [*510] estate to M., and to the heirs of her body lawfully begotten, and for default of such heirs, to the heirs of his body, &c.; *held*, that the estate tail so devised to M., was, by the act of the 12th of July, 1782, (Sess. 6. c. 2.) for abolishing entails, and which operated prospectively, converted into a fee simple, and M. being illegitimate, and dying without issue, the estate escheated. *Jackson*, ex dem. *Hicks*, v. *Van Zandt*, 12 J. R. 169.

29. A. devised a farm to his sons, J. and E., equally to be divided between them, and for them to pay legacies to his daughters of 20 pounds each, and then added, "to be paid by my executors out of my money and movables; the debts to be paid out of the estate that I shall die seized of;" *held*, there being no apt words of limitation, that the devisees took an estate for life; and the charge, as to the payment of the debts, being upon the land, and not on the persons of the devisees, no estate in fee could arise by implication. *Jackson*, ex dem. *Townsend*, v. *Bull*, 10 J. R. 148.

(d) *As to the designation of the person of the devisee.*

30. Where there is a devise to the children of the testator, some of whom die before the devise takes effect, the whole will go to the survivor or survivors, and the children of those who died can take nothing under the devise. *Jackson*, ex dem. *Staats*, v. *Staats*, 11 J. R. 337. See *Jackson*, ex dem. *Decker*, v. *Merrill*, 6 J. R. 185.

(e) *Estate to commence in futuro.*

31. Where the whole property is devised, with a particular exception out of it, it operates by way of exception out of the absolute property; and where an absolute property is given, and a particular interest is given in the mean time, as until the devisee shall come of age, this does not operate as a condition precedent, but as a description of the time when the remainderman is to take possession. *Jackson*, ex dem. *Beach*, v. *Durland*, 2 J. C. 314.

32. P. devises lands to his daughter C., "during the term of her life, and immediately after her death, unto and among all and every such child and children as the said C. shall have, lawfully begotten at the time of her death, in fee simple, equally to be divided between them, share and share alike:" by this devise, all the children of C. living at the time of the death of the deviser, take a vested remainder in fee, and if C. has any children afterward born, the estate opens for their benefit, and the remainder vests in them and their heirs in common with the children living at the deviser's death. *Doe*, ex dem. *Barnes*, v. *Provoost*, 4 J. R. 61.

33. The testator devises as follows: "I give to each of my three daughters 35 pounds, which I require my three sons to pay out of

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my last estate, when it shall fall into their hands: the first of all, I leave my loving wife the sole possession of all my estate, my lands, and goods, and chattels, which she shall enjoy as long as she shall continue my widow: after it shall fall to my children, I will and require that my three sons pay each of their sisters 35 pounds apiece, as they shall come of age: and if any of my children die before they shall come of age, their part shall be equally divided among the rest:" the widow takes an estate, *durante viduitate*, with remainder in fee to the three sons, and in case of the death of any of the children under age, the surviving children take as executory devisees; and the word *children* is here intended to apply as well to the daughters as to the sons. *Jackson, ex dem. Decker, v. Merrill*, 6 J. R. 185.

34. A. devised as follows: "I give and bequeath unto my eldest son *Daniel*, all that part of the lot of land that I now live on, northward," &c., and after devises and legacies to other sons and his daughters, devised to his third son, as follows: "I give and bequeath unto my third son *Jeremiah*, and to his heirs and assigns forever, all the rest of my estate, both movable and immovable, of every kind not disposed of, &c., he paying all my just debts, and the said legacies, &c.; and if he should refuse or neglect to pay all my just debts, &c., then my will is, that my executors sell so much of that part of my estate given to him as shall pay, &c." *Held*, that *Daniel* took only a life estate in the lot devised to him; and that *Jeremiah*, under the devise to him of the residue of the testator's estate, took the remainder in fee, after the determination of such life estate. *Jackson, ex dem. Wells, v. Wells*, 9 J. R. 222.

(f) *Condition, and conditional limitation.*

35. A man devises land to his children, *in case they continue to inhabit the town of H.*; these words, whether a condition subsequent or precedent, or a limitation, are void, as being repugnant to the estate devised, unreasonable or uncertain, or as nugatory, the heirs themselves being to take advantage of it, there being no limitation or devise over by the will. *Newkirk v. Newkirk*, 2 C. R. 345.

36. And a residuary clause, devising the testator's whole real estate, except what he had before disposed of, is not a devise over. *Ibid.*

(g) *Recital in a devise.*

37. A recital in a devise, that the devisor had conveyed lands to a particular person, must be intended of a conveyance in fee. *Denn, ex dem. Colden, v. Cornell*, 3 J. C. 174.

Further, as to remainders, see REMAINDER.
And as to executory devises, see post, II.
And see WILL.

II. *Executory devise*; (a) *When a devise is good, as an executory devise, or void, as cre-*

ating an estate tail; (b) *Devise over after a failure of issue*; (c) *When a limitation is void for repugnancy*; (d) *Contingency on which the devise over is to take effect*; (e) *Interest of the devisee of the particular estate.*

(a) *When a devise is good, as an executory devise, or void, as creating an estate tail.*

38. C. devises his real estate to his sons, A., B., C. and D., and his daughter, E., in fee, and then adds: further, [512] *my mind and will is, that if any of my said sons, A., B., C. and D., or my daughter M., shall happen to die without heirs male of their own bodies, that then the lands shall return to the survivors, to be equally divided between them*; these words do not control the previous devise in fee, nor create an estate tail, but the limitation over being to take effect on the death of the devisee without issue male, is good, as an executory devise. *Fosdick v. Cornell*, 1 J. R. 440.

39. A devise to the children of the testator, and if one of them happen to die without heirs, then his share to be divided among the rest of the children, does not create an estate tail, but is a good executory devise. *Jackson, ex dem. Staats, v. Staats*, 11 J. R. 337.

40. Though there is no one to take under an executory devise, the estate does not therefore revert to the right heirs of the testator. *Ibid.*

41. Where there is an express limitation of a chattel by words, which, if applied to a freehold, would create an estate tail, the whole interest vests absolutely in the first taker, and the limitation over is too remote. *Executors of Moffat v. Strong*, 10 J. R. 12.

(b) *Devise over after a failure of issue.*

42. A., by his last will, after giving specific parts of his real and personal estate to each of his five sons, by name, devised as follows: *After the above-mentioned articles are taken out of my movable estate, let the remainder be valued by indifferent men, agreed upon for that purpose, and then to be divided as my heirs can agree among themselves; and if any of my sons as aforesaid should die without lawful issue, then let his or their part or parts be equally divided among the survivors, unless it should happen that he or they so dying should leave a wife behind, in which case she shall take back what she brought with her, and £100 beside, and only the remainder shall be divided as aforesaid; held*, that if the limitation had rested alone on the dying without lawful issue, it would have failed; yet, the devise over being to the survivors, it would be construed to mean children living at the death of the party, and not a general failure of issue. *Executors of Moffat v. Strong*, 10 J. R. 12.

43. The words *dying without issue*, do, in the case of a chattel as well as a freehold estate, devised by will, mean an indefinite failure of issue, and are not to be confined to issue living at the time of the death; this construction, however, may be controlled by other

words in the will, [which show that it was the intention of the testator, that the limitation was to take place, if at all, on the death of the devisee,] as a devise over to a survivor or survivors. *Ibid.*

44. E. devised a farm to his son *Joseph*, his heirs, &c. forever, and another farm to his son *Meleef*, his heirs, &c. forever, and added: "It is my will that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor;" and in case of both their deaths, without lawful issue, he gave the property to his brother and sister in *England*. J. died without lawful issue. *Held*, that the words did not create an *estate tail*, especially since the *statute abolishing entails, but the limitation over was good, by way of *executory devise*, to the survivor, on failure of issue living at the death of either of the sons. *Anderson v. Jackson*, ex dem. *Elen*, in error, 16 J. R. 382. (*Kent*, Ch. dissenting, who said that the case of *Fosdick v. Cornell*, 1 J. R. 440. was decided on mistaken grounds, and that the Supreme Court were misled by the opinion of Lord *Kenyon*, in *Porter v. Bradley*, 3 Term Rep. 143. and *Roe v. Jeffery*, 7 Term Rep. 589.) [*Had see Clark v. Baker*, 3 Serj. & Rawle, 470.]

45. In a case, which afterwards arose on the same will, with the additional fact, that M., the other son of the testator, died on the 26th of *July*, 1819, without lawful issue; it was decided by the Supreme Court, that the limitation over on the death of the testator's son *Joseph* being good, by way of *executory devise*, the estate vested in M., the surviving son, and the devise in his favor having taken effect, ceased to be *executory*, and he became seised *in fee tail* by necessary implication of law, with a remainder expectant in favor of *John* and *Hannah*, the brother and sister of the testator; and by virtue of the statute of the 26th of *February*, 1786, abolishing estates tail, M. became seised in fee simple absolute of the estate, &c. first devised to his brother *Joseph*. *Eden*, ex dem. *Eden*, v. *Burtiss*, 20 J. R. 483.

46. H., by his will, dated *April* 5, 1771, devised as follows: "My will and pleasure is, that my son *John* should have the farm which I now live upon, &c., two of the best negroes, all my wearing apparel, three geldings, &c.; but if my said son may happen to die unmarried, and without lawful issue, then it is my will and pleasure, that the said estate shall descend to the next heir of the name of H., and that he may not sell, exchange or dispose of any part of the said estate, without the consent, approbation, and concurrence of my executors." The testator died in *August*, 1775, leaving five sons and eight daughters, and nephews and nieces; *held*, that *John*, the devisee, took an *estate tail* by implication; and that the devise over, depending upon an indefinite failure of issue, was not good as an *executory devise*, and that the *estate tail*, being converted into an estate in fee simple, by the statute, (1 N. L. 52.) descended, on the death of *John*, the tenant in tail, to his heirs at law, according to

the statute regulating descents. *Jackson*, ex dem. *Herkimer*, v. *Billinger*, 18 J. R. 368.

(c) When a limitation is void for repugnancy.

47. Where the testator has given the absolute ownership and disposal of the property, a limitation over repugnant to that ownership and disposal, is void. *Jackson*, ex dem. *Brewster*, v. *Bull*, 10 J. R. 19. (*See Newkerk v. Newkerk*, 2 C. R. 345.)

48. The testator, after devising to his son M. in fee, declares: "In case my son M. should die without lawful issue, the said property he died possessed of I will to my son Y., his lawful issue," &c.; the limitation is repugnant and void. *Ibid.*

49. And, whether it is not void on this other ground, that it is to take effect after an indefinite failure of issue? *Quære. Ibid.*

50. A devise of all the real and personal estate of the testator, and "if [*514] the devisee should die without disposing of it, then to D.; *held*, that the limitation over to D. was void, and as the first devisee took a fee, the limitation over was repugnant to the power given to him. *Jackson*, ex dem. *Livingston*, v. *De Lancy*, 13 J. R. 537. *S. P. Jackson*, ex dem. *Livingston*, v. *Robins*, 15 J. R. 169. *S. C.* in error, 16 J. R. 537.

51. Such a limitation is void, either as a remainder, or as an *executory devise*; and the same rules apply whether the limitation be of real or personal property. *Ibid.*

(d) Contingency on which the devise is to take effect.

52. A. devised "all his estate, real and personal, to his six children, by name, to be equally divided between them, share and share alike; but if any one of them should die before arriving at full age, OR without lawful issue, that then his, her, or their part, should devolve upon, and be equally divided among the surviving children, and their heirs and assigns forever." All the children survived the testator; four of them afterwards died leaving issue; and the fifth, after arriving at full age, died intestate, and without lawful issue; having previously conveyed his share of the estate; *held*, that the word or was to be construed as and, so that the devise over did not take effect; and the surviving child was not entitled to the share of the one dying without lawful issue. *Jackson*, ex dem. *Burhans*, v. *Blanshan*, 6 J. R. 54. *S. C. contra*, 3 J. R. 292.

(e) Interest of the devisee of the particular estate.

53. Every *executory devise* is an unalienable interest, which the devisee cannot defeat by a common recovery, or any other mode of conveyance, and the devisee has only a use and not an absolute interest in the property devised, whether that property be real or chattel. *Executors of Moffatt v. Strong*, 10 J. R. 12. *Jackson*, ex dem. *Brewster*, v. *Bull*, 10 J. R. 19. *S. P. Jackson*, ex dem. *Livingston*, v. *Robins*, 16 J. R. 537.

54. So, where the testator directed his personal property to be divided among his heirs, with a devise over in case either of the heirs died without lawful issue to the survivors; and, in 1809, the executors divided the personal property among the heirs, pursuant to the will; and delivered to *John*, one of the heirs and devisees, a sealed note for 250 dollars, executed by B. to the testator, in his lifetime, of which note *John* continued in possession until 1811, when he assigned it to G., and a few days after died, unmarried, and without lawful issue. His surviving brothers took the note in question, with other articles, out of a trunk belonging to *John*; claiming them by virtue of the devise over in their father's will; G., who also claimed the note by virtue of the assignment from *John*, afterwards, and after a suit had been brought on it against B., by the executors of A., executed a release of it to B.; held, that the interest given under the will was unalienable, and could not be defeated by the devisee, who had only a use, and not an absolute property in the thing so devised; that the note, in this case, not having been collected, or converted into money in the lifetime of *John*, but remaining in his possession, passed to the survivors like any specific movable of which he died possessed; that G. took the assignment, subject to all the rights under the will; and that the release was in fraud of the persons entitled in remainder, and void, and was taken by B. at his peril, both the assignment and release being made in violation of a vested right. *Executors of Moffatt v. Strong*, 10 J. R. 12.

See ante, I. 35, 36.

See further, tit. CHANCERY, XX. Devise.

DISSEISIN.

1. Disseisin is an estate gained by wrong and injury, and therein it differs from dispossession, which may be right or wrong. *Smith*, ex dem. *Teller*, v. *Burtis*, 6 J. R. 197.

2. A mere entry upon another is no disseisin, unless it be accompanied with expulsion, or ouster from the freehold. *Ibid.*

3. A peaceable entry upon land apparently vacant, furnishes, *per se*, no presumption of wrong. *Ibid.*

4. An entry not appearing to be hostile, is to be considered an entry under the title of the true owner. *Ibid.*

5. The doctrine of a descent cast applies only to the case of a tortious seisin, founded on an ouster or disseisin, in fact, of the true owner. *Ibid.*

6. If the lessor in ejectment found his claim on a descent cast, he must show, affirmatively, a tortious seisin in himself, acquired by an entry not congeable at first, or by subsequent disseisin. *Ibid.*

7. Where a person enters upon land without title, and the tenants surrender the possession, and attorn to him, this is not a disseisin or

ouster. *Jackson*, ex dem. *Livingston*, v. *De Lancy*, 13 J. R. 537.

8. A devise is an intimation of an election not to be disseised. Per *Kent*, J. *Jackson*, ex dem. *Van Allen*, v. *Rogers*, 1 J. C. 33. S. C. 2 C. C. E. 314.

9. The donee under a parol gift of land, leases, and the donor merely permits the lessee to build and enjoy the term; it does not operate as a disseisin, unless by election. *Ibid.*

10. The holding over of a tenant for years after the expiration of his term, is not a disseisin, except by election. *Jackson*, ex dem. *June*, v. *Raymond*, 1 J. C. 85. n.

11. And the bringing an action of ejectment against such tenant is not an election to be disseised. *Ibid.*

12. The surrender of the lands of an infant to a third person, by his guardian, is a disseisin. Per *Kent* and *Benson*, Js. *Contra*, *Lewis*, J. and *Lansing* Ch. J. *Jackson*, ex dem. *Rensselaer*, v. *Whillock*, 1 J. C. 213.

*DISTRESS. [*516]

1. Where, on a lease, the rent is made payable in repairs and improvements, being for a sum certain, or capable of being reduced to certainty, the landlord may distrain. *Smith* v. *Colson*, 10 J. R. 91.

2. So, if land be held by certain services, the landlord may distrain. *Ibid.*

3. Cattle, damage feasant, cannot be impounded until the damage has been ascertained, and appraised by two fence viewers, according to the directions of the act. *Pratt* v. *Petrie*, 2 J. R. 191. *S. P. Sackrider*, v. *McDonald*, 10 J. R. 253. *S. P. Hopkins*, v. *Hopkins*, id. 369.

4. And, if the distrainer does so impound them, he is liable to an action of trespass by the owner. *Merritt* v. *O'Neil*, 13 J. R. 477.

5. And it is no defence in such an action, that the owner of the beasts, is himself the pound-master, if the distrainer has actually put the beast into his custody as such pound-master. *Ibid.*

6. Whether it would be a defence, if the beasts had not been delivered to the owner as pound-master? *Quære.*

7. The right to distrain is not extinguished by an unsatisfied judgment for the rent. *Chipman* v. *Martin*, 13 J. R. 240.

8. The act concerning distresses does not apply to the case of a levy on personal property, made by an officer, under a warrant in the nature of an execution. *Rogers* v. *Brasster*, 5 J. R. 125.

9. Where the plaintiff distrained for rent, and took a horse which the tenant claimed as his own, but of which he was, in fact, a bailee only; and it was agreed between the plaintiff and the tenant, that the former, instead of impounding the horse, might use him, until the day of sale; and while the plaintiff was using him, and previous to a sale, the defendant, who was the true owner, took him out of the plaintiff's possession; held, that if the tenant had no authority to make the agreement with the

plaintiff, still the using the horse was merely an irregularity, after a regular distress, and as by the provisions of the 10th section of the statute, (Sess. 36. c. 63.) the plaintiff was protected in such case, from being deemed a trespasser *ab initio*, the defendant could not treat the distress as a nullity, and was, therefore, a trespasser in taking away the horse from the plaintiff. *Holt v. Johnson*, 14 J. R. 425.

10. By the act in addition to the *act concerning judgments and executions*, (Sess. 38. c. 227.) the necessary cooking utensils owned by any person being a householder, are exempted from execution, and from distress for rent; the party claiming the exemption must show affirmatively and certainly, that the cooking utensils taken in execution or distrained upon, were, in fact, necessary, and not such as might be useful merely. *Van Sickler v. Jacobs*, 14 J. R. 434.

11. The remedy by distress and sale of beasts *damage feasant*, given by the statute, Sess. 36. c. 35. s. 19. (2 N. R. L. 184.) does not take away the common law remedy by action of trespass. *Colden v. Eldred*, 15 J. R. 220.

*12. Where beasts *damage feasant* have been distrained, or even impounded, the distrainer may relinquish the proceedings, before satisfaction for the damage sustained, and may bring his action of trespass. *Ibid.*

DOMICIL.

1. Where B. a neutral citizen, came to reside in the *United States*, in 1811, on account of ill health, but continued to reside here for more than two years, and superintended the business of the commercial house in *St. Bartholomews*, of which he was a partner; *held*, that this was presumptive evidence of an intention to reside in the *United States* permanently, or for an indefinite time, and that he was to be considered as having his *domicil* here. *Elbers v. The United Insurance Company*, 16 J. R. 128.

2. The property of a neutral citizen or subject, having his *domicil* in the country of a belligerent, is liable to capture and condemnation by the other belligerent. *Ibid.*

And see tit. INSURANCE, VI. (b)

DOWER.

- I. *Title of the widow, and of what lands she shall be endowed.*
- II. *Quarantine.*
- III. *Assignment of dower.*
- IV. *What is a bar to dower.*
- V. *Action and damages.*

I. *Title of the widow, and of what lands she shall be endowed.*

1. The husband, having been in possession of the premises for some years and using them

as his own, and not in the right of another, conveyed them in fee to the tenant, or those from whom he derived title; this is *prima facie* evidence of seisin in the husband, and the demandant is not bound to produce her husband's deeds. *Bancroft v. White*, 1 C. R. 185.

2. M., having been in possession of land for ten years, conveyed it in fee to E., who continued in possession twelve years, when the land was sold under a *fi. fa.* against the property of E., and purchased by M. In an action of dower, brought by the wife of E., this was *held prima facie* evidence of seisin in the husband, so as to entitle the wife to dower. *Embree v. Ellis*, 2 J. R. 119.

3. And where the lessor of the tenant acknowledged that he got his title from one who claimed to hold as a devisee, under the will of the *person who granted [*518] the land to the demandant's husband; *held*, that this was a recognition of the title. *Ibid.*

4. Where the husband, on purchasing land, executes, at the same time, a mortgage, to secure the payment of the consideration money, which mortgage is not satisfied until after the death of the husband; he acquires a seisin, sufficient, as against his heirs and persons claiming under him, to entitle his widow to dower. *Hitchcock v. Carpenter*, 9 J. R. 344.

5. Where the seisin of the husband is instantaneous, or passes from him *eo instanti* that he acquired it, his widow is not entitled to dower. *Stow v. Tiff*, 15 J. R. 458.

6. Where land is conveyed to the husband, during coverture, and he *at the same time* executes a mortgage of the land to the grantor, to secure the consideration money, the seisin of the land being but for an instant in the grantee, and is immediately reverted to the grantor, the widow of the grantee is not entitled to dower in the premises. *Ibid.*

7. The widow of a mortgagor is entitled to dower out of the land mortgaged, (or the equity of redemption,) as against every person excepting the mortgagee, or those claiming under him. *Collins v. Torry*, 7 J. R. 278. *S. P. Coles v. Coles*, 15 J. R. 319.

8. K., a native of *Ireland*, removed to *New-York*, in 1760, where he continued to reside until his death, in 1798. He left a wife in *Ireland*, at the time he removed from that country, having been married in 1750. His wife was a native of *Ireland*, and had never left that country. *Held*, that she, being an alien, could recover dower of those lands of which K. was seised before the 4th of July, 1776, and not of those he acquired after that period. *Kelly v. Harrison*, 2 J. C. 29.

9. Where A. and B. purchased a piece of land, and divided it between them, and A., being in the exclusive occupation of her part, sold it to D., but both A. and B. joined in the conveyance; *held*, that though the deed from A. and B. might be *prima facie* evidence that they were tenants in common of the part conveyed to D., yet the occupation of it by A., and the purchase of it from him exclusively were sufficient evidence of A.'s seisin of the whole

so conveyed, so as to entitle the widow of A. to her dower out of the whole. *Dolf v. Basset*, 15 J. R. 21.

10. Where the husband was seised of land in severalty, the widow cannot proceed under the act for the partition of lands, (Sess. 36. c. 100.) for the purpose of obtaining her dower; nor can she be made a party to a partition among the heirs, devisees or grantees of her husband. *Coles v. Coles*, 15 J. R. 319.

11. But it seems, that where the husband was seised as joint tenant or tenant in common of land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners. *Ibid.*

II. Quarantine.

12. The widow's right to tarry in the chief house of her husband, *determines [*519] on the expiration of 40 days, whether her dower has been assigned to her or not. *Jackson, ex dem. Clark, v. O'Donaghy*, 7 J. R. 247.

13. And, after the expiration of the 40 days, the heir may expel her, and put her to her suit. *Ibid.*

14. She is not protected from an action of ejectment by the heir, or by any person deriving the title from him, after the 40 days have elapsed. *Ibid.*

III. Assignment of dower.

15. The widow cannot enter for her dower until it is assigned to her. *Jackson, ex dem. Clark, v. O'Donaghy*, 7 J. R. 247.

16. Where land has been aliened by the husband, his widow is entitled to dower, only according to the value of the land at the time of alienation. *Humphrey v. Phinney*, 2 J. R. 484. *S. P. Dorchester v. Coventry*, 11 J. R. 510. *Dolf v. Bassel*, 15 J. R. 21.

17. Where a surrogate proceeded on the application of a widow, to appoint admeasurers of dower, and had the same admeasured under the act, (Sess. 29. c. 168.) without giving notice of the proceedings to the adverse party; the Supreme Court, on motion, ordered the proceedings to be set aside. *Rathbun v. Miller*, 6 J. R. 281. *S. P. Matter of Cooper*, 15 J. R. 533.

18. But no costs are allowed on a motion in the Supreme Court, to set aside the proceedings as irregular. 15 J. R. 533.

19. There is no provision for trying, before the surrogate, the title to dower; and the admeasurement to be made in pursuance of his order, cannot affect or prejudice the right to dower, or the legal or equitable bar to it. *Matter of Watkins*, 9 J. R. 245.

20. The admeasurers are not to do execution as the sheriff does, but are in the nature of commissioners, to set off the one third in value of the estate, so as to prevent all difficulty and contention between the widow and the heir or tenant, as to the just extent or ascertainment of her dower. *Ibid.*

21. If the right of dower be denied, the party may protect his possession, notwithstanding the admeasurement, and drive the widow to her action at law. *Ibid.*

22. It seems, that notice need not be given to the tenant of the time of the admeasurement. *Ibid.*

23. Where the admeasurers met at the house of the heir, and requested him to show the premises, and he refused to have any thing to do with the premises; that was held a sufficient notice in the first instance, and a waiver of all further notice. *Ibid.*

24. No appeal lies to the Supreme Court, from an order of the surrogate, for the appointment of admeasurers. *Gardener v. Spikeman*, 10 J. R. 368.

25. An appeal is not given until after the filing of the report of the admeasurers. *Ibid.*

26. And then, the question of seisin, or any other question which may arise, may be tried by a jury, on a feigned issue, or in some other mode which the Supreme Court may prescribe. *Ibid.*

*27. A surrogate has no right to [*520] assign dower at the instance of a purchaser of the widow's right, which, resting in action merely, cannot be assigned until after it has been duly admeasured and assigned, so as to enable the purchaser or grantee to bring an action in his own name. *Jackson, ex dem. Totten, v. Aspell*, 20 J. R. 411.

IV. What is a bar to dower.

28. A person holding under the husband of the demandant, or his heirs, cannot deny his seisin. *Hitchcock v. Harrington*, 6 J. R. 290. *S. P. Hitchcock v. Carpenter*, 9 J. R. 344.

29. Or his death. *Hitchcock v. Carpenter*, 9 J. R. 344.

30. He cannot set up a satisfied mortgage in bar. *Hitchcock v. Harrington*, 6 J. R. 290.

31. A tenant, deriving title from, and holding under the title of the husband of the demandant, as it existed during the coverture, is not permitted to deny the seisin of the husband. *Collins v. Torrey*, 7 J. R. 278.

32. Neither can he set up a mortgage, before foreclosure or entry, as a legal title; for, until then, it can only be used by the mortgagee, or his representatives. *Ibid.*

33. It is no defence, that proceedings had been had in partition, under the statute, between the heirs of the demandant's husband, in which her dower was assigned to her, and she was adjudged to pay costs, and that a *fi. fa.* was issued, and her dower sold for payment of the costs, and purchased by the tenant. *Bradshaw v. Callaghan*, 5 J. R. 80.

34. Attainder of the husband, under the act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, passed 22d of October, 1779, does not bar the wife's right of dower. *Palmer v. Horton*, 1 J. C. 27.

35. The act, limiting the period of bringing claims and prosecutions against forfeited estates, passed the 29th of March, 1797, (Sess. 11 c. 52,) does not extend to, or bar the claims of

the widows of persons attainted, for their dower in the estates forfeited, and sold by the commissioners of forfeitures. *Hogle v. Stewart*, 8 J. R. 104.

36. A bequest by a husband to his wife, of certain chattels and money, in lieu and stead of every other claim and pretension on his estate, [without acceptance of the bequest by the widow, or election to receive it as a bar,] is not a bar of her right of dower at law. *Larrabee v. Van Alstyne*, 1 J. R. 307.

37. It seems, that Courts of law as well as of equity will hold the widow to elect between her dower and a legacy given in lieu of it. *Van Orden v. Van Orden*, 10 J. R. 30.

38. Where an annuity is given by will in lieu of dower, an acceptance of the legacy by the widow is an equitable bar of dower; and payment of part, and judgment recovered by her for the residue, it seems, would be a good plea in bar, at law, to an action for her dower, being conclusive evidence of an agreement and election to accept the testamentary provision in lieu of dower. *Ibid.*

[*521] *V. Action and damages.

39. If dower be not assigned to the widow, during her quarantine, she has a right of action. *Jackson*, ex dem. *Clark*, v. *O'Donaghy*, 7 J. R. 247.

40. If the tenant be an infant, he must appear and defend by guardian. *Hillyer v. Larzelere*, 9 J. R. 160.

41. A release must be pleaded. *Hitchcock v. Carpenter*, 9 J. R. 344.

42. The demandant is not entitled to damages, unless her husband died seised. *Embree v. Ellis*, 2 J. R. 119.

43. When the husband dies seised, the widow is entitled to damages from the day of his death. *Jackson*, ex dem. *Clark*, v. *O'Donaghy*, 7 J. R. 247.

44. If the husband, having mortgaged the land, die in possession after the mortgage debt has become due, but without foreclosure or entry by the mortgagee, it is a dying seised, so as to entitle the demandant to damages, from the time of his death, as against all persons, except the mortgagee and those claiming under him. *Hitchcock v. Harrington*, 6 J. R. 290.

45. If the heir sell the land, the widow will be entitled to damages against the tenant, from the time of her husband's death, although the tenant may not have been so long in possession. *Ibid.*

46. The widow is entitled to dower in lands aliened by the husband, during the coverture, to one third of the value, at the time of alienation. *Saw v. White*, 13 J. R. 179. *S. P. Dolf v. Basset*, 15 J. R. 21.

47. The value must be ascertained, either by the sheriff on the writ of seisin; or by a writ of inquiry founded on proper suggestions, or by the jury, on the trial of the issue in the action of dower. *Dolf v. Basset*, 15 J. R. 21.

48. Where, on application to the surrogate, dower has been duly admeasured and assigned, pursuant to the statute, and there has been no appeal or review of the proceedings, the ad-

measurement, until reversed, is conclusive, in an action of ejectment, brought by the widow, as to the part which she is entitled to recover. *Jackson*, ex dem. *Miller*, v. *Hixon*, 17 J. R. 123.

49. The right to dower rests in action only, and cannot be aliened, so as to enable the grantee to bring an action in his own name. *Jackson*, ex dem. *Clowes*, v. *Vanderheyden*, 17 J. R. 167. *S. P. Jackson*, ex dem. *Totten*, v. *Aspell*, 20 J. R. 411.

50. And if a surrogate, at the instance of a purchaser of the widow's right of dower, has it admeasured to him, the proceeding is *coram non judice*, and confers no title under the statute, even though the heir or his guardian consented to it. 20 J. R. 411.

51. Dower cannot be recovered in an action of ejectment, until it is regularly assigned. *Ibid.*

52. In an action of dower under *nihil habet*, it is not a matter of course to grant a view to the tenant; but he must show, by affidavit, sufficient cause to satisfy the Court of its necessity. *Ostrander v. Kneeland*, 20 J. R. 276.

*53. *Tout temps prist* may be [*522] pleaded where the tenant wishes to preclude the demandant from her claim to damages. *Humphrey v. Phinney*, 2 J. R. 484.

54. To such a plea the demandant ought not to demur, but should pray judgment according to the tender; and the value may be afterward ascertained by the sheriff on a writ of seisin, or by a writ of inquiry, founded on her suggestion. *Ibid.*

55. An omission in the widow to demand her dower will not prejudice her claim to damages; and the tenant, to excuse himself from damages, must plead *tout temps prist*. *Hitchcock v. Harrington*, 6 J. R. 290.

56. The statute of limitations must be pleaded; but *quære*, whether it is a bar in dower? *Ibid.*

57. When the demandant recovers damages, she shall have costs. *Hillyer v. Larzelere*, 10 J. R. 216.

See further *tit. CHANCERY, XXXI, Husband and Wife, E.*

DUELLING.

The act to suppress duelling, passed November 5, 1816, (Sess. 40. c. 1.) which declares, that any person convicted of challenging another to fight a duel, &c. "shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under the state," is constitutional; and a conviction and judgment of disqualification under that act, are, therefore, legal and valid. *Barker v. The People*, 20 J. R. 457.

DUTIES.

1. A Spanish ship bound from Havana to London, having met with a violent gale of wind, put into the port of New-York, and was entered at the custom-house, as a ship in distress, hav-

ing conformed to the regulations of the act of Congress, (Cong. 5. Sess. 3. c. 128. s.60.) in such cases, she was condemned after a regular survey by the wardens of the port, as unfit to be repaired, and, under their direction, was sold at public auction, and purchased by American citizens, who, at their own expense, afterwards repaired her, and fitted her out for a voyage to Cadiz; but the collector of the customs refused to give her a clearance, unless the new owners would pay the tonnage duty, or light money, of 50 cents per ton, imposed on all foreign vessels entering the ports of the *United States*. *Held*, that no tonnage duty or light money was due in this case, and that it having been paid compulsorily, an action for money had and received lay against the collector, to recover it back. *Ripley v. Gelston*, 9 J. R. 201.

*2. Under the 91st section of [*523] the act of Congress, passed March 2, 1799, for the collection of duties, to entitle an officer of a revenue cutter to a share of the forfeiture, the information given by him must be of such a nature, as to conduce essentially, though not independently of other evidence, to a forfeiture. *Brewster v. Gelston*, 11 J. R. 390.

3. The mere naked seizure of a vessel by the officers of a revenue cutter, does not give any right to a share of the forfeiture. *Ibid*.

4. The settlement of the collector's accounts, respecting the proceeds and distribution of forfeitures, and the expenses attending condemnation, at the treasury of the *United States*, are to be received as *prima facie* evidence of the fairness and correctness of the settlement. *Ibid*.

EJECTMENT.

- I. *When an ejectment lies.*
- II. *What title or claim will support the action;*
 - (a) *Title by deed, judgment, fine, award, or devise;* (b) *Title by possession;* (c) *Acknowledgment of tenancy;* (d) *Equitable title;* (e) *When there is a subsisting title.*
- III. *Entry.*
- IV. *Notice to quit, when necessary, and when waived by the tenant's disclaimer.*
- V. *Defence;* (a) *Title in the defendant or a third person;* (b) *Adverse possession;* (c) *How the lessor may repel the defence of adverse possession;* (d) *When the defendant is precluded from disputing the lessor's title;* (e) *Other matters of defence in ejectment.*
- VI. *Declaration;* (a) *Demise;* (b) *Consequence of bringing an action in the name of a lessor before consent;* (c) *Amending declaration;* (d) *Rule to appear and notice, and service of declaration and notice.*
- VII. *Proceedings against the casual ejector, where the tenant does not appear.*
- VIII. *Proceedings when the tenant appears and enters into the consent rule;* (a) *Consent rule and plea;* (b) *Setting aside*

default; (c) *Admitting the landlord to defend;* (d) *Subsequent proceedings until judgment inclusive.*

IX. *Proceedings in cases of re-entry for non-payment of rent.*

X. *Habere facias possessionem.*

XI. *Action of trespass for the mesne profits.*

I. *When an ejectment lies.*

1. The general rule is, that an action of ejectment will lie for any thing attached to the soil, of which the sheriff can deliver possession. *Jackson, ex dem. Saxton, v. May*, 16 J. R. 184.

*2. Whenever a right of entry [*524] exists, and the interest is tangible, so that possession can be delivered, ejectment will lie for it. *Jackson, ex dem. Loux, v. Buch*, 9 J. R. 298.

3. So, if a grantor reserve to himself, his heirs and assigns, forever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the premises without any hindrance or molestation from the grantee or his heirs," he has such an interest in the land reserved as will support an ejectment. *Ibid*.

4. But the grant of a privilege to erect a machine and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without an actual entry and location, confer such a right as to enable the lessee to maintain ejectment. *Jackson, ex dem. Saxton, v. May*, 16 J. R. 184.

5. Ejectment will not lie by a person already in possession of the premises. *Jackson, ex dem. Clowes, v. Hakes*, 2 C. R. 335.

II. *What title or claim will support the action;*

- (a) *Title by deed, judgment, fine, award, or devise;* (b) *Title by possession;* (c) *Acknowledgment of tenancy;* (d) *Equitable title;* (e) *When there is a subsisting title.*

(a) *Title by deed, judgment, fine, award, or devise.*

6. If A. convey to B., and afterwards convey or release the same land to C., who is in possession, and an action of ejectment is brought against C., on the demise of A. and B., the plaintiff cannot recover on the demise of A., who is estopped by the subsequent deed to C.; and if the deed to B. were void, by reason of an adverse possession, he must also fail on that demise. *Jackson, ex dem. Lathrop, v. Demont*, 9 J. R. 55. *S. P. Jackson, ex dem. Bonnel, v. Wheeler*, 10 J. R. 164.

7. The plaintiff relied on a judgment in partition only, and that being void, it was held, that he could not recover, in such case, his undivided share, without deducing a regular title, as if no such judgment had been entered. *Jackson, ex dem. Antell, v. Brown*, 3 J. R. 459.

8. Where the plaintiff, in an action of ejectment, commenced in 1800, showed title by a release, made in 1767, in partition, to eighteen twentieths of the premises in question, and

proved by witnesses, that all the lots in the patent so divided, with which they were acquainted, were held agreeably to that partition, and no outstanding title in the two remaining patentees; *held*, that it might legally be inferred that the lessors had a perfect title to the whole. *Doe, ex dem. Clinton, v. Campbell*, 10 J. R. 475.

9. Where, by an act of the legislature, passed 6th of April, 1792, the surveyor-general was authorized to sell such lands of W. as C. should discover to have become forfeited by the attainder of W., under the act of October, 1779, and pay the moneys arising from such sale to the treasurer, &c., out of which the treasurer was to pay the demand of C. against W.; and the surveyor-general sold all the estate of W. in a certain lot of land; in an action of ejectment by a person claiming under the deed of the surveyor-general, it was *held*, [*525] that the act of the legislature, and the deed of the surveyor-general, were *prima facie* evidence of title, sufficient to enable the plaintiff to recover. *Jackson, ex dem. Wickham, v. Belknap*, 12 J. R. 96.

10. A title derived from the grant of a foreign government is void. *Jackson, ex dem. Winthrop, v. Waters*, 12 J. R. 365.

11. In an action of ejectment by a purchaser under a sheriff's sale on execution, to recover the possession of the land, the plaintiff must produce not only the sheriff's deed, and the execution, but an exemplification of the judgment on which the execution issued. *Jackson, ex dem. Sleight, v. Hasbrouck*, 12 J. R. 213.

12. The plaintiff in ejectment cannot recover under a demise from a lessor, who has released his interest to the defendant, he being estopped by such release from claiming any title. *Jackson, ex dem. Bonnell, v. Foster*, 12 J. R. 488.

13. Where a person recovers a judgment in ejectment, and neglects to enforce it within the period laid in his demise, his right of entry under that judgment is altogether gone; and if there has been an adverse possession for 20 years, during which such judgment was recovered, it will not avail him to take the case out of the statute of limitations. *Jackson, ex dem. Beekman, v. Haviland*, 13 J. R. 229.

14. A fine and five years non-claim are conclusive evidence of title in the cognizee against all persons not under any legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered during the five years without title. *Jackson, ex dem. Watson, v. Smith*, 13 J. R. 426.

15. Where several persons are devisees and tenants in common of land which is sold by two of the executors and devisees, under a power in the will of the devisor, and afterwards one of the executors and devisees who made the sale, purchases from the grantee, and takes a conveyance to himself absolutely, the title becomes vested in him solely; and his declarations that he held in common with his co-devisees are insufficient to entitle him to recover a portion of the land, as tenants in common with him. *Jackson, ex dem. King, v. Burtis*, 14 J. R. 391.

16. When an award settles the boundary of land, it is sufficient to enable the party to whom the land has been awarded, to bring an action of ejectment. *Sellick v. Addams*, 15 J. R. 197.

17. One tenant in common may maintain ejectment against his co-tenant, though no actual ouster be proved. *Per Spencer, J. Shepard, v. Ryers*, 15 J. R. 501.

18. A purchaser at a sheriff's sale of all the right and title of a mortgagor in possession, is entitled to recover in ejectment against the mortgagor, though the mortgagee was made a co-defendant, and the mortgage outstanding. *Jackson, ex dem. Randall, v. Davis*, 18 J. R. 7.

19. Though the exemplification of the record of the judgment stated that it was filed and docketed on the 22d of May; and the execution directed the sheriff to levy on lands of which the defendant was seised on the 2d of May; and the clerk of the Court certified that there was a mistake in the exemplification; and that the record was, in fact, filed on the 2d of May; *held*, that the error in the exemplification produced at the trial, [*526] was not sufficient to affect or defeat the plaintiff's title. *Ibid.*

20. C., who derived his title from E. of a lot of ground of 60 acres, mortgaged the whole lot to E., who afterwards sold and conveyed six acres, part of the lot, in fee to B.; *held*, that C., the mortgagor, might maintain ejectment against B., the grantee of the mortgagee. *Jackson, ex dem. Curtis, v. Bronson*, 19 J. R. 325.

(b) Title by possession.

21. An undisturbed possession of 38 years, of premises which, by a recent survey, appear to have been originally improperly located, is conclusive evidence of title. *Jackson, ex dem. Wright, v. Dieffendorf*, 3 J. R. 269.

22. Where the lessor had, 35 years before the defendant came into possession of the part which he claimed, exercised acts of ownership with respect to parts of a tract of land, and asserted his right to the whole, which was admitted by all the settlers on the tract, until many years after the entry of the defendant; it is to be inferred, that the defendant came in under the lessor, and a grant from the original patentees to the lessor must be presumed. *Jackson, ex dem. Gansevoort, v. Lunn*, 3 J. C. 109.

23. Possession in the lessor, without claiming title, will not maintain the action. *Truesdale v. Jefferies*, 1 C. R. 190. n.

24. A mere possessory title in the lessor, on whose possession the defendant, without claim or color of title, had entered, will be sufficient to enable him to maintain this action. *Jackson, ex dem. Murray, v. Hazen*, 2 J. R. 22.

25. So, a person who has been in possession of land for 8 or 10 years, under color of title, may recover against a mere intruder or trespasser. *Jackson, ex dem. Duncan, v. Harder*, 4 J. R. 202.

26. It is not necessary that the plaintiff should, in every case, show a possession of 20 years, or a paper title; but a possession for a less period will raise a presumption of title

sufficient to put the tenant on his defence. *Smith, ex dem. Teller, v. Lorillard*, 10 J. R. 338.

27. A prior possession, short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than 20 years, when no other evidence of title appears on either side. *Ibid.*

28. But it must appear, that such prior possession of the plaintiff was not voluntarily relinquished, without the *animus revertendi*, and that the subsequent possession of the defendant was acquired by mere entry, without any right. *Ibid.*

29. Where the first possessor died, and a descent was cast, and the infant heirs were driven from the actual possession by a public enemy, the possession was considered, by the equity of the *jus posthumum*, as re-vested in the heirs on the removal of the hostile force. *Ibid.*

30. Where a person dies possessed of land, it is *prima facie* evidence of title in his heirs by descent. *Per Kent, Ch. J. Ibid.*

31. Where the plaintiff claims to recover, on the ground of prior possession, that possession must be clearly and unequivocally proved. *Jackson, ex dem. Ludlow, v. Myers*, 3 J. R. 386.

*32. The payment of taxes, and [*527] the execution of partition deeds, are not evidence of an actual possession, though they may show a claim of title. *Ibid.*

33. If the lessor in ejectment show himself to have been in peaceable possession, and that he was forcibly dispossessed, it will be sufficient to entitle him to recover, and the defendant cannot set up title in bar. *The People v. Leonard*, 11 J. R. 504.

34. Where a person who recovers in an action of ejectment, takes possession, and conveys the land, for a valuable consideration, to a third person, who enters and takes possession, such entry and possession afford strong *prima facie* evidence of right. *Jackson, ex dem. Klock, v. Richtmyer*, 13 J. R. 367.

*35. Where a person acting, in relation to land, as executor, and consistently with his duty as such, permits another to enter upon and occupy the land, he, or those who claim under him, cannot maintain ejectment against such tenant; and his declarations claiming the land in his own right are inadmissible to support the action, as evidence of title; such declarations being evidence only as to the possession. *Jackson, ex dem. Brown, v. M'Vey*, 15 J. R. 234.

36. Though a prior possession, under a claim of right, and not voluntarily abandoned, will prevail, in ejectment, over a subsequent possession acquired by mere entry, without any lawful right; yet, where the subsequent possession of the defendant is acquired by a recovery and execution in ejectment, his entry is lawful, and affords a better presumption of right than the prior possession, although the judgment was obtained by default; and the party who brings a second ejectment, after being ousted by a writ of *habere facias possessionem*, must procure additional evidence of ti-

tle, and not rest upon his possession alone. *Jackson, ex dem. Klock, v. Richtmyer*, 16 J. R. 314.

(c) Acknowledgment of tenancy.

37. An acknowledgment by the defendant, that he went into possession under one of the lessors of the plaintiff, is sufficient evidence to enable the plaintiff to recover, it being a matter of fact for the jury to decide, whether the defendant held under the plaintiff or not. *Jackson, ex dem. Sagoharie, v. Dobbin*, 3 J. R. 223.

38. So, an acknowledgment by the person under whom the defendant claims, that he came into possession under the plaintiff's lessor, is conclusive as to the tenancy. *Jackson, ex dem. Vandeuzen, v. Scissam*, 3 J. R. 499.

39. A., as the owner of land in the patent of *Van Schaick*, permitted B., in 1791, to occupy the land, for which B. paid him rent. In 1794, commissioners, appointed by the legislature to settle the boundaries between the patent of *Van Schaick* and that of *Kayaderoseras*, made an award, by which the land of A. was determined to be within the latter patent, on which A. said, that he gave up all claim to the land, and B., with the knowledge of A., purchased it of the proprietors, under the *Kayaderoseras* patent. Ten years after, during which time no rent was demanded of B., A., conceiving himself not bound by the award of the commissioners, brought an action of ejectment against *B., and attempted to [*528] recover, on the ground of the possession of B., as his tenant, from 1791; held, that A., having so long acquiesced in the award of the commissioners, and having permitted B. to attorn to a stranger, could not recover on his tenancy or possession, but must prove a title. *Jackson, ex dem. Waldron, v. Welden*, 3 J. R. 283.

40. Evidence of an agreement for a lease, between the lessor in ejectment and the tenant, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claimed to hold adversely. *Jackson, ex dem. Southampton, v. Cooley*, 2 J. C. 223.

(d) Equitable title.

41. An equitable claim, which is doubtful, cannot prevail against the legal estate. *Jackson, ex dem. Potter, v. Sisson*, 2 J. C. 321.

(e) When there is a subsisting title.

42. A lessor in ejectment ought to have a subsisting title or interest in the premises. *Jackson, ex dem. Starr, v. Richmond*, 4 J. R. 483. *Jackson, ex dem. Livingston, v. Sclover*, 10 J. R. 368.

43. If a person out of possession of land held adversely, convey the same to another, the title still continues in the grantor, and he may maintain ejectment. *Williams, v. Jackson, ex dem. Tibbits*, in error, 5 J. R. 489. *Jact*

son, ex dem. *Youngs, v. Vredenburg*, 1 J. R. 159.

44. And where, in an action of ejectment, several demises were laid, one from the grantor, and another from the grantee of such a deed, it was held, that the plaintiff might recover, though he could not on the demise of the grantee only. *Williams v. Jackson*, ex dem. *Tibbitts*, in error, 5 J. R. 489.

45. A recovery in ejectment does not prejudice the right of the defendant, and he may bring his action, and recover, according to the interest which he had before the recovery against him. *Jackson*, ex dem. *Wright, v. Duffendorf*, 3 J. R. 269.

46. So, where the defendant in ejectment, having been 38 years in undisturbed possession, suffered a judgment by default, and was turned out of possession; held, that he might, notwithstanding, recover the premises on the strength of his previous possession. *Ibid.*

III. Entry.

47. An actual entry is in no case necessary, except to avoid a fine. *Jackson*, ex dem. *Bronck, v. Crysler*, 1 J. C. 125.

48. An entry into part of a tract of land, with a claim to the whole, is equivalent to an entry into the whole. *Jackson*, ex dem. *Gausewoort, v. Lunn*, 3 J. C. 109.

49. An entry, to avoid a statute of limitations, must be an entry for the purpose of taking possession. *Jackson*, ex dem. *Hardenbergh, v. Schoonmaker*, 4 J. R. 390.

[*529] *IV. Notice to quit, when necessary, and when waived by the tenant's disclaimer.

50. A person entering upon land with the permission of the owner, as an occupant, without reserving any rent, and with leave to make improvements, will, after 18 years' possession, be considered a tenant from year to year, and, as such, entitled to notice to quit. *Jackson*, ex dem. *Livingston, v. Bryn*, 1 J. R. 322.

51. A. entered into possession of land, as tenant of B., under an agreement for the hire of the land, for one year, at 100 dollars, and held over the year; held, that, after the year, he was a tenant at sufferance, and not entitled to a notice to quit. *Jackson*, ex dem. *Anderson, v. McLeod*, 12 J. R. 182.

52. Where A., by his attorney, executed a lease to B. for three years, and after the expiration of the term, B. applied to the attorney to know if he was authorized by A. to enter into a new agreement, and the attorney replied that he was not, but said that B. might continue in possession of the premises until he heard from A.; held, that B. was, after the expiration of the term, a mere tenant at sufferance, and not entitled to notice to quit. *Jackson*, ex dem. *Van Cortlandt, v. Parkhurst*, 5 J. R. 128.

53. A lessee, who has taken possession of more land than he was entitled to by his lease, and rent has been paid and received for the entire premises in his possession, becomes ten-

ant from year to year, and the lessor cannot bring ejectment for the land not included in the lease, without showing a notice to quit. *Jackson*, ex dem. *Livingston, v. Wilsey*, 9 J. R. 267.

54. Where A., a lessee, agreed to sell a lease to B. for a certain sum, and endorsed his name on the lease, and delivered it to B., who paid him the purchase money, and agreed to pay the rent in arrear, and to become due on the lease; held, that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, so as to entitle B. to a notice to quit. *Jackson*, ex dem. *Stewart, v. Kingsley*, 17 J. R. 158.

55. Where, by an agreement for the sale of lands, the defendant is, on delivery of the possession, to pay part of the purchase money, the residue to be paid at future periods, and the defendant pays part, and takes possession under the agreement, the vendor cannot maintain ejectment without giving notice to quit. *Jackson*, ex dem. *Ostrander, v. Rowan*, 9 J. R. 330.

56. A. entered into possession, under an agreement for a conveyance when the whole of the purchase money should be paid, and in the mean time to pay an annual rent of 25 bushels of wheat; A., having paid rent for one year at least, becomes a tenant, and is entitled to notice to quit. *Jackson*, ex dem. *Livingston, v. Niven*, 10 J. R. 335.

57. A mortgagor is entitled to notice to quit previous to the bringing an action of ejectment by the mortgagee. *Jackson*, ex dem. *Benton, v. Laughhead*, 2 J. R. 75. *S. P. Jackson*, ex dem. *Carr, v. Green*, 4 J. R. 186.

*58. But a purchaser from the [*530] mortgagor is not entitled to notice, for the relationship of landlord and tenant does not exist between him and the mortgagee. *Jackson*, ex dem. *Simmons, v. Chase*, 2 J. R. 84. *S. P. Jackson*, ex dem. *Ferris, v. Fuller*, 4 J. R. 215.

59. To entitle the defendant to notice, there must be a privity either of contract or of estate between the lessor and the defendant. *Jackson*, ex dem. *Ferris, v. Fuller*, 4 J. R. 215.

60. There must be a tenancy, or existing relation of landlord and tenant. *Jackson*, ex dem. *Whitbeck, v. Deyo*, 3 J. R. 422. *S. P. Jackson*, ex dem. *Phillips, v. Aldrich*, 13 J. R. 106.

61. A person claiming to hold land in fee is not entitled to notice to quit. *Ibid.* 3 J. R. 422.

62. A tenant at will is not entitled to notice to quit. *Jackson*, ex dem. *Van Denberg, v. Bradt*, 2 C. R. 169. (*But see Jackson*, ex dem. *Livingston, v. Wilsey*, 9 J. R. 267. in which the Court seem inclined to the opinion that he is entitled to notice; and see ante, pl. 53.)

63. If a person, holding under adverse title, make application to the lessor of the plaintiff to be deemed his tenant, there is no tenancy created, and he is not entitled to notice. *Jackson*, ex dem. *Viely, v. Cuerden*, 2 J. C. 353.

64. Where the defendant had originally entered adversely, a permission by one of the lessors of the plaintiff to continue in possession, and a disclaimer by the defendant to hold ad-

versely, will not constitute him tenant so as to entitle him to notice to quit. *Jackson, ex dem. Dill, v. Tyler, 2 J. R. 444.*

65. A servant or bailiff, in the possession of lands, is not entitled to notice to quit. *Jackson, ex dem. Fitzroy, v. Sample, 1 J. C. 231.*

66. If a person holding land by virtue of a *parol* gift, and who is consequently but a tenant at will, lease the land, and the donor merely permits the lessee to build and enjoy the term, the relationship of landlord and tenant is not created, and the lessee is not entitled to notice to quit. *Jackson, ex dem. Van Allen, v. Rogers, 1 J. C. 33. S. C. 2 C. C. E. 314.*

67. Notice to quit, given by the lessor to his immediate lessee, who has continued to pay him his annual rent, is sufficient, though another person is in possession of the premises. *Jackson, ex dem. Livingston, v. Baker, 10 J. R. 270.*

68. A disclaimer by the tenant dispenses with the necessity of notice. *Jackson, ex dem. Locksell, v. Wheeler, 6 J. R. 272.*

69. A. entered on the land of B., with his permission, as a mere occupant, without any rent being reserved; B. sold the land to C., under whom A. continued in possession, and afterwards sold all his right, &c. to D., who took possession, and claimed to hold under the deed from A.; this disclaimer was held to be sufficient to dispense with a previous notice to quit. *Ibid.*

70. But where the disclaimer was made after the date of the demise, and no notice to quit was shown, or other determination of the tenancy, so as to prove a right of entry, the plaintiff was nonsuited. *Ibid.*

71. Where a mortgage contains a *power of sale*, on default of payment, and the mortgagee proceeds under the power, and gives
[*531] public notice of the sale for six successive months, pursuant to the statute, this, in an ejectment afterwards brought against the mortgagor, will be deemed equivalent to six months' notice to quit, previous to the suit. *Jackson, ex dem. Bennet, v. Lamson, 17 J. R. 300.*

72. Though a mortgagor in possession is entitled to a notice to quit, before an action brought; yet if he sells the premises absolutely, the purchaser is not entitled to notice to quit. *Jackson, ex dem. Barclay, v. Hopkins, 18 J. R. 487.*

73. Offering to show that a mortgage had been paid off and satisfied, is not a waiver of notice to quit. *Ibid.*

74. An assignment of the mortgage, by the mortgagee, does not destroy the privity of the estate, or change the condition of the mortgagor's tenancy. *Ibid.*

And see LANDLORD AND TENANT.

V. Defence; (a) Title in the defendant, or a third person; (b) Adverse possession; (c) How the lessor may repel the defence of adverse possession; (d) When the defendant is precluded from disputing the lessor's title; (e) Other matters of defence in ejectment.

(a) Title in the defendant or a third person.

75. Where the landlord, on a clause of re-entry for non-payment of rent, obtained judgment by default against the casual ejector, the record of the judgment, without the previous affidavit required by statute being produced, is a sufficient defence to an ejectment brought by the former tenant for the premises. *Jackson, ex dem. Smith, v. Wilson, 3 J. C. 295.*

76. A. died seised of lands, leaving three sons, B., C., and D. In ejectment, by the heirs of B., against E., who claimed to hold under D., E. offered in evidence the will of A., dated in 1757, by which he devised his real estate to his three sons and their heirs in equal proportions; but it being objected that the will was void, on account of the insanity of the testator, E. waived the production of the will, and relied on a *parol* partition of the testator's estate, between the three sons, made in 1786, a previous holding by them as tenants in common, and the separate possession, under the partition of D., continued from that time: Held, that, though when a tenancy in common is admitted, a *parol* partition, followed by possession under it, will be valid; yet, where the whole right or title of the party setting up the tenancy in common and *parol* partition is denied, a *parol* partition and possession under it, will not be sufficient to transfer the title; that by waiving the will of A. the title was to be considered in B., as heir at law, and could not be divested by *parol*. *Jackson, ex dem. Van Beuren, v. Vosburgh, 9 J. R. 270.*

77. Though, after a possession by D. for so long a time, a tenancy in common might have been presumed; yet, by offering the will of A., and waiving it, the door was shut against the presumption of any other source of title. *Ibid.*

78. In ejectment, by the heirs at law of A. against B., who had taken a lease of the ancestor, the heirs are not
[*532] bound to produce the will of the ancestor, supposing that it can be shown that he made one, but the defendant, if he means to bar the title of the heir at law, must show affirmatively a devise of the premises in question. *Brandt, ex dem. Cuyler, v. Livermore, 10 J. R. 358.*

79. An outstanding title must be a present and operative one, otherwise the presumption will be, that it has become extinguished. *Jackson, ex dem. Klock, v. Hudson, 3 J. R. 375. S. P. Jackson, ex dem. Dunbar, v. Todd, 6 J. R. 257.*

80. And if the plaintiff show a good title, the presumption of the extinguishment of the outstanding title ought to be liberally indulged. *Jackson, ex dem. Klock, v. Hudson, 3 J. R. 375.*

81. Though the defendant forcibly entered and took possession, he is not precluded from setting up a title in himself or in a third person, in bar of the action. Per *Spencer, J. Jackson, ex dem. Seelye, v. Morse, 16 J. R. 197.*

82. Where upwards of twenty years of adverse possession have run against an outstanding title, it cannot be set up as a bar; for the presumption is, that it is no longer a subsisting

title. *Jackson, ex dem. Duncan, v. Harder*, 4 J. R. 202.

83. A claim or title which could not be set up by a person while in possession, cannot be set up by another person who comes into possession under him. *Ibid*.

84. A mortgage, before foreclosure or entry, is not a legal title which a stranger can set up. *Collins v. Torry*, 7 J. R. 278. *Jackson, ex dem. Martin, v. Pratt*, 10 J. R. 381.

85. Where the mortgagee has never entered, and there has been no foreclosure, and interest has not been paid within twenty years, a mortgage is not a subsisting title. *Collins v. Torry*, 7 J. R. 278. *S. P. Per Kent, Ch. J. Jackson, ex dem. Klock, v. Hudson*, 3 J. R. 375.

86. But the assignee of a mortgagee in possession is protected by the mortgage, though no foreclosure of it is shown. *Jackson, ex dem. Minkler, v. Minkler*, 10 J. R. 480.

87. Where no possession had been taken under a mortgage, nor any interest paid, nor steps taken to enforce it, for 19 years; held not to be a subsisting outstanding title, and that a jury might presume it satisfied. *Jackson, ex dem. Martin, v. Pratt*, 10 J. R. 381.

88. Where a person who had a mortgage of lands, was afterwards attainted; held, that the mortgage might be set up against the people as having succeeded to the rights of the mortgagor. *Jackson, ex dem. People, v. Pierce*, 10 J. R. 414.

89. A., in 1770, being indebted to B. by three several bonds, executed a mortgage, including the premises in question, and covenanted, that on default, the mortgagee, his heirs, &c. might enter; in 1771 the mortgage had become forfeited, and a judgment had also been recovered by B. against A., which was revived in 1775, and in 1778, under which the premises in question were sold to C., (who also derived title from the heirs and devisees of B.) from whom the defendant claimed title, but the validity of the sheriff's deed was questionable; in an action of ejectment by persons claiming under B., held, that although the mortgage was forfeited as long ago as 1771, it was

[*533] still *outstanding, the presumption of payment being rebutted by the proceedings had to revive the judgment, (which judgment had been recovered on two of the bonds recited in the mortgage,) and the sale under the execution, notwithstanding the proceedings and sale, might have been defective; and that from 1771 to 1790, when C. took possession, after deducting the period of the revolutionary war, there had not been sufficient time on which to found a presumption; and that, consequently, the mortgage was a good outstanding title, and sufficient to protect the defendant's possession, independent of the sheriff's deed. *Jackson, ex dem. Livingston, v. De Lancey*, 11 J. R. 365.

90. A satisfied mortgage, though paid off by the defendant, is not a bar in ejectment. *Jackson, ex dem. Watson, v. Cris*, 11 J. R. 437.

(b) *Adverse possession.*

91. A claim and color of title sufficient to destroy all presumption that the defendant is

in possession under the plaintiff, is adverse. *Jackson, ex dem. Dunbar, v. Todd*, 2 C. R. 183. *S. P. Jackson, ex dem. Young, v. Ellis*, 13 J. R. 118.

92. It is not necessary that it should be a legal and valid title. *Ibid*.

93. Where a boundary line was in dispute, which the lessor claimed to have run according to a partition deed under which both parties held, and which would cut off part of the premises of the defendant, the latter was allowed to protect his possession by showing a possession in that part by himself, adversely to any other claim, for 36 years, and a recognition by the lessor of the existing boundary. *Jackson, ex dem. Putnam, v. Bowen*, 1 C. R. 358.

94. To constitute an adverse possession, it is not necessary that there should be a rightful title; it must, however, be a possession under claim and color of title, and exclusive of any other right. *Per Spencer, J. Smith, ex dem. Teller, v. Burtis*, 9 J. R. 174. *S. P. Jackson, ex dem. Roosevelt, v. Wheat*, 18 J. R. 40. *Jackson, ex dem. Vanderlyn, v. Newton*, 18 J. R. 355.

95. Adverse possession is a question exclusively for the jury. *Jackson, ex dem. Jadwin, v. Joy*, 9 J. R. 102.

96. That an adverse possession may be a bar, strict proof is required that it was hostile in its inception, and had continued so for 20 years; and the possession must also be marked by definite boundaries. *Brandt, ex dem. Walton, v. Ogden*, 1 J. R. 156. *S. P. 3 J. C. 124. 9 J. R. 163. 12 J. R. 365.*

97. There must be a real and substantial enclosure, an actual occupancy, a *positio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title; a fence, made by felling trees, and lapping them one upon another round the land, called a possession fence, is not sufficient. *Jackson, ex dem. Hardenberg, v. Schoonmaker* 2 J. R. 230.

98. An entry adverse to the lawful possessor is not to be presumed, but must be clearly proved. *Jackson, ex dem. Gansevoort, v. Parker*, 3 J. C. 124. *Wickham v. Conklin*, 8 J. R. 220. *Jackson, ex dem. Bonnel, v. Sharp*, 9 J. R. 163.

*99. Where the defendant did not originally enter under a title hostile [*534] to the lessor, it will be intended that he entered under his title. *Jackson, ex dem. Gansevoort, v. Parker*, 3 J. C. 124. *Jackson, ex dem. Bonnel, v. Sharp*, 9 J. R. 163. *S. P. Jackson, ex dem. Winthrop, v. Waters*, 12 J. R. 365. *Jackson, ex dem. Belden, v. Thomas*, 16 J. R. 293.

100. The statute of limitations does not begin to run from the time that the tenant came into possession, but from the time of his holding adversely. *Jackson, ex dem. Gansevoort, v. Parker*, 3 J. C. 124.

101. Where an adverse possession has commenced in the lifetime of the ancestor, the operation of the statute of limitations is not prevented by the title descending to a person under a legal disability. *Jackson, ex dem. Livingston, v. Robins*, 15 J. R. 169.

102. A purchaser at a sheriff's sale will not be presumed to hold adversely. *Jackson*, ex dem. *Klein*, v. *Graham*, 3 C. R. 188.

103. The possession of a defendant after a sale under an execution, is not adverse to the purchaser, for he is *quasi* his tenant at will. *Jackson*, ex dem. *Kane*, v. *Sternbergh*, 1 J. C. 153. S. C. 1 J. R. 45. n. S. P. *Jackson*, ex dem. *Klein*, v. *Graham*, 3 C. R. 188.

104. A person entering under a lease, and holding over after its expiration, does not thereby gain a possession adverse to his lessor. *Brandtler*, ex dem. *Fitch*, v. *Marshall*, 1 C. R. 394.

105. And a person coming in under the lessee will be considered as holding under the same title. *Ibid*.

106. Where A. went into possession of land under an agreement made with B. for the purchase, and C. afterwards took possession under an agreement with A. for the purchase, the possession of C. was *held*, not to be adverse to the title of B. *Jackson*, ex dem. *Griswold*, v. *Bard*, 4 J. R. 230.

107. A possession of a lot of land commenced adversely 25 years ago, by clearing of four or five acres, without showing on what part such clearing was made, and a regular deduction of title, or privity and continuity of possession down to the defendant, is not such an adverse possession as will bar the plaintiff. *Doe*, ex dem. *Clinton*, v. *Campbell*, 10 J. R. 475.

108. A. entered into possession of land without title, and afterwards entered into a contract with T., who covenanted to give him a deed for the land. A. assigned the contract to S., who took possession, and afterwards received the deed from T., and afterwards a deed from B., the patentee and true owner. *Held*, that the original possession of A., being without title, was to be deemed the possession of B., the patentee; and that the possession of S., under the covenant from A. to T., was not adverse. *Jackson*, ex dem. *Bonnel*, v. *Sharp*, 9 J. R. 163. See *ante*, pl. 99.

109. A., claiming title to land by descent, made a parol gift of the same to B., under which B. entered, and afterwards A. conveyed the land to B.; *held*, that if the deed related back to the entry of B., there was an adverse possession, commencing in B.; and that if it did not, still, as B., by virtue of the parol gift, became the tenant at will of A., and his possession was to be deemed that of
[*535] A., there was an *adverse possession commencing in A. *Jackson*, ex dem. *Young*, v. *Ellis*, 13 J. R. 118.

110. The defendant having purchased a lot of land, and received a deed for the whole of it, in which the grantor stated himself to be heir of the patentee, and the grantee entered into possession under that deed, and it afterwards appeared that the grantor had a title to *one ninth* part only of the lot as tenant in common; *held*, that this did not alter the character of the defendant's possession, or prevent its being adverse; but that he must be deemed to have entered under his deed, as sole owner in fee of the whole lot. *Jackson*, ex dem. *Preston*, v. *Smith*, 13 J. R. 406.

111. Possession of land by a purchaser under a deed for the entire lot, given without right in the grantor, is adverse to the rightful owners, though tenants in common with the grantor; and a subsequent deed executed by them, during such adverse possession, is void; and subsequent releases by the other tenants in common to the grantor of the defendant, enure to the benefit of the defendant. *Ibid*.

112. Where a grantee enters into possession of land under his deed, and afterwards commissioners appointed by the Court to make partition of the land convey it to a purchaser, the grantee's possession becoming adverse, the deed of the commissioners is void, and the original grantee, not being a party to the proceedings in partition, is not bound by them. *Jackson*, ex dem. *Smith*, v. *Vrooman*, 13 J. R. 488.

113. A., being owner of certain lands in the *Lunenburgh* patent, died, after devising the same to his wife, during widowhood, and remainder, in fee, to B., and his three brothers. A dispute having arisen between C., the daughter of B., and her husband, and the other devisees, as to the portion of land to which she was entitled, her portion was ascertained and conveyed, in 1772, to her husband; and certain persons were appointed by the deed to locate and reduce to severalty her share, on any of the land within the patent, in possession of the parties of the first part, or their tenants. In an action of ejectment, by persons claiming under A., against the defendant, who entered upon the premises in question 23 years before, claiming title under the husband of C.; *held*, that there was such an adverse possession in the defendant as barred the action, and which could not be repelled by showing that he had obtained his possession from the tenants of the lessors of the plaintiff, or their ancestors; for it was to be presumed, after such a lapse of time, that the persons appointed to locate the share of C., had located it upon lands in the possession of tenants, as they were authorized to do. *Jackson*, ex dem. *Livingston*, v. *Hallenback*, 13 J. R. 499.

114. A. entered into possession of land under a lease in fee, in 1775, and in 1778 gave the land to her son B., by parol, who entered into possession, and continued in possession, claiming under the lease, until 1798, excepting the period of the revolutionary war, and a year or two afterwards; and B. conveyed the same premises to C., and C. to D., who conveyed the same to the defendant; *held*, that this was such an adverse possession as barred an action of ejectment, brought by a person having title to the land commencing in 1807. *Jackson*, ex dem. *Colden*, v. *Moore*, 13 J. R. 513.

*115. Where an adverse possession begins to run in the lifetime of the ancestor, and the land descends to an infant heir, the latter is not protected by his disability. *Ibid*.

116. Where a person enters upon land without title, and the tenants surrender their possessions, and attorn to him, this is not a disseisin or ouster, and the attornment is void; and such entry and attornment are not the commencement of an adverse possession.

Jackson, ex dem. Livingston, v. De Lancy, 13 J. R. 537.

117. C., who had married a devisee of B., a mortgagee, purchased the land, after the mortgage had become forfeited, under an execution issued on a judgment against B., on his bond, and took possession under the deed. In an action of ejectment, brought by D., claiming under the will of A., the mortgagor; held, that as the mortgage passed under the general words of the will of the mortgagee, the defendant might set up this as an outstanding title, to defeat the plaintiff's action; and that his adverse possession under it was not repelled by the circumstance, that D. had not a right of entry until after the determination of a previous estate for life, the executory devise to D., in the will of A., being repugnant and void. *Ibid.*

118. If, on the trial, the defendant shows that he took possession claiming under a deed, he is not bound to produce the deed, though called for by the plaintiff, but may rely on his adverse possession. *Jackson, ex dem. Roosevelt, v. Wheat*, 18 J. R. 40. *S. P. Jackson, ex dem. Vanderlyn, v. Newton*, 18 J. R. 355.

119. And if the party produces the deed, and it is found defective, it will not destroy the effect of his adverse possession. *Jackson, ex dem. Vanderlyn, v. Newton*, 18 J. R. 355.

120. If a party in possession claiming under a deed, supposing that there was some defect in the execution of it, applies to purchase the title of a person claiming the same premises, under a subsequent deed, for the purpose of strengthening or quieting his own title, this is not an abandonment of his own title, nor an acknowledgment of a superior title in another. *Ibid.*

121. Where the defendant entered into possession, claiming title, and afterwards took a deed of the land from the legal owners, under whom the lessor of the plaintiff derived title by a subsequent deed, the possession of the defendant is to be considered as adverse from the beginning, or, at least, from the date of his deed; and not from the date of the deed to the lessor of the plaintiff. *Ibid.*

(c) *How the lessor may repel the defence of adverse possession.*

122. Where a person enters without pretending to a title, his possession will be deemed the possession of the true owner. *Jackson, ex dem. Bonnel, v. Sharp*, 9 J. R. 163. See ante, pl. 99.

123. Every presumption is in favor of a possession in subordination to the title of the true owner. *Ibid.* *S. P. Jackson, ex dem. Winthrop, v. Waters*, 12 J. R. 365. *Jackson, ex dem. Belden, v. Thomas*, 16 J. R. 293.

124. But if a person so entering afterwards obtain a good or colorable title, an adverse possession will commence from that period. *Jackson, ex dem. Belden, v. Thomas*, 16 J. R. 293.

*125. Where an adverse possession is relied on, the plaintiff may produce evidence to show, that the

person whose possession is set up as adverse, entered, claiming to be tenant in common, under the same title with those through whom the plaintiff claims, without being at the same time obliged to admit the fact that B. was a tenant in common with him. *Smith, ex dem. Teller, v. Burtis*, 9 J. R. 174.

126. If B. enter, claiming as tenant in common, under the same title as that of the lessor, it admits the title of the lessor, so that neither B. nor those claiming under him, can set up such entry as adverse to the common title, or injurious to the rights of the other tenants in common. *Ibid.* See *Jackson, ex dem. Fisher, v. Creal*, 13 J. R. 116.

127. Where A. entered into possession of land in 1770, and in 1786, received a deed from his father and mother for the land, but which was not acknowledged by the mother, to whom the title belonged by inheritance; held, that the acceptance of the deed was sufficient to repel the parol evidence, that A. entered adversely to his mother's title, or if his possession had been adverse to that time, it ceased to be so on accepting the deed. *Jackson, ex dem. Sinsabaugh, v. Sears*, 10 J. R. 435.

128. The repeated application of the defendant to the lessor of the plaintiff, to purchase the premises in question, affords a presumption that he came into possession under such lessor. *Jackson, ex dem. Russell, v. Croy*, 12 J. R. 427.

129. A person who has entered by permission of one tenant in common, cannot (a partition having been made) set up an adverse title in a bar of an action of ejectment by the tenant in common, to whose share the premises have fallen. *Jackson, ex dem. Fisher, v. Creal*, 13 J. R. 116.

130. Where a person in possession of land, covenants with another to pay him for the land, and receive a deed from him, he cannot, in an action of ejectment by the covenantee, set up an outstanding title, or a title in himself, unless he can show that he was deceived or imposed upon in making the agreement. *Jackson, ex dem. Brown, v. Ayers*, 14 J. R. 224.

(d) *When the defendant is precluded from disputing the lessor's title.*

131. A mere trespasser or intruder cannot protect himself by setting up an outstanding title in a stranger. *Jackson, ex dem. Duncan, v. Harder*, 4 J. R. 202.

132. A person who has entered into possession under another, and acknowledged his title, cannot set up an outstanding title in a third person. *Jackson, ex dem. Smith, v. Stewart*, 6 J. R. 34. *S. P. Jackson, ex dem. Davy, v. De Walts*, 7 J. R. 157.

133. If the defendant has recognized the lessor as his landlord, he cannot afterwards dispute his title. *Jackson, ex dem. Low, v. Reynolds*, 1 C. R. 444. *Jackson, ex dem. Bleeker, v. Whitford*, 2 C. R. 215. *Jackson, ex dem. Van Alen, v. Vosburgh*, 7 J. R. 186.

134. He will not be permitted to show, that the land leased to him is without the bounds

of his lessor's premises. *Jackson*, ex dem.

**Bleecker*, v. *Whitford*, 2 C. R. 215.

[*538] *S. P. Brant*, ex dem. *Cuyler*, v. *Livermore*, 10 J. R. 358.

135. A tenant who had been in possession under an adverse title, made application to the lessor of the plaintiff to purchase the land, and requested to be considered as his tenant; held, that although this precluded the tenant from taking advantage of the statute of limitations, yet he might show, that the application was founded in mistake, or that the fee existed in himself, or out of the lessor, but he cannot set up want of notice to quit as a defence. *Jackson*, ex dem. *Viely*, v. *Cuerden*, 2 J. C. 353.

136. A person purchasing land under an execution is substituted in the place of the defendant; and in ejectment by the landlord, cannot set up a title in a third person. *Jackson*, ex dem. *Klein*, v. *Graham*, 3 C. R. 188.

137. Neither can the defendant set up a title in a third person, against the purchaser. *Ibid.*

138. In ejectment by a purchaser under a *fi. fa.*, against a person in possession under the debtor, without title or collusively, the defendant cannot set up an outstanding title in a third person. *Jackson*, ex dem. *Masten*, v. *Bush*, 10 J. R. 223.

139. If the defendant, having originally entered under a title from A., afterwards take a release from B., he cannot, in an action of ejectment against him by a person claiming under A., deny the title of A., and set up B.'s title as an older and better one. *Jackson*, ex dem. *Bourne*, v. *Hinman*, 10 J. R. 292.

140. Whether there is a tenancy or not, is matter of fact, and the defendant may produce parol evidence to disprove the existence of it. *Jackson*, ex dem. *Van Allen*, v. *Vosburgh*, 7 J. R. 186.

(e) *Other matters of defence in ejectment.*

141. If the plaintiff has the legal title, the defendant cannot set up an equitable title as a bar. *Jackson*, ex dem. *Smith*, v. *Pierce*, 2 J. R. 221. *S. P. Jackson*, ex dem. *Potter*, v. *Sisson*, 2 J. C. 321. *S. P. Jackson*, ex dem. *Kemball*, v. *Van Slyck*, 8 J. R. 487. *S. P. Jackson*, ex dem. *Whilbeck*, v. *Deyo*, 3 J. R. 422.

142. The only way in which an equitable title can be assisted, at law, is, by allowing the presumption, in certain cases, to prevail, that there has been a conveyance of the legal estate. Per *Thompson*, J. *Jackson*, ex dem. *Smith*, v. *Pierce*, 2 J. R. 221.

143. Evidence of the acts of the lessor of the plaintiff, which tend to conclude him, and those who derive title under him, is admissible. *Jackson*, ex dem. *Goodrich*, v. *Ogden*, 4 J. R. 140.

144. Showing a line as a boundary, and erecting a fence thereon, the party at the same time asserting his right to have more land, will not conclude him from afterwards contesting that boundary. *Jackson*, ex dem. *Zimmerman*, v. *Zimmerman*, 2 C. R. 146.

145. A possession of 40 years, in conformi-

ty to a division line, will not be disturbed, on the ground that the line was run erroneously. *Jackson*, ex dem. *Nellis*, v. *Dysling*, 2 C. R. 198.

146. A party in possession may protect himself under a title acquired *by a person under whom he claims, [*539] subsequently to his coming into possession. *Jackson*, ex dem. *Humphrey*, v. *Given*, 8 J. R. 137.

147. A., a patentee of land, conveyed it to B.; afterwards, C. purchased the same lot of a person pretending to be the original patentee, and fraudulently executed a deed for the lot to C., who afterwards conveyed it to D., who sold it to various persons, who took possession under him; the real patentee, during the continuance of the adverse possession, executed another deed, for the same lot, to W., which was first recorded; and D. purchased the title of W., and took a deed from him, which was also recorded. B. brought an action of ejectment against the persons in possession under D., and it was held, that B. could not set up the adverse possession of D., to defeat W.'s purchase from the real patentee, and that the persons holding under D. had a right to protect themselves by the title of W., equally, as if they had purchased it of W. *Ibid.*

148. A. claimed title under J. S., and B. also claimed title under a deed from J. S. and others, as trustees of the town of R., settling the boundaries of certain disputed premises; held, that J. S. was bound, in his individual capacity, to the line so agreed to and settled by him as a trustee, and which he had covenanted to maintain, and that such deed of settlement, being prior to the deed to A., was a bar to his claim. *Wood*, ex dem. *Elmendorf*, v. *Livingston*, 11 J. R. 36.

149. The defendant derived his title from A., who derived it from B.; held, that the defendant could not give in evidence the declarations of A. and B., as to the loss of the deed from B. to A., nor could he prove a parol exchange between B. and A. *Jackson*, ex dem. *Watson*, v. *Cris*, 11 J. R. 437.

150. Where a person having no title to land, conveys to another, and afterwards purchases the same land, he is estopped from maintaining an action against his grantee for the land, but the title subsequently acquired will enure to the benefit of his grantee, and in confirmation of his title. *Jackson*, ex dem. *Stevens*, v. *Stevens*, 13 J. R. 316. *S. P. Jackson*, ex dem. *Preston*, v. *Smith*, 13 J. R. 406.

151. A person in possession of land, claiming title, may purchase in an outstanding title, to protect his possession. *Jackson*, ex dem. *Preston*, v. *Smith*, 13 J. R. 406.

152. Though parol declarations of tenancy have been admitted, yet parol declarations are inadmissible evidence to defeat or take away a title; it being contrary to the statute of frauds. *Jackson*, ex dem. *White*, v. *Cary*, 16 J. R. 302.

153. In an action of ejectment brought by the grantee in a mere voluntary conveyance, against the heir of the grantor, the latter cannot set up the want of consideration, in bar of the recovery; for the party making a volun-

tary conveyance, and his heirs are bound by it. *Jackson, ex dem. Malin, v. Garnsey*, 16 J. R. 189.

154. Nor can the heir of such grantor take advantage of a judgment against himself, under which the land conveyed by his ancestor had been sold, and set it up as an outstanding title to defeat the grantee's action; for [*540] such a sale operates only on the interest which he had in the land, which was a naked possession. *Ibid.*

155. In ejectment against a person who has forcibly entered upon and taken possession of land; it seems, that the defendant is not precluded from setting up a title in himself or a third person, in bar of the action. *Jackson, ex dem. Seelye, v. Morse*. Per *Spencer, J.*, 16 J. R. 197.

156. Where the lessor of the plaintiff, who became the purchaser of the title of a mortgagor in possession of land, under a judgment and execution, had covenanted with the defendant to postpone the sale under the execution for two years, it is no defence in an action of ejectment, that the sale to the lessor had been made before the expiration of the two years, and in violation of his covenant. *Jackson, ex dem. Randall, v. Davis*, 18 J. R. 7.

157. It seems, that the defendant cannot plead a release, from the lessor of the plaintiff, to defeat the action; *James Jackson* being the real plaintiff on record. *Jackson, ex dem. Allen, v. Bell*, 19 J. R. 168.

VL Declaration; (a) Demise; (b) Consequence of bringing an action in the name of a lessor without his consent; (c) Amending the declaration; (d) Rule to appear and notice, and service of the declaration and notice.

(a) Demise.

158. The demise must be laid at, or subsequent to, the time when the lessor's right accrued. *Van Allen v. Rogers*, 1 J. C. 281.

159. A coparcener may bring ejectment on her separate demise. *Jackson, ex dem. Fitzroy, v. Sample*, 1 J. C. 231.

160. Tenants in common may declare either on a joint demise, or on separate demises. *Jackson, ex dem. Van Denberg, v. Bradt*, 2 C. R. 169.

161. Separate demises from several lessors, may be laid in the declaration in ejectment; and the plaintiff, at the trial, may give in evidence the separate titles of the several lessors to separate parts of the premises in question, and recover accordingly. *Jackson, ex dem. Roman, v. Sidney*, 12 J. R. 185.

162. The plaintiff cannot recover under a demise from a lessor who has released his interest to the defendant. *Jackson, ex dem. Bonnel, v. Foster*, 12 J. R. 488.

163. The death of a lessor does not abate the suit. *Frier v. Jackson, ex dem. Van Allen*, in error, 8 J. R. 495.

(b) Consequence of bringing an action in the name of a lessor without his consent.

164. Where a person is made a lessor against Vol. I. 35

his consent, and the nominal plaintiff afterwards becomes nonsuit, such lessor is not liable for costs; but the plaintiff's attorney, who used his name as lessor without his authority, is liable. *The People v. Bradt*, 6 J. R. 318.

*165. If the name of a person is used as lessor, without his consent, [*541] it may be struck out, on application to the Court. *Jackson, ex dem. Goodrich, v. Ogden*, 4 J. R. 140.

166. Where a lessor was brought up on an attachment for the non-payment of costs, and he denied that he ever consented to have his name used in the action; the Court said, that they could not receive his denial in bar of the attachment, nor decide between the contradictory affidavits of the party and the attorney; but the party must pay the costs, and take his remedy over against the attorney who inserted his name as lessor; but they stayed the proceedings, to give the party an opportunity to bring his action against the attorney, and to try the truth of the allegation. *The People v. Bradt*, 7 J. R. 539.

(c) Amending the declaration.

167. A new demise may be added, on terms, viz.: that the defendant have 20 days after service of the amended declaration, to elect whether he would continue to defend; should he elect to defend, then he is to have the costs usual in cases of amendment, and 20 days from the time of making such election, to plead *de novo*, or abide by his former plea. If he elect to proceed no further, then to receive all his costs up to the day of making such election. *Anonymous*, 2 C. R. 260. S. P. *Anonymous, id.* 261. And see C. C. 49.

168. After six years' service of the declaration, leave was given to amend, by adding new demises, on the plaintiff's paying all the costs already incurred, in case the defendant should choose to relinquish his defence. *Jackson, ex dem. Finch, v. Kough*, 1 C. R. 251.

169. The plaintiff will not be permitted to amend his declaration, by inserting a demise from a person who has no claim, or any subsisting title to the premises in question. *Jackson, ex dem. Starr, v. Richmond*, 4 J. R. 483.

170. The defendant may, at any time, move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration, without costs. *Jackson, ex dem. Low, v. Reynolds*, 1 C. R. 20. *Jackson, ex dem. Butler, v. Ditz*, 1 J. C. 392. S. C. C. C. 102. *Jackson, ex dem. Atkins, v. Bankcraft*, 3 J. R. 259.

171. Where, on application of the defendant, a demise is ordered to be struck out of the declaration, he must serve a copy of the rule for the amendment on the plaintiff, which shall be deemed an actual amendment as to all subsequent proceedings on the part of the plaintiff; and the defendant, without a new copy of the declaration being served on him, must enter into the consent rule, and plead in twenty days after service of the certified copy of the rule for the amendment, unless otherwise ordered by the Court; and the rule shall

be sufficient to authorize an actual amendment of the declaration on file, or to file a new one in its stead, whenever it may become necessary. *Jackson, ex dem. Kelly, v. Belknap*, 7 J. R. 300.

172. A lessor may be struck out of the declaration, on affidavit of his having no interest in the premises. *Jackson, ex dem. Livingston, v. Selover*, 10 J. R. 368.

*173. But, under special circumstances, the Court may permit his demise to be retained. *Ibid.* [***542**]

174. Before trial, the declaration may be amended, by enlarging the term, or adding a new demise, on payment of costs. *Lion, ex dem. Eden, v. Burtis*, 18 J. R. 510.

175. But where there was an actual entry and actual lease, for the purpose of avoiding a fine, and the demise was, by mistake, laid on the first, instead of the sixth day of May; the Court, in allowing the amendment, gave the defendant leave to elect within 20 days, whether to defend the suit or not; and if he chose to defend, then to have costs of the amendment only; but if he abandoned his defence, then he should have costs to the time of his election. *Ibid.*

176. *Quare*, Whether the judge, at the trial, can allow the amendment in such a case? *Ibid.*

177. If the objection, on the ground of variance, is made at the trial, and the plaintiff is nonsuited, it seems, that the Court will set aside the nonsuit, and give leave to amend on payment of costs. *Ibid.*

178. Where the judge at the trial refused nonsuit, but reserved the question as to the variance, and the defendant went into his defence fully at the trial, the plaintiff was allowed, after verdict, to amend his declaration on the usual terms, under the circumstances of the case, it being a mere clerical mistake. *Ibid.*

(d) *Rule to appear and notice, and service of the declaration and notice.*

179. Serving the declaration is the commencement of the action. Per *Van Ness, J. Baron v. Abeel*, 3 J. R. 481.

180. The service of a second declaration by the plaintiff's agent, though without his knowledge, is a waiver of the first. *Kemble v. Finch*, 1 J. C. 414.

181. Serving the declaration and notice on the tenant, is sufficient to put him on inquiry, and a subsequent notice may be served by putting it up in the clerk's office. *Jackson, ex dem. Hogeboom, v. Stiles*, 1 C. R. 249.

182. The tenants moved to set aside the rules to appear, &c., on the ground of a misdirection of the notice, which would appear by reference to the proceedings on file; but the Court refused to grant the motion, as it was to be presumed, from their not producing the notices served, that the services were regular, especially if, by granting the motion, the statute of limitations would attach. *Jackson, ex dem. Hogeboom, v. Stiles*. 1 C. R. 501.

VII. *Proceedings against the casual ejector, where the tenant does not appear.*

183. A default for the tenant's not appearing, must be entered before judgment by default can be entered against the casual ejector. *Jackson, ex dem. Vrooman, v. Smith*, 1 J. C. 106.

184. A default for want of a plea, must be entered against the *casual ejector, and not against the tenant. *Jack- [*543] son, ex dem. Van Alen, v. Vischer*, 2 J. C. 106. S. C. C. C. 115. *Jackson, ex dem. Quackenboss, v. Woodward*, 2 J. C. 110. S. C. C. C. 120.

185. The principles, as to the proceedings for a vacant possession in *England*, do not apply to the unsettled lands of this country.—*Saltonstall v. White*, 1 J. C. 221. S. C. C. C. 22.

VIII. *Proceedings when the tenant appears, and enters into the consent rule; (a) Consent rule and plea; (b) Setting aside default; (c) Admitting landlord to defend; (d) Subsequent proceedings until judgment inclusive.*

(a) *Consent rule and plea.*

186. The tenant must plead at the time he signs the consent rule. *Jackson, ex dem. Van Alen, v. Vischer*, 2 J. C. 106. S. C. C. C. 115.

187. The signing the consent rule, delivering a new declaration, putting in common bail, and filing a plea, are all simultaneous acts. *Jackson, ex dem. Quackenboss, v. Woodward*, 2 J. C. 110. S. C. C. C. 120.

188. If the defendant claim title as tenant in common, he ought to enter into the consent rule specially; otherwise, if he enters into the usual consent rule, he cannot object that no actual ouster was proved at the trial. *Jackson, ex dem. Denniston, v. Denniston*, 4 J. R. 311.

189. In an action of ejectment by one tenant in common, who has been ousted, against his co-tenant, the latter may enter into the consent rule, where he does not dispute the title, as to part of the premises only, and the plaintiff may take judgment as to the residue, and recover the *mesne* profits thereof from his co-tenant. *Langendyck v. Burhans*, 11 J. R. 461.

190. It seems, that in such case, where the title is not denied, the tenant need not stipulate to confess ouster. *Ibid.*

191. Where the defendant in ejectment means to defend as a tenant in common with the lessors of the plaintiff, on the ground, that there has been no ouster of the co-tenants, he should apply to the Court, on affidavit, for leave to enter into the consent rule specially, stipulating to confess lease and entry only, not ouster, unless an actual ouster of the lessors should be proved at the trial. *Jackson, ex dem. Jones, v. Lyons*, 18 J. R. 398.

(b) *Setting aside default.*

192. Where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, on payment of costs, to let in the ten-

ant to defend his possession. *Jackson*, ex dem. *Mentz*, v. *Stiles*, 4 J. R. 489.

193. The Court will go further, to protect the possession, where it can be done without injury to the plaintiff's claim, than [*544] it is willing in *other cases to proceed. *Jackson*, ex dem. *Rosekrans*, v. *Stiles*, 1 C. R. 503.

194. So, where the plea and consent rule miscarried through mistake, and never reached the plaintiff's attorney, judgment by default, and writ of possession, were set aside, and a writ of restitution ordered, on payment of costs. *Ibid*.

195. A default was set aside on an affidavit of merits, and that the tenant supposed that the Supreme Court was held at the Circuit. *Jackson*, ex dem. *Norton*, v. *Stiles*, 3 C. R. 133.

(c) *Admitting the landlord to defend.*

196. After a judgment by default, against the casual ejector, the landlord may be let in to appear and defend. *Jackson*, ex dem. *Cantine*, v. *Stiles*, 4 J. R. 493.

197. Where the lessor of the plaintiff proceeded as for a vacant possession, and obtained a regular judgment by default; it was set aside, and the person claiming to be owner of the land, on the affidavit of merits, &c. was admitted a defendant, on payment of costs, and stipulating to admit he was in possession at the commencement of the suit. *Wood*, ex dem. *Elmendorf*, v. *Wood*, 9 J. R. 257.

198. A person may be admitted to defend as landlord, between whom and the defendant a privity of interest exists, although he does not receive rents, which is not the true test. *Winer* v. *Wilcocks*, C. C. 56.

199. A party will not be admitted to defend on an affidavit that he claims title to the premises, and has a real and substantial defence to make. *Jackson*, ex dem. *Winter*, v. *McEvoy*, 1 C. R. 151.

200. A. leased a lot of land to B., and the lease contained a power of re-entry, for the non-payment of the rent, &c.; B. leased the same premises to C., by parol. A. brought an action of ejectment for the recovery of the premises, under the 23d section of the act, (Sess. 11. c. 36.) for non-payment of the rent, &c., and a judgment by default was entered, on the 27th of September, 1811, against the casual ejector, and final judgment entered on the 23d of December, 1811, and a writ of possession thereon executed before January term, 1812. B. was not informed of the proceedings in the ejectment suit, until the 27th of May, 1812, and in August following, applied to set aside the default and subsequent proceedings, to be let in to defend as landlord; and it appearing, that B. had been discharged under the insolvent act, in September, 1811, it was held, that he had no further right, as landlord, to come in and defend; and that, though he had afterwards, on the 27th of May, 1811, purchased the premises at the sheriff's sale under an execution on a judgment against him, he could not, in the new character of purchaser, be let in, so long after a regular execution of

the judgment in ejectment. *Jackson*, ex dem. *Vanderveenker*, v. *Stiles*, 10 J. R. 67.

201. If a person be admitted to defend, on payment of costs, and after entering into the consent rule, keep out of the way, to avoid being served with a copy of the *ca. sa.* against the casual ejector, a rule will be granted to show cause why an attachment should not issue against *him; and [*545] that service of the rule at the defendant's house shall be sufficient. *Jackson*, ex dem. *Jackway*, v. *Stiles*, 2 C. R. 368.

202. A mortgagee in possession may be let in to defend. *Jackson* v. *Stiles*, 11 J. R. 407.

203. So, the assignee of a mortgagee may be let in to defend. *Jackson*, ex dem. *Clark*, v. *Babcock*, 17 J. R. 112.

204. When the landlord unites with the tenant in defending the suit, it is sufficient to prove the tenant to have been in possession at the commencement of the suit, and his possession is deemed to be the possession of the landlord. *Jackson*, ex dem. *Wood*, v. *Harrow*, 11 J. R. 434.

205. A copy of the rule of Court, certified by the clerk, is sufficient evidence that the landlord was admitted to defend. *Ibid*.

(d) *Subsequent proceedings until judgment inclusive.*

206. In ejectment against several defendants, though they sever in their pleadings, and enter into separate consent rules, the notices and pleadings must be entitled against all, as at the commencement, but each party must be served with a separate notice, &c. *Jackson*, ex dem. *Jauncey*, v. *Cooper*, 1 C. R. 19.

207. In ejectment against several defendants, who possessed the premises in separate parts, and who entered into the consent rule, and pleaded jointly, the jury found each defendant separately guilty, as to that part of the premises in his separate possession, and not guilty as to the other parts possessed by the other defendants; the verdict is good, and the plaintiff is entitled to judgment against all the defendants, severally, according to the finding of the jury. *Jackson*, ex dem. *Haines*, v. *Woods*, 5 J. R. 278.

208. Where several defendants appear and plead jointly, and enter into the consent rule jointly, the plaintiff is bound to prove a joint possession of all the defendants; and if, on the trial, it appear, that two of the defendants occupied distinct parcels of the premises in severalty, and that the other defendants possessed the residue of the premises jointly, the plaintiff can have judgment only against the defendants holding jointly, and the defendants holding in severalty will be entitled to judgment. *Jackson*, ex dem. *Murray*, v. *Hazen*, 2 J. R. 438.

209. On an application for an attachment for costs, on nonsuit, for not confessing lease, entry, and ouster, the affidavit must show that there was authority from the lessor to demand the costs of the tenant. *Jackson*, ex dem. *Cramer*, v. *Stiles*, 3 C. R. 140.

210. The Court has no power to compel the defendant to consent to a survey of the premises in his possession. *Jackson*, ex dem. *Rensselaer*, v. *Hogeboom*, 9 J. R. 83.

211. Where the plaintiff and defendant claim under adjoining patents, the Court cannot grant a rule, ordering the lessors of the plaintiff to permit a survey to be taken of the boundary line; but if it appear necessary for the defence in the suit, that it should be ascertained, they will allow a rule to stay proceedings till the lessors consent to a [*546] survey, or the judge at the circuit may postpone the cause. *Jackson, ex dem. Waggoner, v. Murphy*, 3 C. R. 82.

212. Alienage may be given in evidence under the general issue. *Jackson, ex dem. Johnston, v. Decker*, 11 J. R. 418.

213. But where issue has been joined on the demise of an alien residing in *England*, claiming to hold land under the act (Sess. 21. c. 72.) before the declaration of war, his alienage must be pleaded *purs darrein continuance*. *Jackson, ex dem. Smith, v. M'Connel*, 11 J. R. 424.

214. It is too late, after trial, to move that the lessors of the plaintiff, who were infants, file security for costs, *nunc pro tunc*. *Jackson, ex dem. Erving, v. Bushnell*, 13 J. R. 330.

215. Where ejectment was brought by one tenant in common, and the consent rule for the undivided moiety was entered in the common form, and the plaintiff proved title to an undivided moiety only; *held*, that the defendant was entitled to judgment as to the one moiety, though, as to the other, the plaintiff was entitled to judgment by default. *Jackson, ex dem. Jones, v. Lyons*, 18 J. R. 398.

216. Where the title of the lessor, being a *life estate*, ends before trial, the plaintiff is entitled to judgment, but with a perpetual stay of the writ of possession, so as to enable him to bring an action for the mesne profits. *Jackson, ex dem. Henderson, v. Davenport*, 18 J. R. 295.

IX. Proceedings in cases of re-entry for non-payment of rent.

217. Where a lease contains a covenant against waste, and also a clause of re-entry for a breach of covenants, if the lessee, or his assigns, commit waste, the lessor may bring ejectment. *Jackson, ex dem. Church, v. Brownson*, 7 J. R. 227.

218. If a lessee, holding lands under a lease containing a clause of re-entry in case of non-payment of rent, leave the premises, and persons claiming title under the lessor have been in possession for 14 years since the departure of the lessee, a re-entry by the lessor will be presumed. *Jackson, ex dem. Goose, v. Demarest*, 2 C. R. 382.

219. A lease was executed in 1769, reserving rent, with a clause of re-entry, and the lessee died, in 1775, without wife or children; and there being no evidence of a continuance of possession under him, or of payment of rent, and the lessor having taken possession in 1786, it was *held*, in 1809, that a re-entry for non-payment of rent was to be presumed. *Jackson, ex dem. Smith, v. Stewart*, 6 J. R. 34.

220. After a lapse of only nine years, an entry for the non-payment of rent will not be presumed. *Jackson, ex dem. Donally, v. Walsh*, 3 J. R. 226.

221. Where the landlord, on a clause of re-entry for the non-payment of rent, obtained judgment by default against the casual ejector, the record of the judgment, without the previous affidavit required by statute being produced, is a sufficient defence to an ejectment, brought by the former tenant for the premises. *Jackson, ex dem. Smith, v. Wilson*, 3 J. C. 205.

222. The tenant absconded, and the landlord took possession of the premises, and then brought an ejectment, as for a vacant possession, in order to bar the tenant's right under the lease; the Court, on motion, set aside the proceedings, with costs, as a nullity, ejectment not lying by a person already in possession. *Jackson, ex dem. Clowes, v. Hakes*, 2 C. R. 335.

223. The plaintiff, if he proceed under the statute, (Sess. 36. c. 63. s. 23. 1 N. R. L. 440.) must show that there was no sufficient distress on the premises, or, if he proceed at common law, he must prove a demand of the rent. *Jackson, ex dem. Van Rensselaer, v. Collins*, 11 J. R. 1.

224. But if the tenant deny the title of the lessor, and disclaim by parol to hold under him, it is a waiver of the necessity of the demand. *Ibid.*

225. It seems, that where the lease contains no clause of re-entry, the landlord cannot bring ejectment under the statute. *Jackson, ex dem. Van Rensselaer, v. Hogeboom*, 11 J. R. 163.

226. The want of sufficient distress on the premises must be at the time when the declaration in ejectment is served. *Ibid.*

227. A lease for lives contained a clause of re-entry for non-payment of rent; or, if the lessee should leave the possession for six months, &c. The tenant left the premises in 1810, and the landlord, in April, 1811, executed another lease to the defendant, who entered and took possession of the premises; and the first lessee, who had paid no rent to his landlord, after the 1st of May, 1809, brought an action of ejectment, in 1821, against the defendant, the second lessee, to recover the possession; *held*, that the right of the tenant, the first lessee, could be barred only by a recovery in ejectment, under the statute; and that if a *legal re-entry* was to be presumed, it would be a re-entry under the statute, rather than at common law; but that, in the absence of any record or evidence of a re-entry or recovery in ejectment, under the statute, such re-entry could not be presumed, unless after a possession for fourteen years, at least; and, admitting that the landlord entered six months after his tenant had quitted the possession, that alone could not divest the apparent right of possession gained by the tenant, or first lessee. *Jackson, ex dem. Myers, v. Elsworth*, 20 J. R. 180.

X. Habere facias possessionem.

228. If the jury give a general verdict for the plaintiff in ejectment, the Court will order him to take possession of so much of the premises as he has given evidence of title to. *Jackson, ex dem. Moore, v. Van Bergen*, 1 J. C. 101.

229. No tenant, who was in possession anterior to the commencement of an ejectment, can be dispossessed, upon a judgment and writ of possession, to which he is not a party. *Ex parte Reynolds*, 1 C. R. 500.

230. And if a tenant, whose possession is distinct from that for which the action was brought, be turned out, he may have a writ of restitution. *Ibid*.

231. On setting aside a default against the casual ejector, and a *writ of possession issued thereon, the Court will, on payment of costs, grant a writ of restitution. *Jackson*, ex dem. *Rosebrum*, v. *Stiles*, 1 C. R. 503.

232. If the defendant alleges, that the lessor of the plaintiff has taken possession of more land than was recovered by the verdict, the Court will order a restitution. *Jackson*, ex dem. *Ostrander*, v. *Hasbrouck*, 5 J. R. 366.

233. But if the plaintiff deny the fact, he will be allowed a feigned issue to try the question. *Ibid*.

234. A lessor in ejectment, after judgment, may enter peaceably, without a writ of possession; the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass, as long as the effect of the judgment continues. *Jackson*, ex dem. *Beckman*, v. *Haviland*, 13 J. R. 229.

235. But after the expiration of the demise laid in his declaration he cannot proceed to enforce his judgment. *Ibid*.

XL. Action of trespass for the mesne profits.

236. The plaintiff is entitled to the mesne profits from the time of the demise laid in the declaration in ejectment. *Van Allen* v. *Rogers*, 1 J. C. 281.

237. If the tenant has made improvements on the land, under a contract with the owner, he will not be allowed for them in this action, when brought by a devisee, but must seek his compensation from the personal representatives of the deviser. *Ibid*.

238. An action for mesne profits is an equitable action, and will allow of every kind of equitable defence. *Murray* v. *Gouverneur*, in error, 2 J. C. 438.

239. It lies against a person who has entered under a contract for a deed, and afterwards refuses to perform the contract. *Smith* v. *Stewart*, 6 J. R. 46.

240. After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits, against the tenant, as well for the use of the land as for the costs of the ejectment. *Baron* v. *Abeel*, 3 J. R. 481.

241. The right to mesne profits is a necessary consequence of a recovery in ejectment. *Benson et al.* v. *Matsdorf*, 2 J. R. 369.

242. The defendant cannot set up a title in bar, even if he has a better title. *Ibid*. *S. P. Jackson* v. *Randall*, 11 J. R. 405.

243. So, where the lessor had taken possession under the judgment in ejectment, and brought his action for the mesne profits, and

the defendant had, in the mean time, brought ejectment for the same premises, and obtained a verdict; he cannot set up the verdict as a bar to the action for mesne profits. *Ibid*.

244. No defence can be set up in the action for mesne profits, which would have been a bar to the action of ejectment. *Baron* v. *Abeel*, 3 J. R. 481. *S. P. Jackson* v. *Randall*, 11 J. R. 405. *Langendyk* v. *Burhans*, 11 J. R. 461.

245. A recovery of nominal damages in ejectment is no bar to an action for the mesne profits. *Van Allen* v. *Rogers*, 1 J. C. 281.

*246. And it is unnecessary to enter a *remittitur damna*. *Ibid*. [*549]

247. If the plaintiff claims damages for the occupation prior to the demise in the declaration in ejectment, the defendant may dispute the title prior to that time. *Jackson* v. *Randall*, 11 J. R. 405.

248. When, during the pendency of an action of ejectment, the defendant gives up the possession to a third person, and afterwards the plaintiff recovers judgment, such third person is liable for the mesne profits; the recovery in ejectment being conclusive against him, and he cannot set up a title in himself, as a bar to the action. *Jackson* v. *Stone*, 13 J. R. 447.

249. Where the title of the lessor, being a *life estate*, ends before the trial of the cause, the plaintiff, though he cannot turn the defendant out of possession, is entitled to judgment, so as to enable him to recover the *mesne profits*, but with a perpetual stay of the writ of possession. *Jackson*, ex dem. *Henderson*, v. *Davenport* 18 J. R. 295.

ELECTION.

1. If a person bound in the alternative to do one of two things, by a certain day, let the day pass without making an election, by performing one or the other alternative, he loses his election, and the obligee may elect which he will demand. *M'Nitt* v. *Clark*, 7 J. R. 465.

2. So, where, by the condition of a bond, the obligor had an election to pay 600 dollars for a patent right, at the end of twelve months, or to account to the obligee for the profits, &c., and the obligor sold the right to a third person, and having failed to perform any part of the condition; *held*, that the obligee might elect which he would demand, and hold the obligor for the payment of the 600 dollars. *Ibid*.

3. An election once made is irrevocable. *Lawrence* v. *The Ocean Insurance Company*, 11 J. R. 241.

4. A. executed certain promissory notes to B., and procured land, of which he was the *cestui que trust*, to be conveyed to B. under an agreement, that B., on the payment of the notes, should reconvey the land. The notes not being paid, and B. having exercised acts of ownership on the land, by selling, &c.; *held*, that he could not support an action on the notes, there being a failure of the consid-

eration, and the agreement to reconvey being void on the non-payment of the notes, if B. elected so to consider it; and that by exercising acts of ownership on the land, he had determined his election, and had a complete title to the land. *Winter v. Livingston*, 13 J. R. 54.

5. Where a grant is made of a right of election, without giving any present interest before election, the election must be made in the lifetime of the parties, and does not descend to the heirs of the grantee. *Vandenbergh v. Van Bergen*, 13 J. R. 212.

6. One hundred acres of land, in a certain patent, were devised to M., where she pleased to take the same, and to her heirs and assigns forever; *held*, that no title to any particular part of the patent vested *in M., [*550] and she not having made an election in her lifetime, the right of election was gone, and could not be exercised by her heirs, especially after a lapse of 40 years from the death of the devisee. *Jackson, ex dem. Valkenburgh, v. Van Buren*, 13 J. R. 525.

See tit. CHANCERY, XL. E. LIV. G. XXXI. E.

ERROR.

- I. On what a writ of error may be brought.
- II. Writ of error, when and how to be obtained, and the effect of it.
- III. Proceedings in error; (a) Non-prossing or quashing a writ of error; (b) Assignment of errors, joinder in error, and amendments; (c) Error on a bill of exceptions.
- IV. When a judgment will be reversed, or affirmed, in part, or in whole.
- V. Judgment in error, and venire de novo.
- VI. Error, coram vobis.

I. On what a writ of error may be brought.

1. If a party be nonsuited, and a judgment be given against him for costs, error lies. *Smith v. Suttis*, 2 J. R. 9. *S. P. Willson v. Foree*, 6 J. R. 110. *S. P. Schemerhorn, v. Jenkins*, 7 J. R. 373.

2. And it seems, that error lies on a judgment of nonsuit, though no costs are awarded on the record. *Lovell v. Evertson*, 11 J. R. 52.

3. A writ of error lies on an award of the Supreme Court, for refusing to discharge a prisoner brought before them on a *habeas corpus*. *Yates v. The People*, in error, 6 J. R. 337.

4. Where the chancellor has committed a person for a contempt, and the Supreme Court, the prisoner being brought before them on a *habeas corpus*, refuse to discharge him, and a writ of error is brought, the Court of Errors may inquire into the validity of the order of the Court of Chancery awarding an attachment, notwithstanding an appeal might have been brought on that order. *Ibid*.

5. Error will not lie on an arrest of judg-

ment. *Fish v. Weatherox*, 2 J. C. 215. *S. P. Horne v. Barney*, 19 J. R. 247.

6. But where a verdict has been given for the plaintiff, and judgment is arrested, he may move for judgment against himself, in order to bring a writ of error. *Ibid*.

7. And if the Court refuse to give such judgment, he may apply to the Supreme Court for a *mandamus*. *Horne v. Barney*, 19 J. R. 247.

8. In such case, the Court below will order the rule for arresting judgment to be vacated, and that judgment be entered as of the term when the judgment was arrested, for the insufficiency of the declaration; and that, if the defendant's attorney do not make up and file the record within a given time, the plaintiff may do it, with a *remittitur* of the costs by the defendant. *Bayard v. Malcolm*, 2 J. R. 101.

*9. If a party wishes to bring a writ of error on a judgment against [*551] him, the Court below will grant a rule that the opposite side make up the record in eight days, or that the applicant have leave to do it for him. *Yates v. Lansing*, 5 J. R. 367. *S. P.* where the rule was four days. See *Keteltas v. North*, C. C. 419.

10. A writ of error lies to a Court of Common Pleas, for error in fact, and the Supreme Court can award a venire to try the fact. *Arnold v. Sandford*, 14 J. R. 417.

11. If a venire be executed and returned by any other person than the sheriff, without a special suggestion of facts, and an award to such person on the record, it is error for which the judgment may be reversed. *Cooper v. Bissell*, 16 J. R. 146.

12. Where a juror was challenged, as being interested in a bank who were the plaintiffs in the cause, and being sworn on his *voir dire*, said that he was not interested in the bank, nor a drawer, though he was endorser of a note in the bank; and the Court of Common Pleas, not being called upon for the purpose, expressed no opinion on the sufficiency of the evidence, and the *triers* found that the juror was not indifferent, and he was set aside; *held*, that this was not ground for a writ of error. *Mechanics' Bank v. Smith*, 19 J. R. 115.

13. Where a Court of Common Pleas refuse to nonsuit a plaintiff, on motion of the defendant, when the evidence entirely fails to support the plaintiff's case, a writ of error lies. *Foot v. Sabin*, 19 J. R. 154.

14. Every final or definitive sentence or decision of the Supreme Court, by which the merits of a cause are settled or determined, although such sentence is not technically a judgment, or the proceedings are not capable of being enrolled, so as to constitute what is technically called a record, is a judgment within the meaning of the constitution of this state, and is subject to the appellate jurisdiction of the Court of Errors. *Clasen v. Shetwell*, 12 J. R. 31.

15. *Aliter* as to interlocutory orders of the Supreme Court. *Ibid*.

16. Where, on an indictment for a forcible entry and detainer, no return could be obtained to a *certiorari*, by reason of the death of the

justice, before the record of conviction was made out, and the Supreme Court investigated the cause on affidavits, and awarded a re-restoration; *held*, that the Court of Errors might, on a writ of error, review the proceedings on the evidence presented to the Court below. *Ibid*.

II. Writ of error, when and how to be obtained, and the effect of it.

17. A writ of error is a writ of right, and the Court of Chancery can in no case refuse to grant it, except in a capital case. *Yates v. The People*, 6 J. R. 337.

18. Neither can it supersede it, *quia improvide emanavit*; not even, as it seems, where the prerequisites required by the statute, such as filing a certificate of counsel, have not been complied with. *Ibid*.

19. Whether properly granted or not, is a question for the decision alone of the Court in which it is returnable. *Ibid*.

20. A writ of error may be brought before the judgment is entered up. *Richardson v. Backus*, 1 J. R. 493.

*21. Where some of the defendants below do not join in bringing the writ of error, they ought to be summoned and served. *Bradshaw v. Callaghan*, 8 J. R. 558.

22. The allowance of a writ of error, after the sheriff has levied under a *fi. fa.*, is no *supersedeas* to it. *Blanchard v. Myers*, 9 J. R. 66.

23. Bail in error, put in before the judgment below has been perfected, is good, and it will be deemed as taking effect from the judgment. *Richardson v. Backus*, 1 J. R. 493.

24. A recognizance taken before a judge, at his chambers, is sufficient. *Ibid*.

25. It will be sufficient if the penalty be to the amount of the judgment. *Ibid*.

26. In judgment of law, the record itself is removed to the Supreme Court from the Common Pleas, though, in fact, a transcript only is sent up. *Brown v. Clark*, 3 J. R. 443.

27. A defendant has four clear days after signing final judgment to put in bail in error. *Brisban v. Caines*, 11 J. R. 197.

28. The plaintiff may take out execution after the allowance of a writ of error, and before bail is put in, at his peril, and if the writ of error is regularly followed up, by putting in bail, the execution will be set aside. *Ibid*.

29. But if bail in error is not put in, the writ of error is a nullity. *Ibid*.

30. A writ may be tested before judgment is given; and it is sufficient, if the judgment be given before the return of the writ; and the test of this is not the signing of the judgment roll, but the rule for judgment. *Arnold v. Sandford*, 14 J. R. 417.

31. Though it appears by the record that the judgment roll was signed after the return day of the writ of error; yet it will not be intended, that the writ of error was returned before judgment was in fact signed; it is sufficient if judgment was signed before the writ was in fact returned. *Ibid*.

32. Where an execution is issued, and actu-

ally levied before a writ of error is filed, the writ is no *supersedeas*. *Kinnie q. t. v. Whilford*, 17 J. R. 34.

33. In a *qui tam* action, bail to a writ of error is not required by the statute, in order to make it a *supersedeas*. *Ibid*.

34. The act relative to writs of error on judgments of the Courts of Common Pleas, passed April 5, 1817, (Sess. 40. c. 179.) is prospective merely, not retrospective. *Watkins v. Haight*, 18 J. R. 138.

[By an act passed February 17, 1815, all original writs are directed to be issued out of the Courts in which they are made returnable, (instead of the Court of Chancery,) and the Supreme Court has the same power as the Court of Chancery to devise and make writs. Sess. 38. c. 38.]

*III. Proceedings in error; (a) Nonprossing or quashing a writ of error; (b) Assignment of errors, joinder in error, and amendment; (c) Error on a bill of exceptions. [*553]

(a) Nonprossing a writ of error.

35. The defendant in error cannot nonpross the plaintiff's writ, before it is returned. *Van Der Mark v. Jackson*, 1 C. R. 251.

36. Where a writ of error was brought on a bill of exceptions, from the Supreme Court, and the cause was decided in favor of the plaintiffs in error, and a *venire de novo* awarded, and on the new trial of the cause below, a second bill of exceptions was taken on the same point, and a second writ of error brought, the Court of Errors, on motion, quashed the second writ of error. *Hartshorne v. Sleight*, 3 J. R. 554.

(b) Assignment of errors, joinder in error, and amendment.

37. In error from a Court of Common Pleas, the plaintiff may proceed by *scire facias ad audiendum errores*. *Sheldon v. M'Evers*, 1 J. C. 169. But see *Burr v. Waterman*, 18 J. R. 508. *contra*.

38. Or, by rule to join in error; and, if the defendant does not appear, judgment will be reversed of course. *Ibid*.

39. After the rule to join in error has expired, and a default entered, the plaintiff may enter a rule for judgment of reversal. *Oppie v. Colegrove*, 19 J. R. 124.

40. Where no attorney is employed by the defendant in error, in the Supreme Court, the service of the assignment of errors and notice of the rule to join in error, must be made on him personally, either by delivering the same to him, or leaving them at his dwelling-house, or in such other mode as the Court might specially direct under the circumstances of the case: but affixing them in the clerk's office is not sufficient. *Clement v. Crossman*, 8 J. R. 287.

41. Though a party had not a regular notice in writing of a writ of error being brought in the Supreme Court, or of a judgment of re-

versal; yet if he was informed and sufficiently apprized of the pendency of the writ of error, to have pleaded in time, and of the judgment of reversal by default, in season to have moved the Court at a former term to set it aside, it is a *laches*, and the judgment will not be set aside, after a term has so intervened. *Ibid.*

42. Service of notice of a rule, for the assignment of errors in the Supreme Court, must either be personal, or a good reason shown why it is not, or that it has been left at the party's last usual place of abode. *Graves v. Miller*, 1 J. R. 509.

43. If the plaintiff has had reasonable grounds for expecting the transcript before the rule for assigning errors in the Supreme Court had expired, the Court will set aside a default for not assigning, on payment of costs. *Mitchell v. Ingersoll*, 2 C. R. 385.

44. If an error in fact be well assigned, as the infancy of the defendant, and the defendant pleads in *nullo est erratum*, he [*554] admits the *fact*. *Bliss v. Rice*, 9 J. R. 159. *S. P. Harvey v. Rickett*, 15 J. R. 87.

45. After an assignment of errors and joinder, the Court of Errors will not send the transcript of the record back to the Supreme Court, to be amended by the record in that Court, which had been amended by that Court, since the joinder in error in the Court of Errors. *Cheetham v. Tillotson*, 4 J. R. 499.

46. All defects, or errors properly amendable, may be amended in the Court of Errors, which will disregard all defects or errors in matters of form, which may be amended or are aided by the statute of jeofails. *Ibid.*

47. If the party wishes to have the transcript amended, the proper course is, to allege diminution, and pray a *certiorari* to the Court below. *Ibid.*

48. But, after the defendant has pleaded in *nullo est erratum*, he cannot allege diminution; for, by his plea, he admits the record to be perfect; so that, after a joinder in error, neither party can allege diminution, or pray a *certiorari*. *Ibid.*

49. The Supreme Court allowed the defendant in error to amend his declaration, on paying the costs in the Court below, subsequent to the declaration, by averring that the plaintiffs in error were partners, &c., and the plaintiffs in error were allowed twenty days, after service of such declaration, to pay the amount recovered below, without costs, or to plead; and if they pleaded, a *venire de novo* was ordered, returnable at the next circuit. *Pease v. Morgan*, 7 J. R. 468.

50. On a writ of error from the Common Pleas, the error assigned was the want of a plaint below; the defendant in error had applied to the Court below, for leave to file a plaint, *nunc pro tunc*, which had been refused: and the Supreme Court granted a rule on the Court below, to show cause why a *mandamus* should not issue to compel them to allow the application. *The People v. Judges of Westchester*, C. C. 55.

51. The infancy of the defendant is well assigned in error, by averring him to have been an infant, at the time of appearance and plea pleaded, and not at the time of the rendition of judgment. *Arnold v. Sanford*, 14 J. R. 417.

52. Although a defendant, who was an infant at the time of appearance and plea, by going to trial after arriving at full age, may be deemed to have waived the error, yet it cannot be taken advantage of, as a waiver, on a demurrer to the assignment of errors, unless the fact appears on the record. *Ibid.*

53. If judgment was not actually signed, until after the infant attained his full age, this does not affect his right to assign his infancy, as error. *Ibid.*

54. The assignment of errors should state, that the infant was of a certain age, and *no more*; but the omission of the words "*and no more*," being a mere informality, must be taken advantage of by special demurrer. *Ibid.*

55. After judgment against the defendant in error, on a demurrer to an assignment of an error in fact, he may withdraw the demurrer, and rejoin to the assignment. *Ibid.*

*56. Whether accord and satisfaction can be pleaded in bar of a writ of error? *Quare*. *Potter v. Smith*, 14 J. R. 444.

57. On filing a writ of error and return in the Supreme Court, the defendant in error, instead of issuing a *scire facias ad audiendum errores*, enters a rule that the plaintiff in error assign errors in twenty days, or that his default be entered; and serves a notice on the plaintiff in error or his attorney, that the writ of error has been returned, and filed, and that a rule has thereupon been entered, that the plaintiff in error assign errors, &c. *Burr v. Waterman*, 18 J. R. 508. See *ante*, pl. 37, 38, 40, 41, 42.

And see AMENDMENT, X. 80, 81, 82, 83.

(c) Error on a bill of exceptions.

58. In error on a bill of exceptions, the Supreme Court will grant a writ, ordering the judges of the Court below to come in, and confess, or deny their seals, and that, in the mean time, all proceedings by the defendant be stayed. *Pomroy v. Preston*, 2 C. R. 373.

59. The Supreme Court will not hear an argument on a bill of exceptions, taken in the Common Pleas, unless a writ of error has been brought. *Bradt v. Cray*, 3 C. R. 170.

60. Facts stated upon a record on a return to a writ of error, after the attestation and signatures of the judges to the bill of exceptions, and which are not incorporated in it, not being legally before the Court, cannot be considered as ground of error. *Foot v. Sabie*, 19 J. R. 154.

61. Where the record is made up, a general assignment of errors to a bill of exceptions is sufficient. *Shepard v. Merrill*, 13 J. R. 475.

And see BILL OF EXCEPTIONS. MANDAMUS.

IV. When a judgment will be reversed, or affirmed, in part or in whole.

62. A judgment will be reversed for a variance between the sum reported by referees, and the judgment entered thereon; as where the judgment was for 99 cents more than the amount reported. *Stafford v. Van Zandt*, 2 J. C. 66.

63. If some of the counts in a declaration are bad, and, after a default and interlocutory judgment, entire damages are assessed, the judgment will be reversed. *Cheetham v. Tylolson*, 5 J. R. 430.

64. So, where, after a judgment for the plaintiff, on a demurrer to the whole declaration, his damages are assessed, and some of the counts in the declaration are bad, the damages will be considered as applying to the whole declaration, and judgment will be reversed. *Backus v. Richardson*, 5 J. R. 476.

65. Irregularity in an execution, where the judgment is correct and legal, cannot be taken advantage of in error, but the party should apply to the Court below. *Dumond v. Carpenter*, 3 J. R. 141.

66. If a judgment consist of distinct parts, it may be reversed as to one part only. [*556] *Smith v. Jansen*, 8 J. R. 111. *S. P. Bradshaw v. Callaghan*, 8 J. R. 558.

67. So, a judgment may be affirmed in part, and reversed in part; but in such case, no costs will be allowed, on either side. *Anonymous*, 12 J. R. 340.

68. But if the judgment be entire, it must be affirmed or reversed *in toto*. *Richards v. Walton*, 12 J. R. 434. *S. P. Bronson v. Mann*, 13 J. R. 460. *Arnold v. Sandford*, 14 J. R. 417.

69. So, where two persons were sued by a warrant before a Justice's Court, and one only appeared, and the justice gave judgment against both, the judgment being entire, and erroneous as to the one defendant, who did not appear, it was reversed as to both. *Richards v. Walton*, 12 J. R. 434.

70. So, where the plaintiff entered judgment on a bond, for the penalty and costs, and also for the damages assessed by the jury, on a writ of error, the judgment was reversed as to the damages, and affirmed as to the debt and costs. *Smith v. Jansen*, 8 J. R. 111.

V. Judgment in error, and venire de novo.

71. On reversing a judgment given in favor of the defendant, on a verdict, the Court of Errors will order that the Court below award a *venire de novo*. *Livingston v. Rogers*, 1 C. R. 583.

72. After the reversal of a judgment of the Common Pleas, a *venire de novo* may be issued from the Supreme Court, returnable at the Circuit, in the county in which the original judgment was pronounced. *Brown v. Clark*, 3 J. R. 443. *S. P. Arnold v. Crane*, 8 J. R. 79.

73. But where it appeared that the sum demanded by the plaintiff was so small, that the plaintiff, if he recovered, would be obliged to pay the costs, the Court refused to grant a *venire*. *Brown v. Clark*, 3 J. R. 443.

74. Where a judgment has been reversed in the Supreme Court, and the cause tried at the circuit, on the record remaining in that Court, and verdict for the plaintiff, the defendant cannot set up a defect in form in the record, on motion, in arrest of judgment. *Williams v. Vanderveer*, 10 J. R. 200.

75. The Court to which a cause is brought by writ of error, is bound to give such judgment as the Court below ought to have given. *Pangburn v. Ramsay*, 11 J. R. 141.

76. Where the judgment of the Court for the Correction of Errors, affirming a judgment of the Supreme Court, was affirmed by the Supreme Court of the United States, on a writ of error from that Court, interest on the judgment of the Court below was allowed only to the time of the last judgment of affirmance. *Hoyt v. Gelston*, 15 J. R. 221.

77. Where a Court of Common Pleas refused leave to amend a verdict by applying the evidence to one count, and to enter a *nol. pros.* as to the other, the Supreme Court, judgment having been rendered on the verdict in the Court below, cannot, on a writ of error, order the record to be amended. *Cooper v. Bissell*, 15 J. R. 318.

78. A Court of Errors cannot grant an amendment, by inquiring into facts *dehors* the record. *Ibid.*

*79. Whatever is good cause for [*557] arresting a judgment, is good cause for reversing it. *Gage v. Reed*, 15 J. R. 403.

80. Where in error to a Court of Common Pleas, the judgment was *revoked* for error in fact; held, that the plaintiff in error was entitled to costs, under the 13th section of the act, Sess. 36. c. 96. it being, substantially, a reversal of the judgment; and, in such case, the defendant below may be ordered to appear and plead *de novo* to the declaration removed into this Court, he having refused to rejoin to the assignment of errors, after leave given for that purpose in withdrawing a demurrer. *Arnold v. Sandford*, 15 J. R. 534.

VI. Error coram vobis.

81. Where an infant defendant appears by attorney, it is error in fact, for which the judgment will be reversed on a writ of error *coram vobis*. *Dewitt v. Post*, 11 J. R. 460. *S. P. Arnold v. Sandford*, 14 J. R. 417.

82. On a writ of error, *coram vobis*, only the proceedings complained of as erroneous, are reversed, and all prior proceedings remain unimpeached, from whence the plaintiff may, after reversal, continue the original action, without being obliged to commence it *de novo*. *Ibid.*

83. The judgment in case of reversal for error in fact is, that the judgment below be recalled, and not that it be reversed, as in the case of an error in law. *Ibid.*

84. On a writ of error to a Court of Common Pleas, for an error in fact, the Supreme Court may award a *venire*, to try the fact. *Arnold v. Sandford*, 14 J. R. 417.

See COURT FOR THE CORRECTION OF ERRORS. *TIL. CHANCERY, V. Appeals.*

ESCAPE.

- I. *What is an escape, and when voluntary or negligent.*
- II. *Escape on *meine process*.*
- III. *Escape on execution.*
- IV. *Recaption, voluntary return, and other matters of defence in an action for an escape, and what may be shown in mitigation of damages.*
- V. *Escape in criminal cases.*

I. *What is an escape, and when voluntary or negligent.*

1. A deputy sheriff arrested a defendant on an execution, and left him in the custody of two brothers of the defendant, and went to serve other process, and did not take him to gaol until the next day; this ^{*was} [558] an escape, for which the sheriff was liable, the persons in whose custody the prisoner was left, having no authority to detain him in the absence of the deputy. *Palmer v. Hatch*, 9 J. R. 329.

2. If a constable, who has a prisoner in custody, by virtue of an execution from a Justice's Court, discharge him, by order of the justice, who has no authority for that purpose from the plaintiff, it is an escape, for which the constable is liable. *Van Slyck v. Taylor*, 9 J. R. 146.

3. Where a constable, having arrested a defendant, on a warrant issued by a justice of the peace, left the defendant, on his promising to follow him, and afterwards went back with a deputy sheriff, who also arrested the defendant, and detained him in custody, and afterwards took him to prison on a criminal action, so that the constable could not take him before the justice on the warrant; *held*, that, by the constable's leaving the defendant, after the arrest, there was a voluntary escape, and not being able afterwards to retake the defendant, the constable was liable for such escape. *Olmstead v. Raymond*, 6 J. R. 62.

4. If, when a sheriff has taken a prisoner on an attachment for the non-payment of costs out of the Supreme Court, the prisoner applies to the Court of Common Pleas for a discharge, pursuant to the act for the relief of debtors, with respect to the imprisonment of their persons, which is granted, and an order for his discharge served on the sheriff, who discharges him accordingly, the sheriff will be liable for the costs, such order being void. *Jackson v. Smith*, 5 J. R. 115. [And see PRISONERS.]

5. A sheriff cannot be imprisoned in the gaol of which he has the custody; and, therefore, if the coroner arrest him, and put him into the gaol, it is an escape. *Day v. Brett*, 6 J. R. 22.

6. If it be averred or found on the record, that the sheriff permitted a prisoner to escape, the Court must intend it to be a voluntary escape. *Holmes v. Lansing*, 3 J. C. 73.

7. An escape by a prisoner who has been admitted to the liberties of the gaol on giving a bond to the sheriff, differs in no respect from an escape in other cases; it is either voluntary or negligent, according to the circumstances;

and in an action against the sheriff for an escape of such prisoner from the liberties, he may avail himself of any defence which he might have had at common law. *Jansen v. Hilton*, in error, 10 J. R. 549. *S. P. Barry v. Mandell*, *id.* 563. *Contra, Tillman v. Lansing*, 4 J. R. 45.

8. It is not an escape, for a sheriff to bring up, on a *hab. corp. ad test.*, a prisoner in his custody, on execution in a civil suit, to testify. *Noble v. Smith*, 5 J. R. 357.

9. After an arrest on *meine process*, the sheriff, by whom the prisoner was arrested, assigned him to his successor, but himself returned the writ *cepi corpus in custodia*; before the return day, the new sheriff admitted the prisoner to bail, the plaintiff proceeded to judgment, and issued a *ca. sa.*, which being returned *non est inventus*, he brought an action against the new sheriff for an escape; *held*, that as the new sheriff was bound to admit the prisoner to bail, and as he was not bound to give the plaintiff notice of his having taken a bail bond in any other way than by an endorsement on the writ, which he could not do, the old sheriff not having delivered [559] it to him, there was no escape, and he was not liable. *Richards v. Porter*, 7 J. R. 137.

10. Where a sheriff, after he had arrested the defendant on execution, went with him two or three miles out of the direct route to gaol, in order that the prisoner might obtain the means of settling the execution, and also went with him that distance to the prisoner's house, in order that he might get his necessary apparel, and to see his wife before he went to gaol, it was *held*, not to be an escape, it being no more than a reasonable indulgence, from laudable and compassionate motives. *Wool v. Turner*, 10 J. R. 420.

11. Where an officer had a defendant in execution, and A. promised the officer, that if he would release the defendant from custody, he (A.) would pay the amount of the execution, if he failed to re-deliver him to the officer on a certain day, and the officer accordingly released him; *held*, that this was a voluntary escape, and that the officer could not maintain an action against A. for the non-performance of his promise. *Wheeler v. Bailey*, 13 J. R. 366.

12. Where an execution is issued out of a Justice's Court against the body of a defendant, although the constable has thirty days within which to serve it, yet if he arrests him during that time, it will be an escape to suffer him to go at large, and which will not be excused by his having the defendant in custody, at the expiration of the thirty days. *Pulver v. McIntyre*, 13 J. R. 503.

13. A sheriff who has a defendant in custody on execution, is bound to obey a writ of *habeas corpus ad testificandum*, according to the exigency of the case; and if, in doing so, he takes his prisoner out of the county, and returns with him again, without unnecessary delay, it is not an escape. *Hassam v. Griffin*, 18 J. R. 48.

14. And while the sheriff has the prisoner

on such writ of *habeas corpus*, he is not bound to keep him always in his sight, or with the same strictness as before; and if the prisoner, of his own head, should go about for a short time, on his own business, out of the view of the sheriff, it is not an escape. *Ibid.*

II. Escape on *mesne process*.

15. If the sheriff has the body of the defendant after an arrest upon *mesne process*, at the return day of the writ, it is sufficient. *Stone v. Woods*, 5 J. R. 182.

16. If the defendant escape at any time thereafter, and before execution, whether the escape be voluntary or negligent, the sheriff is liable. *Ibid.*

17. In an action against a sheriff for an escape and false return on *mesne process*, the plaintiff can recover no more than he might have done in the original action, nor ought he to recover more than he has actually lost in consequence of the escape. *Potter v. Lansing*, 1 J. R. 215.

18. The plaintiff can recover damages only for what he has lost by the escape, and the jury may find such damages as [*560] they may think the plaintiff has sustained under all circumstances. *Russell v. Turner*, 7 J. R. 189.

III. Escape on execution.

19. If the sheriff, knowing that the execution had not been satisfied, by the consent and direction of the plaintiff's attorney, acting merely under his general authority, permit the defendant to go at large, he will be liable for an escape. *Kellogg v. Gilbert*, 10 J. R. 220.

20. An action on the case, as well as debt, lies for an escape of a prisoner in execution. *Rauson v. Dole*, 2 J. R. 454.

21. In the action of debt, no interest is allowed, and the original debt and damages are all that can be recovered. *Ibid.*

22. But in an action on the case it seems, that the jury may allow interest in the assessment of the damages, so as to give the plaintiff all that he has lost by the escape. *Ibid.*

23. Debt for an escape lies only where the prisoner is in execution; and a prisoner is not in execution unless on a *ca. sa.* *Van Slyck v. Hogeboom*, 6 J. R. 270.

24. So, if a person surrendered by his bail, and who has not been charged in execution, escapes, debt will not lie. *Ibid.*

25. The proper remedy is by an action on the case. *Ibid.*

26. But where, in an action of debt, the whole defence was let in, as if it had been an action on the case, and the jury found for the plaintiff nominal damages only, the Court refused to grant a new trial merely to give the defendant an opportunity to get rid of the suit, as he would be entitled to costs as the verdict stood. *Ibid.*

27. If a new sheriff regularly receives a prisoner from his predecessor, he is bound to detain him, and is answerable for his escape, although a voluntary escape may have existed

in the time of his predecessor. *Rauson v. Turner*, 4 J. R. 469.

28. But in case there has been an escape both in the time of the former and of the new sheriff, the plaintiff has an election, either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff. *Ibid.*

29. The bringing a suit against the one or the other is a determination of his election. *Ibid.*

30. Where, after an escape of a prisoner on execution and return into custody, the sheriff went out of office, and assigned the prisoner to his successor, and while in his custody the prisoner applied for his discharge, under the act for the relief of debtors, &c., and the plaintiff, not knowing of the escape, opposed the application, in consequence of which the prisoner remained in custody; *held*, that this was not such an election to affirm the debtor in custody, as amounted to a waiver of the plaintiff's remedy against the former sheriff for the escape. *Dash v. Van Kleeck*, 7 J. R. 477.

31. After an escape by a prisoner in custody on a *ca. sa.*, the plaintiff may proceed against the sheriff for the escape, and at the same time taken out a *f.* [*561] *fa.* against the property of the defendant; for the remedies are not inconsistent with each other. *Jackson, ex dem. McCrea, v. Bartlett*, 8 J. R. 361.

As to an escape of a prisoner from the jail liberties, see SHERIFF.

IV. Reception, voluntary return, and other matters of defence, in an action for an escape, and what may be shewn in mitigation of damages.

32. After a voluntary escape of a prisoner in execution, a voluntary return or assent of the prisoner, will not prevent the sheriff's liability. *Lansing v. Fleet*, 2 J. C. 3.

33. And the sheriff cannot retake or detain the defendant without a new authority from the plaintiff. *Ibid.*

34. After a voluntary escape, the sheriff cannot lawfully retake or detain a prisoner, though he may after a negligent escape. *Ibid.* *S. P. Thompson v. Lockwood*, 15 J. R. 256.

35. He can only detain him on a new execution, issued by the plaintiff; he cannot retain him on his own surrender, unless the plaintiff does some act showing his election to hold him on the old process. *Thompson v. Lockwood*, 15 J. R. 256.

36. If the sheriff, after a voluntary escape, arrests the defendant again on the same action, and takes a bond from him, with sureties, for the jail liberties, such bond is not only void as to the defendant, but also as to the sureties. *Ibid.*

37. Where the prisoner, having escaped without the knowledge of the sheriff, voluntarily returns before suit is brought, it is equivalent to a reception on fresh pursuit. *Dole v. Moulton*, 2 J. C. 205.

38. A voluntary return before a suit is brought is not a defence in an action for an escape, whether negligent or voluntary, on *mesne* process, after the return of the writ. *Stone v. Woods*, 5 J. R. 182.

39. The sheriff cannot take advantage of error in the process or execution under which the defendant was arrested. *Bissell v. Kip*, 5 J. R. 89.

40. Where, in an action for the escape of a defendant in execution, the sheriff justifies under a discharge by the Common Pleas, pursuant to the act for the relief of debtors, with respect to the imprisonment of their persons, it is sufficient to show that the Common Pleas had jurisdiction in the case: with the regularity of their proceedings he has no concern. *Cantillon v. Graves*, 8 J. R. 472.

41. Where there has been an escape of a prisoner in execution, both in the time of the old and of the new sheriff, and the plaintiff brings an action against the old sheriff and recovers judgment, it is a bar to any action against the new sheriff. *Rawson v. Turner*, 4 J. R. 469.

42. In an action for an escape on *mesne* process, if the plaintiff, having real and competent security from the defendant for his debt, relinquish it after knowledge of the escape, the sheriff may avail himself of that fact in mitigation of damages. *Russell v. Turner*, 7 J. R. 189.

*43. And where, in such a case, [*562] the jury gave nominal damages only, the Court refused to set aside the verdict. *Ibid.*

44. Whether, if the plaintiff had retained the security for the debt, the defendant could have availed himself of that fact, in his defence to an action for an escape? *Quære. Ibid.*

45. But it is probable that Chancery would compel the plaintiff to assign the security to the defendant for his indemnity. *Per Thompson, J. Ibid.*

46. It is a good defence in an action for an escape, that the party taken, and afterwards suffered to go at large, was privileged from arrest. *Ray v. Hogeboom*, 11 J. R. 433.

47. If the defendant in a popular action, having been taken in execution, is discharged by the plaintiff, without satisfaction of the judgment, such discharge is no bar to an action for an escape. *Minton v. Woodworth*, 11 J. R. 474.

48. Where a plaintiff brings an action against a sheriff for the escape of a prisoner in execution, the plaintiff's election to consider him as out of custody is thereby determined, and he cannot resort to a remedy which would be an acknowledgment of his being in custody. *McElroy v. Mancius*, 13 J. R. 131.

49. Therefore, after bringing an action against the sheriff for the escape, he cannot oppose the discharge of the prisoner under the statute. *Ibid.*

50. The sheriff cannot avail himself, as a defence, of the acts of the plaintiff, subsequent to the suit commenced, recognizing the prisoner to be still in custody; as the plaintiff, by bringing the suit, determined his election. *Ibid.*

51. It is no defence to an action for the escape of a defendant in execution, that the *ca. sa.*

has been irregularly issued; as without a previous *fi. fa.* *Scott v. Shaw*, 13 J. R. 378. *S. P. Hinman v. Breez*, 13 J. R. 529.

52. It is the duty of the sheriff to return a writ without a rule of Court for that purpose; and he cannot avail himself of his neglect of this duty, to defeat an action of the plaintiff against him for an escape. *Hinman v. Breez*, 13 J. R. 529.

53. And where the sheriff has neglected to return and file a *ca. sa.*, and refused to produce it at the trial, though due notice had been given to him for that purpose, in an action against him for an escape, parol evidence is inadmissible to show the issuing of the execution, its delivery to the sheriff, and the arrest of the party upon it. *Ibid.*

54. Where, on executing a writ of *hominum replegiando*, the party is claimed as a slave, and the sheriff takes a bond to himself, with sureties, for the prosecution of the suit with effect, and that the party prove his liberty, and for his return, if return should be adjudged, such bond, not being authorized by law, is no defence in an action against the sheriff for the escape of the slave. *Skinner v. Fleet*, 14 J. R. 263.

55. Nor is an assignment of such a bond to the plaintiff, a bar to the action against the sheriff, unless it appears that it was accepted in discharge of the suit, or by way of accord and satisfaction. *Ibid.*

56. Where a defendant in execution is discharged from imprisonment, under the act for the relief of debtors, with respect to the imprisonment of their persons, and in a suit on the original judgment, he *omits [*563] to plead his discharge; and is taken in execution in the second suit, his discharge is no justification to the sheriff for an escape on such second execution. *Cable v. Cooper*, 15 J. R. 152.

57. Nor, if he is discharged from the execution in the second suit, by the order of a judge or commissioner, on *habeas corpus*, is such a discharge any protection to the sheriff in an action against him for an escape. *Ibid.*

58. A sheriff is never allowed to allege error, either in the judgment or process, as an excuse for an escape; and if he arrests the party, he is bound to keep him until he is discharged by due course of law. *Per Van Ness, J. Ibid.*

59. Where an attorney having a *lien* on a judgment recovered by his client for nominal damages and costs, or an assignee having an equitable interest in the judgment, takes out a *ca. sa.*, and gives notice to the sheriff of his *lien*, or equitable interest, and the sheriff, having arrested the defendant, suffers him to escape, the party beneficially interested may maintain an action against the sheriff for the escape, in the name of the plaintiff in the original suit, which the sheriff cannot defeat by taking a release from the nominal plaintiff. *Martin v. Hawks*, 15 J. R. 405.

V. Escape in criminal cases.

60. Lying in wait near a jail, by agreement with a prisoner, and carrying him away, is not an offence against the statute, (8 Geo. 3. c. 53.)

12, 13. 1 N. R. L. 411.) but is a misdemeanor at common law. *The People v. Tompkins*, 9 J. R. 70.

61. Aiding and assisting to escape from jail, a person committed on suspicion of having been accessory to the breaking the house of S. with intent to commit felony, is not indictable under the statute, (Sess. 24. c. 58. s. 12, 13. 1 N. R. L. 411.) because the prisoner was not committed on any distinct and certain charge of felony. *The People v. Washburn*, 10 J. R. 160.

62. A person confined in jail, who attempts to escape by breaking of the prison, in consequence of which a fellow prisoner, confined for felony, escapes, is guilty of an offence within the 20th section of the act, (Sess. 36. c. 29.) and may be punished by imprisonment in the state prison. *The People v. Rose*, 12 J. R. 383.

ESCHEAT.

1. On a traverse of an office found in behalf of the people, the traverser is considered as a defendant; and if he show that the people have no title, though he prove nothing but a bare possession in himself, he will be entitled to judgment. *The People v. Cutting*, 3 J. R. 1.

2. If there is a failure of inheritable blood, by reason of alienage, the lands do not escheat, but go to the next heir (who is not an alien) of the person last seised. *Jackson, ex dem. Elmsendorf, v. Jackson*, 7 J. R. 214.

See tit. CHANCERY, XXI. Escheat.

[*564] *ESTOPPEL.

1. A recital in a will is an estoppel to parties claiming under the will. *Denn v. Cornell*, 3 J. C. 174.

2. So, where A., by his last will and testament, among other things, devised as follows: *And whereas I have conveyed to my son C. my lands at C., and to my son D. my lands at F., I give and devise all my remaining lands and tenements, and real estate whatsoever, to my sons C. and D., and my daughter, &c.*; held, that the recital in the will was evidence of the conveyance of the farm in F. to D., and that C., as heir of the testator, was estopped, by the recital, to deny that the farm was conveyed to D.; and that the necessary intentment, from the language of the clause in the will, was, that it was a conveyance in fee to D. *Ibid.*

3. A partition deed operates as an estoppel between the parties and persons claiming under them. *Jackson, ex dem. Ostrander v. Hasbrouck*, 3 J. R. 331.

4. A recital in a deed, executed by the party anterior to a submission to arbitration, is not an estoppel to a subsequent award. *Musgrave v. Moore*, 2 C. R. 320.

5. A grant of land, held adversely to the grantor, to a third person, will not enure, by

way of estoppel, for the benefit of the tenant in possession. *Jackson, ex dem. Jones, v. Brinckerhoff*, 3 J. C. 101.

6. No party is technically estopped by a conveyance under the statute of uses. *Ibid.*

7. Strangers cannot avail themselves of an estoppel by mere writing, or matter in pais. *Ibid.*

8. One who is not bound by, cannot take advantage of, an estoppel. *Lansing v. Montgomery*, 2 J. R. 382.

9. An estoppel cannot be taken by inference, but must be relied on in pleading. *Ibid.*

10. Where a person conveys land in which he has no interest at the time, but afterwards acquires a title to the land, he will be estopped from claiming in opposition to his deed, either against the grantee or any person deriving title under him. *Jackson, ex dem. Danforth, v. Murray*, 12 J. R. 201. *S. P. Jackson, ex dem. Stevens, v. Stevens*, 13 J. R. 316.

11. The title subsequently acquired by the grantor, enures to the benefit of his grantee, and in confirmation of his title. *Ibid.*

12. And the stranger to whom he sells, will be equally estopped; but whether this shall be said to be a technical estoppel; or not? *Quære.* Per Kent, J. *Jackson, ex dem. The Loan Officers of Rensselaer, v. Bull*, 1 J. C. 81. 90, 91.

13. A tract of 400 acres of wood land was leased by the proprietor of the manor of R. in 1707, to A. in fee, reserving an annual rent, and granting reasonable *estovers* out of the woods of the manor, &c. In 1763, A. granted to B., his son, part of the premises, with common of *estovers* out of any part of the wood land of A., and afterwards granted to his sons, C. and D., the residue of the said tract of land, *who, on the death of [*565] A., entered and made partition. In 1791, by an agreement between B., C. and D., and other tenants of the manor, with the lord of the manor, the tenants surrendered their leases, and took new leases for their respective lands, at a certain rent; held, that B. was estopped from all claim under the lease to him, and that the right to take *estovers* from the other lands of A. was gone. *Springstein v. Schermerhorn*, 12 J. R. 357.

14. Where land is purchased under a junior judgment, by an agent, who takes a deed from the sheriff to himself, and then conveys the land to his principal, the agent or trustee is not thereby estopped from levying on the same land under a senior judgment, and purchasing it himself. *Jackson, ex dem. Whitlocke, v. Mills*, 13 J. R. 463.

15. No title, not in *esse*, will pass by deed, unless it contains a warranty, in which case it operates by way of estoppel. *Jackson, ex dem. McCrackin, v. Wright*, 14 J. R. 193.

16. Where a person in possession of land, covenants with another to pay him for the land, and receives a deed from him, in an action of ejectment by the covenantee, the tenant is estopped from setting up an outstanding title, or a title in himself, unless he can show, that he was deceived or imposed upon in making the agreement. *Jackson, ex dem. Brown, v. Ayers*, 14 J. R. 224.

17. If an executor or administrator confesses a judgment, or suffers a judgment to pass by default, he is estopped from denying that he has *assets* to the extent of such judgment, as regards the plaintiff. *Ruggles v. Sherman*, 14 J. R. 446.

18. But not as regards another action by another plaintiff. *Ibid.*

19. An instrument not under seal, cannot be pleaded by way of estoppel. *Davis v. Tyler*, 18 J. R. 490.

20. The form of pleading an estoppel is, to rely on the deed as an estoppel, and pray judgment that the party be estopped, or not be admitted to deny the facts in the deed; not to demand judgment, *si actio, &c.* *Ibid.*

See *tit. CHANCERY, XVIII. Deed, A.*

ESTRAY.

1. Trover lies for wild geese, which have been tamed and have strayed away, but without regaining their natural liberty. *Amory v. Flynn*, 10 J. R. 102.

2. And the person finding them has no right to pawn them, or to insist upon a reward from the owner. *Ibid.*

3. The finder is entitled only to be reimbursed for the necessary expenses which he has actually been put to in keeping the property. *Ibid.*

4. A hired a mare of B, which strayed away from the possession of A, and came in the possession of C, by delivery [*566] from D, who had taken her up; (C. claiming her as the property of a third person, who had requested him to search for a mare he had lost,) A. brought an action on the case against C., for not complying with the requisites of the act concerning estrays; (See. 36. c. 21.) held, that C. admitting that he came within the statute, which was questionable, yet the plaintiff, having sustained no injury by the negligence of C., could not support the action; and that as A.'s special property had ceased, before the mare came into the possession of C., the action, if sustainable at all, could only be brought by B., the owner of the mare. *Palmer v. West*, 12 J. R. 186.

EVIDENCE.



- I. *Matter of record; verdict; postea; judgment; execution.*
- II. *Legal proceedings not of record.*
- III. *Public documents.*
- IV. *Corporation books.*
- V. *Laws and legal proceedings of other states and countries.*
- VI. *Deeds.*
- VII. *Wills.*
- VIII. *Other private writings.*
- IX. *Proof of hand-writing, and subscribing witnesses.*
- X. *Translations and copies.*

XI. *Parol evidence to explain, vary or contradict written instruments.*

XII. *Notice to produce papers.*

XIII. *Presumptions.*

XIV. *What may be proved by parol.*

XV. *Confessions and declarations.*

XVI. *Hearsay and general reputation.*

XVII. *Witness; (a) Who are competent witnesses, either generally, or as to particular facts; (b) How a witness is to be examined.*

XVIII. *When a witness is incompetent on the ground of interest; (a) When a witness's interest will be sufficient to exclude his testimony; (b) When the witness will not be excluded; (c) Agents; (d) Release of a witness's liability.*

XIX. *Credibility of witnesses, and how impeached.*

XX. *Evidence in particular cases, and under particular issues.*

I. *Matter of record; verdict; postea; judgment; execution.*

1. No proceeding is a matter of record until enrolled. *Crosswell v. Byrnes*, 9 J. R. 287.

2. An entry on the minutes of the Court is not a record. *Ibid.*

3. So, an entry of a rule for judgment cannot be given as evidence to support a plea of a former recovery. *Ibid.*

4. So, on a plea of *nil sit record*, an entry of a rule to set aside the judgment is not admissible as evidence against the record, but the *vacatur* ought to be enrolled. *Ibid.*

5. To make a record in a former suit conclusive evidence on any point, it should appear from the record that such point was in issue. *Manny v. Harris*, 2 J. R. 24.

6. Other evidence cannot be received to show that a particular matter, not in issue on the record, came in question, or was taken into consideration by the jury. *Ibid.*

7. If the plaintiff, at the trial, waive any particular cause of action, and afterwards brings a new suit for the same cause, the record in the former action is not a bar to the new suit. *Lowe v. Davis*, 13 J. R. 227.

8. The record of a former recovery apparently for the same cause of action, which is the foundation of a subsequent suit, is *prima facie* evidence only that the demand has been once tried, and the plaintiff may repel the evidence by showing, that the subsequent suit is for a distinct and disconnected transaction, in relation to which no evidence was offered on the trial in the former cause. *Phillips v. Berwick*, 16 J. R. 136.

9. Where a claim is submitted to a jury and disallowed by them, a verdict and judgment thereon are conclusive evidence in bar of a second action for the same cause. *Ibid.*

10. So, if the jury allowed the plaintiff a part only of his demand, and less than he was entitled to receive. *Ibid.*

11. So, if the plaintiff brings his action for a part only of an entire and indivisible de

mand, the verdict and judgment in such action are a conclusive bar to a subsequent suit for another part of the same demand. *Ibid.*

12. The discontinuance of a suit may be proved by other evidence, besides the minutes of the Court. *Foster v. Trull*, 12 J. R. 456.

13. An officer sued for taking goods under an execution, need not give the execution in evidence. *Holmes v. Nuncaster*, 12 J. R. 335.

14. Where parol evidence of a judgment has been offered by one of the parties, and improperly admitted, and the opposite party afterwards produces the judgment itself, the error is cured. *Miller v. Starks*, 13 J. R. 517.

15. A decree against the principal binds the agent, who must look to the principal for indemnity. *Gelston v. Hoyt*, 13 J. R. 561.

16. A suit between two persons does not bind or affect a third person, who could not be admitted to make a defence, to examine witnesses, or to appeal from the judgment. Per *Spencer, J. Case v. Reeve*, 14 J. R. 79. 81.

17. A judgment or decree obtained on false or fraudulent suggestions is void, and may be impeached by the party against whom it is sought to be enforced. *Borden v. Fitch*, 15 J. R. 121.

18. In an action against a sheriff for an escape of a prisoner, to whom the limits were granted, the sheriff gave notice of the suit to the prisoner's sureties, who, in conjunction with the sheriff, defended it, and judgment was given against the sheriff; in an action by the sheriff against the sureties on the bond for his indemnity, the former judgment is conclusive evidence, and the defendants [*568] cannot controvert the fact of the escape. *Kip v. Brigham*, 6 J. R. 158. *S. C. 7 J. R. 168.*

19. So, where an action was brought against the vendee of a chattel by the rightful owner, of which action the vendee gave the vendor notice, and judgment was given against him: in an action against the vendor by the vendee, on the implied warranty of title, the record of the recovery against the plaintiff is conclusive evidence of a legal eviction. *Blasdale v. Babcock*, 1 J. R. 517. *S. P. Barney v. Drury*, 13 J. R. 224.

20. Where the matter in dispute is a question of public right, all persons standing in the same situation are affected by it; as where the public is the party aggrieved, and the prosecution is carried through its officers, any individual may avail himself of the conviction; therefore, in an action of slander for saying of the plaintiff he was a thief, and stole the defendant's hens, a record of a conviction of the plaintiff before a Court of Special Sessions, for stealing the defendant's hens, is admissible evidence under notice or plea of justification by the defendant of the truth of the words spoken. *Ibid.*

21. But the conviction, in such case, is only *prima facie* evidence, and the plaintiff may be allowed to disprove the fact, and show the falsity of the proof on which the conviction was founded. *Ibid.*

22. And the conviction cannot be received in evidence at all, if the defendant in the civil suit, and the party aggrieved, was himself a witness in the criminal prosecution. *Ibid.*

23. A verdict for the same cause, and between the same parties, is evidence, although no judgment has been entered. *Feller v. Mulliner*, 2 J. R. 181.

24. A verdict and judgment are not evidence, unless it be on the same point, and between the same parties. *Maybee v. Avery*, 18 J. R. 352.

25. A verdict cannot be given in evidence against a person who was not a party or privy to it. *Jackson, ex dem. Schuyler, v. Vedder*, 3 J. R. 8.

26. Where a verdict is recovered against a sheriff for the escape of a prisoner, who had given security for the liberties of the gaol, in an action by the sheriff on the bond, the *postea*, without the judgment, is evidence to prove the recovery and actual damages, at least, if not the escape. *Kip v. Brigham*, 7 J. R. 168.

27. So, in covenant, for a breach of the covenant against encumbrances, the *postea* in an action of ejectment brought against the grantee by a mortgagee, on a prior mortgage of the same land by the grantor, is evidence of the existence of the ejectment suit, and of the fact of a verdict in the cause. *Waldo v. Long*, 7 J. R. 173.

28. In an action upon a judgment rendered against several joint debtors, some of whom were not brought into Court on the process upon which that judgment was recovered, the judgment is *prima facie* evidence of a debt against the defendants who did not appear in the original action; reserving to them, however, the right of entering again into the merits, and showing that they ought not to have been charged. *Taylor v. Pettibone*, 16 J. R. 66.

29. Where a sheriff justifies under a *fi. fa.*, it is not necessary that he should show that it is returned; nor will [*569] the want of an endorsement on the execution, of the time it was received by the sheriff, render it inadmissible in evidence; for the statute is merely directory to the sheriff on this point, and the time of receiving it may be shown by parol proof, or otherwise. *Bealls v. Guernsey*, 8 J. R. 52.

30. In trespass and trover, by an officer who had seized goods in execution, against a third person for taking them away, the execution is sufficient evidence without producing the judgment. *Barker v. Miller*, 6 J. R. 195. *S. P. Blackley v. Sheldon*, 7 J. R. 32.

31. An entry on the record of the award of a writ, does not conclude the party from denying the fact, and shall be tried *per pais*. *Brown v. Van Deuzer*, 10 J. R. 51.

32. Process cannot be proved by parol; but the process itself, or a sworn copy, must be produced; and if the original be lost, it must be accounted for. *Foster v. Trull*, 12 J. R. 456.

States. See CIRCUIT COURTS OF THE UNITED STATES, (a.)

II. Legal proceedings not of record.

33. The answer of one co-defendant in Chancery is evidence neither for nor against the other. *Grant v. Bissett*, 1 C. C. E. 112. 121.

34. Where an answer in Chancery is given in evidence in a Court of law, the party is entitled to have the whole of his answer read; and it is to be received as *prima facie* evidence of the truth of the facts stated in it, open, however, to be rebutted by the opposite party. *Lawrence v. Ocean Insurance Company*, 11 J. R. 241.

35. The exemplification of a decretal order of a Court of Chancery, directing execution to issue after the affirmance in the Court of Errors of a prior decree, is not admissible evidence on a trial in a Court of law, but the original decree must be produced. *Wilson v. Conine*, 2 J. R. 280.

36. An execution from Chancery will not be received in evidence, without producing the original decree on which it was founded. *Ibid.*

37. A case made between the assurers and assured, in an action on a policy of insurance, will not be received in evidence in another suit, in which the parties are different, though it relates to the same subject or policy. *Elting v. Scott*, 2 J. R. 157.

38. Where one party serves copies of affidavits on the other, the original of which are on file, he cannot afterwards object to reading the copies in evidence, but they are to be considered as equivalent to office copies. *Jackson, ex dem. Wood, v. Harrow*, 11 J. R. 434.

39. The proceedings of a Justice's Court, though not technically a record, are in the nature of a record, and cannot be proved by parol, but the minutes of the justice must be produced, and the justice is a competent witness to verify his minutes. *Posson v. Brown*, 11 J. R. 166.

40. The certificate of a justice, of a judgment recovered before him, is *prima facie* evidence of the existence of the judgment; and if *not objected to by the defendant, on the trial, the Supreme Court will, on *certiorari*, consider it sufficient to support the second judgment. *Kellogg v. Mauney*, 2 J. R. 378.

41. But if the certificate be objected to, it ought to be proved by the justice himself who gave the judgment, or a sworn copy of his minutes should be produced. *McCarty v. Sherman*, 3 J. R. 429.

And see COURTS OF JUSTICES OF THE PEACE, VIII. 127, 128. 132.

III. Public documents.

42. A printed copy of public documents, transmitted to Congress by the president of the United States, and printed by the printer to Congress, is evidence. Per *Kent*, Ch. J. *Rad-*

cliff v. United Insurance Company, 7 J. R. 38. (In this case, a printed copy of a letter from the British secretary of state to the American ambassador, was offered as evidence of the existence of a blockade.)

43. Notarial copies of instruments executed in a foreign country, are not, in themselves, evidence. *Mauri v. Heffernan*, 13 J. R. 58.

44. But where the defendant entered into an obligation with the plaintiff, as his surety, at *Caraccas*, which not being performed, the plaintiff was compelled by proceedings at law there, to pay the amount for his principal; in an action by the surety against the principal, held, that a copy of the obligation, (which, according to the laws of the Spanish colonies, was made before a notary, who kept the original, and delivered copies to the parties,) authenticated according to the laws of Spain, connected with evidences that the original could not be procured, and of the admission of the defendant of its authenticity, and of a breach of the contract, was sufficient, without producing the decree against the plaintiff, and the original contract, or a sworn copy of it. *Ibid.*

45. It seems, that the register of marriages and births, kept in the records of a town, is evidence of pedigree and heirship. *Jackson, ex dem. Miner, v. Boneham*, 15 J. R. 226.

46. In an action to recover back a premium of insurance, on the ground that the plaintiff had no interest in the vessel at the time the insurance was made, the register of the vessel, which was in the name of other persons, is not even *prima facie* evidence to show that the plaintiff was not the true owner of the vessel. *Sharp v. United Insurance Company*, 14 J. R. 201.

47. A copy of the register of a vessel, certified to be a true copy, by the collector, is not, on proof of the hand-writing of the collector, evidence to show the interest of the insured, or a compliance with the warranty of *American* property in a policy of insurance; but as the collector has authority only to grant a copy to accompany the vessel, and not to grant copies generally, a copy given in evidence at the trial, must be authenticated in the usual way, that is, by the oath of a witness who has compared it with the original. *Cookidge v. New-York Firemen Company*, 14 J. R. 308.

*48. A ship's register is not evidence of the ownership of the vessel by the person in whose name the register stands. *Leonard v. Huntington*, 15 J. R. 298. 302. [*571]

IV. Corporation books.

49. Corporation books are evidence of the acts and proceedings of the corporation, but it must be made to appear that they are the books of the corporation, kept as such by the proper officer, or some other person authorized to make entries in his necessary absence. *Highland Turnpike Company v. McKean*, 10 J. R. 154.

50. It is not enough to prove the book to be

in the hand-writing of a person stated in the book itself to be the secretary, but not otherwise shown to be the proper officer. *Ibid.*

51. Entries made by a clerk in the books of trustees, being a corporation, by the direction of the trustees, are not evidence in a cause in which they are interested. *Jackson, ex dem. Donally, v. Walsh*, 3 J. R. 226.

52. Nor is the evidence of the clerk, who made the entries of the declarations of the trustees, admissible. *Ibid.*

53. If a dealer with a bank send his bank book, with money to be deposited, and the clerk enters the amount to his credit in the bank book, at the time the deposit was made, it is conclusive on the bank. *Manhattan Company v. Lydig*, 4 J. R. 377.

54. *Miller*, if the deposit is first made, and the entry is afterwards copied from the ledger into the dealer's bank book. *Ibid.*

V. Laws and legal proceedings of other states and countries; and judgments of Courts of competent and exclusive jurisdiction.

55. The attestation to the record of a Court of another state must be certified by the presiding judge of such Court. (1 L. U. S. 115.) *Smith v. Blagge*, 1 J. C. 238.

56. The judgment of a foreign Court of competent jurisdiction, is *prima facie* evidence of the points adjudged. *Smith v. Williams*, 2 C. C. E. 110. *Radcliff v. United Insurance Company*, 9 J. R. 277.

57. Foreign statutes cannot be proved by parol, but the common law of a foreign country may be shown by the testimony of intelligent witnesses of that country. *Kenny v. Clarkson*, 1 J. R. 385. 394.

58. In an action for putting on board a vessel bound to *Great Britain*, goods prohibited by the laws of that country to be imported, in consequence of which, on her arrival, the vessel was seized, and the owner put to great expense to obtain her release; *held*, that, in this case, the confession of the defendant, that he did carry contraband goods in the vessel, and the testimony of the master, that the goods so carried were contraband by the laws of *Great Britain*, were sufficient evidence of the law of that country. *Smith v. Elder*, 3 J. R. 105.

59. Copies of the proceedings or decrees of foreign Courts or tribunals, though under the hands and seals of the officers of [*572] such Courts, *are not, of themselves, evidence, but must be proved like other writings. *Delafield v. Hand*, 3 J. R. 310.

60. And the delivery of such a copy by a plaintiff, in an action on a policy of insurance, to a broker, to enable him to adjust a loss, will not make it good evidence in another suit, brought by one of the parties against the master of the vessel insured. *Ibid.*

61. A copy of proceedings in a foreign tribunal, certified under the seal of the secretary of state of the kingdom in which the tribunal exists, is inadmissible; it neither being a sworn copy, nor, unless it appears that the secretary

has officially the custody of records of that description, an office copy. *Vandervoort v. Smith*, 2 C. R. 155.

62. Exemplifications of the proceedings in the Court of another country or state, between the same parties, for the same cause of action, are not admissible evidence, under the general issue; but the pendency of another suit for the same matter should be pleaded in abatement. *Percival v. Hickey*, 18 J. R. 257.

63. The sentence of a foreign Court of Admiralty is only *prima facie* evidence as to the character of the property, and of a breach of the warranty of neutrality. [See INSURANCE, VI. 111, 112, 113.]

64. Admiralty surveys, as to the seaworthiness of a vessel, are *ex parte* evidence, and inadmissible to prove the facts stated in them. *Per Kent, J. Abbott v. Sebor*, 3 J. C. 39.

65. A sentence of a Court of Admiralty is sufficient evidence of a condemnation, without showing the previous proceedings; and a copy of the sentence, under the seal of the Court, signed by the actuary, in the absence of the register, accompanied with proof of the seal and signature, was *held* a sufficient authentication. *Gardere v. Columbian Insurance Company*, 7 J. R. 514.

66. The judgment of a Court of competent jurisdiction, upon matter of which it has cognizance, cannot be impeached collaterally: but stands firm, until vacated or reversed. *Hoyt v. Gelston*, 13 J. R. 141.

67. A sentence of *restitution* in the District Court of the *United States*, of a vessel which had been seized by the collector, is conclusive evidence, in an action of trespass brought by the owner against the collector, that the seizure was illegal. *Ibid.* *S. C. affirmed in error*, p. 561.

68. The judgment or decree of a Court of competent jurisdiction binds only parties or privies. *Ibid.*

69. Where a vessel is seized, as forfeited, by the surveyor of the port, under orders from the collector, and is libelled in the District Court, the surveyor and collector are privies, as it is to be presumed, nothing appearing to the contrary, that the seizure was made in consequence of information given by them to the government; and they are bound by the decree of the District Court; but if they are not informers, yet they are privies, by virtue of their office and act of seizure. *Ibid.*

70. A decree, in proceedings *ad rem*, of a Court of peculiar and exclusive jurisdiction, whether of condemnation or acquittal, is binding upon all persons. *Ibid.*

71. A judgment rendered by a Court of another state, having jurisdiction [*573] *neither of the subject of the action, nor of the person, is irregular and void, and cannot be admitted as evidence in this state. *Borden v. Fitch*, 15 J. R. 121.

72. As, where a judgment is rendered in another state against a defendant, not within jurisdiction of such state, by an attachment of his goods, and where the defendant never appeared, it cannot be enforced here. *Ibid.* *Pauling v. Bird's Executors*, 13 J. R. 192.

73. But where a judgment is fairly and regularly obtained in another state, and the Court has jurisdiction both of the subject matter and of the person of the defendant, such judgment is not merely *prima facie*, but conclusive evidence of the debt or matter adjudicated. *Andrews v. Montgomery*, 19 J. R. 162. *Contra, Hitchcock and Fitch v. Aicken*, 1 C. R. 460. *Hubbell v. Coudrey*, 5 J. R. 132. *Taylor v. Bryden*, 8 J. R. 173. and *Pauling v. Bird's Executors*, 13 J. R. 192. which, so far as they are opposed to the decision of the Supreme Court of the *United States*, in *Mills v. Duryee*, 7 *Cranch's Rep.* 481. are overruled.

VI. Deeds.

74. A paper, purporting to be the record of a deed, and not duly acknowledged, is inadmissible, either as a record, or as a copy of a deed. *Doe v. Roe*, 1 J. C. 402.

75. Where a statute declared, that divisions of land of which there was a map or note in writing, should be valid, provided such map and note were proved in a certain manner, filed and recorded; if the condition is not performed, the transaction is left as before, and a deed of partition, not recorded according to the act, may be given in evidence. *Jackson*, ex dem. *Van Denberg*, v. *Bradt*, 2 C. R. 169.

76. A deed, made in 1793, for lands lying in *Onondaga* county, duly acknowledged in *May*, 1794, but not recorded, was not allowed to be read in evidence, without proof of its execution. *Jackson*, ex dem. *Ramson*, v. *Shepard*, 2 J. R. 77.

77. The certificate of the proof or acknowledgment of a deed, taken before a judge, being necessarily *ex parte*, is not conclusive; but the party affected by the deed may contest its validity, and the force and effect of the formal proof. *Jackson*, ex dem. *Hardenbergh*, v. *Schoonmaker*, 4 J. R. 161.

78. Where A. and B. were subscribing witnesses to a deed, both of whom were dead at the time of the trial, and the hand-writing of A. was proved, and also, that he had signed the name of B., and there were two acknowledgments endorsed on the deed, one of which stated that A. and B. both signed as witnesses, and the other and latest acknowledgment stated, that A. had signed the name of B. in his presence, and at his request; *held*, that there was sufficient proof of the execution of the deed; and that the first certificate of acknowledgment could only go to impeach the credit of A., which was matter for the jury to consider, on the question, whether the grantor had executed the deed or not; but that the reasonable supposition was, that the officer had made a mistake in the form of his certificate. *Jackson*, ex dem. *Boyd*, v. *Lewis*, 13 J. R. 504.

79. A deed from a public hospital, under its corporate seal, must be proved in [*574] the same manner as other deeds, it not being an institution of such notoriety that its seal will prove itself. *Jackson*, ex dem. *Martin*, v. *Pratt*, 10 J. R. 381.

80. Evidence by a person, that he had delivered a deed to the clerk of the county to be

recorded, and that search had been made in the clerk's office, and that it could not be found, is not sufficient evidence of the loss of a deed to entitle the party to read a copy in evidence, unless it be shown, that the deed was never re-delivered by the clerk. *Jackson*, ex dem. *Dunbar*, v. *Todd*, 3 J. R. 300.

81. The existence and execution of a deed from commissioners appointed under the statute to make partition, was, without any proof of loss, allowed to be proved by the testimony of one of the commissioners, and of the counsel who drew the deed. *Jackson*, ex dem. *Gillespy*, v. *Woolsey*, 11 J. R. 446.

82. In such case it may be presumed that the commissioners had executed a deed pursuant to the order of the Court. *Ibid.*

83. To entitle a deed to be given in evidence as an ancient deed, without proof of its execution, it should have been accompanied by a possession, in conformity thereto, for thirty years. *Jackson*, ex dem. *Burhans*, v. *Blanshan*, 3 J. R. 292.

84. Where an agreement, relative to lands, has existed for more than a hundred years, and uninterrupted possession under it by one of the parties, his heirs and assigns, the opposite party is concluded from disputing the title, and the Court will not listen to technical objections to the deed, for want of apt words, proper parties, or form. *Emans v. Turnbull*, 2 J. R. 313.

85. If an ancient deed which, when possession corresponds, proves itself, recite a power of attorney, which was necessary to give it validity and effect, the due execution of the power will be presumed. *Doe*, ex dem. *Clinton*, v. *Phelps*, 9 J. R. 169. *S. P. Doe*, ex dem. *Clinton*, v. *Campbell*, 10 J. R. 475.

86. An admission, in a recital of a deed, of one of the lessors of the plaintiff, in an action of ejectment, is evidence against all of them, as he could not be called as a witness, and there was a community of interest among them. *Bradt*, ex dem. *Cortlandt*, v. *Klein*, 17 J. R. 335.

87. A sheriff's deed is not admissible evidence, without showing the judgment and execution, under which he sold the land. *Bowen v. Bell*, 20 J. R. 338.

88. A sheriff's deed is, *per se*, evidence of title in the grantee; but it may be set aside, on motion of the debtor, or of a judgment creditor, on the ground of fraud in the sale; and parol evidence is admissible to show the fraud. *Jackson*, ex dem. *Feeter*, v. *Sternberg*, 20 J. R. 49.

VII. Wills.

89. The record of a will, proved under the statute, (*Sess. 24. c. 9. s. 6. 1 N. R. L. 365.*) is not conclusive upon the heir, so as to prevent the admission of evidence to impeach its validity. *Jackson*, ex dem. *Woodhull*, v. *Rumry*, 3 J. C. 234.

*90. The record of a will, like [*575] that of deed, is only *prima facie* evidence of its authenticity. *Ibid.*

91. In order that a will may be given in evidence as an ancient deed, there should

have been a possession of 30 years, in conformity to it; a lapse of thirty years, since the execution of it by the testator, is insufficient. *Jackson, ex dem. Burhans, v. Blanshan*, 3 J. R. 212. See *ante*, 83, 84.

92. A will, executed nearly 80 years ago, was admitted in evidence as an ancient deed, although possession had not followed it; the premises in question being in a wild and uncultivated state, and there being certificates of its execution, and of its being recorded, endorsed upon it, by persons whose hand-writing could be proved, and which would tend to show its existence at a remote period. *Jackson, ex dem. Lewis, v. Larouay*, 3 J. C. 283.

93. Where the witnesses to a will were all dead, and one of them had signed the initials of his name, as his mark, and the testator had also signed his mark, and the hand-writing of two of the witnesses was proved; and a witness at the trial, in 1807, swore that he had seen the other witness make his mark, in the year 1760, to a paper in his possession, and that, from a comparison of the two marks, and from the peculiar manner in which one of the initial letters was made, he believed the mark affixed to the will was made by the witness to it; *held*, that this was sufficient evidence of the execution of the will to permit it to be read to the jury, when accompanied with evidence of a possession by the devisees under the will, and of the declarations of one of the other witnesses, in his life-time, as to the due attestation by all the witnesses. *Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 J. R. 144.

94. The acts and declarations of third persons, in possession of lands, are admissible in evidence, to prove a continued possession under an ancient will, so as to make out its formal execution. *Ibid.*

95. If either husband or wife be a witness to a will containing a devise or legacy to the other, such devise or legacy is void, and the party is a competent witness to the will. *Jackson, ex dem. Cooder, v. Woods*, 1 J. C. 163. *Jackson, ex dem. Beach, v. Durland*, 2 J. C. 314.

VIII. Other private writings.

96. A party cannot offer his own letters as evidence in his favor. *Toule v. Stevenson*, 1 J. C. 110.

97. In an action against an executor, for a legacy, a memorandum in the hand-writing of the testator, prior to the date of the will, and an account entered in his books, are not sufficient proof of a debt, to support the defendant's claim to retain. *Rickets v. Livingston*, 2 J. C. 97.

98. An alteration on the face of a note, unsupported by other proof, is not competent evidence to set aside the note. *Rankin v. Blackwell*, 2 J. C. 198.

99. But when there is such an alteration or erasure as to render the note suspicious, the party may go into evidence of general corroborating circumstances, to strengthen that suspicion. *Ibid.*

*100. A memorandum of a deceased partner is not evidence in favor of the survivor. *Ibid.*

101. A map of partition by certain commissioners, made nearly 100 years ago, by virtue of an act of the legislature, being *ex parte* evidence, is inadmissible to prove a title. *Jackson, ex dem. Beekman, v. Witter*, 2 J. R. 180.

102. Where an account has been a long time settled, it cannot be opened generally, yet it may be opened for the purpose of falsifying particular items. *Manhattan Company v. Lydig*, 4 J. R. 377.

103. The account books of a party are not evidence in his favor. *Case v. Potter*, 8 J. R. 211.

104. If such evidence is to be tolerated at all, owing to the usage which may have crept in, and the difficulty of proof, it can never apply to a charge for money lent, but only to the regular entries of the party in the usual course of his business, to be considered by the jury in connection with other circumstances. *Ibid.*

105. Where there are regular dealings between the plaintiff and defendant, and it is proved that the plaintiff keeps honest and fair books of account, that some of the articles charged to the defendant have been delivered to him, and that the plaintiff keeps no clerk, his books of account are, under the circumstances, and from the necessity of the case, admissible evidence for the consideration of the jury. *Vosburgh v. Thayer*, 12 J. R. 461.

106. If A. authorize B. to adjust a demand with C., and pay what is due, in an action by A. against B., in which B. sets off the money paid C., C.'s receipt is *prima facie* evidence of payment, and of the legality of the adjustment; and it lies with A. to show fraud in the adjustment, or abuse of the discretion. *Sherman v. Crosby*, 11 J. R. 70.

107. Where the defendant gave a written order in favor of S. on the plaintiff, stating that S. wished to trade with him for hides, to the amount of 80 or 100 dollars, and that the defendant would be responsible for the engagements of S., and S. endorsed on the order a receipt for hides to the amount of 100 dollars; *held*, that the receipt was *prima facie* evidence of the delivery of the hides, pursuant to the order. *Rawson v. Adams*, 17 J. R. 130.

108. *It seems*, that a copy of a letter, which the witness swore was a true copy of the original copy, in the plaintiff's letter book, made by him at the time, from the original letter put by him in the post-office, is admissible, after notice given to the defendant to produce the original letter. *Robertson v. Lynch*, 18 J. R. 451.

IX. Proof of hand-writing, and subscribing witnesses.

109. If the witness to a deed be dead, proof of his hand-writing is sufficient. *Mott v. Doughty*, 1 J. C. 230.

110. Hand-writing may be proved by witnesses from previous knowledge of the hand, derived either from having seen the person write, or from authentic papers received in the course of business. *Tilford, v. Knott*, 2 J. C. 211. *S. P. Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 J. R. 144.

[*577] *111. So, a person who had been accustomed to see the letters of the party, although he had never seen him write, may testify as to his belief that the hand-writing is his, from the knowledge which he had acquired from the correspondence. *Tyford v. Knott*, 2 J. C. 211.

112. But if the witness have no previous knowledge of the hand, he cannot be permitted to decide on it in Court, from a comparison of hands. *Ibid.* (See *Olmstead v. Stewart*, 13 J. R. 238.)

113. Whether papers signed by the party, admitted to be genuine, can be delivered to a jury, to determine, by a comparison, the genuineness of the paper in question? *Quere. Ibid.*

114. The hand-writing of a party to a receipt may be proved by a witness who has never seen him write, but who, in the course of his dealings with him, has received his promissory notes, which the party has paid, if the witness swears affirmatively, from his knowledge derived from these facts, that he believes the signature to the paper to be the proper hand-writing of the party. *Johnson v. Davenport*, 19 J. R. 134.

115. Evidence of the confession of the party, that he executed the promissory note on which the action is brought, does away the necessity of calling the subscribing witness. *Hall v. Phelps*, 2 J. R. 451.

116. If the subscribing witness deny the execution of the deed, it may be proved *aliunde*. Per *Spencer, J. Ibid.* But in the case of a deed not formally acknowledged, and not agreed to be admitted as evidence, and which the party denies by pleading *non est factum*, confession is insufficient; the subscribing witness must be produced, or his absence accounted for. *Fox v. Reil*, 3 J. R. 477.

117. Proof of the hand-writing of a witness absent from the state is sufficient, without proving the hand-writing of the obligor. *Stubbs v. Champlin*, 4 J. R. 461.

118. A deed 44 years old, to which there were two witnesses, was allowed to be read in evidence, on proof of the hand-writing of one of the subscribing witnesses, and that he was dead, without any proof of the hand-writing of the other witness, or that he was dead or absent, or could not be found, or that any inquiry had been made after him; but there were strong circumstances in the case to induce a presumption that he could not be found, or was dead, or beyond sea. *Jackson, ex dem. Livingston, v. Burton*, 11 J. R. 64.

119. The rules and practice of the Courts leave this point with some latitude of discretion. Per *Kent, Ch. J. Ibid.*

120. If there be two or more subscribing witnesses to a deed, the calling of one to prove the deed, has always been held sufficient. Per *Kent, Ch. J. Ibid.*

121. Where a person calls on the maker of a note, payable to A., or bearer, to which there is a subscribing witness, and demands payment, but neither shows him the note, nor mentions the amount or date of it, and the maker acknowledged that he had given a note to A., and said that he would pay it at a future day,

this is not a sufficient admission of the note, to supersede the necessity of proving it by the subscribing witness. *Shaver v. Ehle*, 16 J. R. 201.

122. The fact of a *rasure* in a deed may be proved by any other person than the subscribing witness. *Penny v. Corwith*, 18 J. R. 499.

123. Where there were two subscribing witnesses to a paper, one of whom was proved to be dead, and the other living within the state, but too aged and infirm to attend the trial, proof of his hand-writing is inadmissible, as his examination under oath, taken under an order of the Court for that purpose, or under the statute, would be better evidence. *Jackson, ex dem. Bond, v. Root*, 18 J. R. 60.

124. A deed cannot be proved by the grantee in an action in which he is not a party, without accounting for the absence of the subscribing witnesses. *Willoughby v. Carleton*, 9 J. R. 136.

125. Where the witnesses to a written contract were the sons of the defendant who executed the contract, and the plaintiff, the day before the sitting of the circuit, inquired of the defendant for the witnesses, in order to *subpoena* them, and was falsely told by the defendant that they were gone on a journey; *held*, that this was not a sufficient reason for admitting other testimony of the hand-writing, the plaintiff not having used sufficient diligence to procure the witnesses. *Mills v. Troist*, 8 J. R. 121.

X. Translations and copies.

126. A translation from a foreign language must have been made on oath; and the translation by a consul, not on oath, can have no greater validity than that of any other person. *Vandevoort v. Smith*, 2 C. R. 155.

127. Where facts have been given in evidence sufficient to induce a presumption that an instrument has been lost, a copy may be received, or parol proof given of its contents. *Jackson, ex dem. Donaldson, v. Lucett*, 2 C. R. 363.

128. So, if it be shown that a will cannot be found, a record of the probate in the book of the judge of the Court of Probates is evidence. *Ibid.*

See ante, VI. 80.

XI. Parol evidence to explain, vary, or contradict written instruments.

129. Extrinsic evidence cannot be received to contradict, vary, or add to, an instrument in writing, but only to explain and elucidate it; and this only in the case of a latent ambiguity. *Jackson, ex dem. Van Vechten, v. Sill*, 11 J. R. 201.

130. Parol evidence is inadmissible to show that in a release of all demands, a particular debt was not intended to be released. *Pierson v. Hooker*, 3 J. R. 68.

131. Such evidence is inadmissible to show that a boundary is incorrectly described in a deed. *Jackson, ex dem. Putnam, v. Bowen*, 1 C. R. 358.

132. Evidence of usage is inadmissible to ex

plain the language of a deed not ambiguous or equivocal. *Cortelyou v. Van Brundt*, 2 J. R. 357.

*133. But where the words of [*579] an ancient deed are equivocal, the usage of the parties under the deed is admissible to explain the language. *Livingston v. Ten Broeck*, 16 J. R. 14. As, where the grantor, in a deed executed in 1694, gave to the grantee the privilege of cutting timber, to be used for *building* on the premises conveyed, from the woods of the grantor, evidence that the grantee and his heirs, &c., with the knowledge of the grantor, his heirs, &c., had cut wood for the purpose of *erecting fences*, is admissible to show the intention of the parties to apply the word "building" to the making of fences, as well as the erection of houses and barns. *Ibid.*

134. So, *possession* may be resorted to, in the location of land, to explain the intention of parties, where the words of the deed are equivocal. *Per Spencer, J. Ibid.*

135. *Parol* evidence is inadmissible to show that the land conveyed did not contain the quantity of acres expressed in the deed. *Howes v. Barker*, 3 J. R. 506.

136. *Parol* evidence to show that a different or greater consideration than the one stated in a written contract was intended, is inadmissible. *Schemerhorn v. Vanderheyden*, 1 J. R. 139. But the date of a deed, and whether the consideration expressed was paid or not, are facts open for consideration by *parol* proof. *Shepherd v. Little*, 14 J. R. 210. See *post*, pl. 144.

137. A, by a written contract, agreed to receive of B. 60 shares of the *Hudson Bank*, on which 10 dollars per share had been paid, and to deliver B. his note for 667 dollars, and pay him the balance in cash; and also to pay *five per cent.* advance: here is a latent ambiguity, and the nominal value of each share being 50 dollars, *parol* evidence was admissible, to show whether the *five per cent.* advance was to be paid on the sum paid in on each share only, or on the nominal amount. *Cole v. Wendel*, 8 J. R. 116.

138. A patent was granted to *David H.* without any other words of description to identify the patentee; *parol* evidence was held admissible to show that *Daniel H.* and not *David H.* was the patentee intended. *Jackson*, ex dem. *Dickson*, v. *Stanley*, 10 J. R. 133.

139. A patent was issued to a person of the name of *George Houseman*, (a real person, capable of accepting the grant,) when a person of the name of *George Hosmer* was, in fact, intended; *held*, that there was no such latent ambiguity as would justify the admission of *parol* evidence, to show that the latter was the person really intended. *Jackson*, ex dem. *Houseman*, v. *Hart*, 12 J. R. 77. *Spencer, J.* absent, and *Thompson, Ch. J.* dissenting. [In *Jackson v. Goes*, 13 J. R. 518. the two cases of *Jackson v. Stanley*, and *Jackson v. Hart*, came in review, and they were said to be distinguishable, and the latter not intended to shake or overrule the former. *Van Ness, J., Platt, J. and Yates, J.* adhered to the decisions in those cases; *Thompson, Ch. J.*, and *Spencer, J.*, agreed, that the identity of the patentee or grantee was, in many cases, a latent ambiguity,

produced by extrinsic or collateral matter, and explainable by *parol* evidence. And see *tit. CHANCERY, XXII. Evidence, B. Phillips' Evid. v. l. c. 10. s. l. p. 415. and note (a.)*] See pl. 140. 141.

*140. It is competent to a de- [*580] fendant in ejectment to prove that a person claiming as patentee, although of the same name, was not the patentee intended by the grant. *Jackson*, ex dem. *Shultz*, v. *Goes*, 13 J. R. 518.

141. As, where the plaintiff, in an action of ejectment, on the demise of P. S., produced in evidence a patent to P. S., issued in pursuance of the act of *April 6, 1790*, to carry into effect the concurrent resolutions of the legislature, for granting certain lands promised as bounty lands, &c.; and the defendant proved that there was another person of the name of P. S. living, who was too young during the revolutionary war to be a soldier, and that the lessor of the plaintiff had not himself been a soldier in that war; *held*, that the defendant was entitled to judgment. *Ibid.*

142. *Parol* evidence is inadmissible to show that a lease executed in the name of, and reserving rent to, one person, were intended for the benefit of another. *Jackson*, ex dem. *Bonnel*, v. *Foster*, 12 J. R. 488.

143. So, it is inadmissible to show that part of the premises contained in a deed, were intended to be excepted from the grant. *Jackson*, ex dem. *Russell*, v. *Croy*, 12 J. R. 427.

144. Where the consideration of a conveyance is expressed therein, and that it was paid by the grantee or assignee, *parol* evidence is, nevertheless, admissible to show that it had not, in fact, been paid. *Shepherd v. Little*, 14 J. R. 210. *S. P. Bowen v. Bell*, 20 J. R. 338.

145. On a submission to arbitration of all causes of action, *parol* evidence is inadmissible to show that arbitrators had awarded concerning a matter not in controversy between the parties at the time of the submission. *De Long v. Stanton*, 9 J. R. 38.

146. *Parol* evidence of an agreement to enlarge the time for performing a condition, or of a waiver of the performance of the condition of a bond, is admissible. *Fleming v. Gilbert*, 3 J. R. 523.

147. So, of a *parol* agreement, to enlarge the time of performance of a written simple contract. *Keating v. Price*, 1 J. C. 22.

148. But it is inadmissible to show that a time of payment, different from that appearing on the face of the agreement, was intended. *Thompson v. Ketcham*, 8 J. R. 189. *S. P. Fitzhugh v. Runyon*, 8 J. R. 375.

149. On a written warranty of soundness, *parol* proof is admissible, to show that at the time of sale the vendor informed the vendee of a defect. *Schuyler v. Russ*, 2 C. R. 202.

150. A receipt, although absolute in its terms, and expressed to be in full, is not conclusive; and *parol* evidence is admissible to show a mistake in it, or to explain it. *Ensign v. Webster*, 1 J. C. 145. *House v. Love*, 2 J. R. 378. *Tobey v. Barber*, 5 J. R. 68. *M Kinstry v. Pearsall*, 3 J. R. 319. *Johnson v. Weed*, 9 J. R. 310. *Putnam v. Lewis*, 8 J. R. 389.

151. A receipt for rent arising at a subsequent period, is presumptive evidence that all rent previously accruing had been paid. *Decker v. Livingston*, 15 J. R. 479.

52. But *parol* evidence is not admissible, to show that a receipt *given twenty-five years ago was for continental money, and therefore of less value than the sum expressed. *Robert v. Garrie*, 3 C. R. 14.

153. Though parties and privies are *estopped* from contradicting a written instrument by *parol* proof, the rule does not apply to strangers who have an interest in knowing the real truth of the case. *Overseers of New-Berlin v. Overseers of Norwich*, 10 J. R. 229.

154. *Parol* evidence is inadmissible to show that an execution on which a levy and sale of goods had been made, had been withdrawn, and the levy abandoned by the plaintiff, in contradiction to the sheriff's deed. *Jackson, ex dem. Clowes, v. Vanderheyden*, 17 J. R. 167.

155. But the proper remedy is to apply to the Court to set aside the execution, &c. *Ibid.*

156. So, *parol* evidence is inadmissible to show that the land was sold under a different judgment and execution, than those recited in the deed. *Jackson, ex dem. Feeter, v. Sternbergh*, 20 J. R. 49. But it is admissible to show fraud in the sale. *Ibid.*

157. Where a plaintiff in an execution gave to a deputy sheriff, who had the defendant in custody on a *ca. sa.*, a writing stating that he wished the officer to show the defendant as much indulgence as he could with safety to himself, and without hazarding, in any way, the debt; *held*, that the writing being, in itself, ambiguous, *parol* evidence of the conversation between the plaintiff and the officer at the time, and of collateral extraneous circumstances, to ascertain the nature and extent of the indulgence which it was intended might be shown to the defendant, was admissible. *Ely v. Adams*, 19 J. R. 313.

XII. Notice to produce papers.

158. Where a paper, on which the action is founded, is in the possession of the opposite side, and the party has not given notice to produce it, whereby to entitle himself to prove its contents, he will be nonsuited. *Dobbin v. Watkins*, C. C. 33. *S. P. Rogers v. Van Hoesen*, 12 J. R. 221.

159. A party is not bound to produce a paper, unless the opposite party has given him notice for that purpose. *Waring v. Warren*, 1 J. R. 340.

160. Where a party had given notice to produce a deed which, there was strong ground to presume, had either been destroyed or was in the possession of the opposite party, he was allowed to give *parol* evidence of its contents. *Jackson, ex dem. Gillespy, v. Woolsey*, 11 J. R. 446.

161. Notice to produce a writing upon the trial, without referring to any particular circuit, is not spent by the cause not being tried at the next circuit, but extends to any subsequent time of trial whenever it should take

place. *Jackson, ex dem. Burr, v. Shearman*, 6 J. R. 19.

162. If, after notice given, the party puts the writing out of his power, he ought to apprise the opposite side of it, that he may know where to look for it. *Ibid.* And if it does not appear by what means it went out of his possession, it will be considered as still continuing under his control. *Ibid.*

163. Whether a paper called for by the opposite party, and produced at the trial, immediately becomes evidence, and the party calling *for it is entitled [*582] to inspect it first, and then offer or reject it at his pleasure? *Quere. Lawrence v. Van Horne*, 1 C. R. 276. *But see Kenny v. Clarkson*, 1 J. R. 385.

164. Where a party had given notice to produce a deed, which, there was strong presumption, had either been destroyed, or was in the possession of the opposite party, he was allowed to give *parol* evidence of its contents. *Jackson, ex dem. Gillespy, v. Woolsey*, 11 J. R. 446.

165. A deed produced by a party at the trial, pursuant to notice to him from the opposite party, is, (when the party producing it is one of the parties to the deed,) *prima facie*, to be taken as duly executed, and may be read in evidence without proof of its execution. *Bells v. Badger*, 12 J. R. 223. *See Kenny v. Clarkson*, 1 J. R. 385, and *note*, p. 395, in which the Court had some doubt as to the rule of practice.

166. But the rule is now settled, that where a party to the suit, pursuant to notice, produces an instrument, to which he is a party, or under which he claims a beneficial estate, it is not necessary that the opposite party, whether he be a party or a stranger to the instrument, should call the subscribing witness to prove its execution. *Jackson, ex dem. Stewart, v. Kingsley*, 17 J. R. 158.

167. But in all other cases, the execution of the instrument must be regularly proved by the party calling for, and offering it in evidence. *Ibid.*

168. And the circumstance of the names of the subscribing witnesses being torn off, will not exempt the party calling for and offering the instrument, from the necessity of proving the hand-writing of the party who executed it, there being no evidence that the party producing the deed had mutilated it. *Ibid.*

169. When the form of the action gives the defendant notice to be prepared to produce an instrument, if necessary, to falsify the plaintiff's evidence, the plaintiff need not give the defendant notice to produce it. *People v. Holbrook*, 13 J. R. 90. *S. P. Hardin v. Kretzinger*, 17 J. R. 293.

170. Where the action is not founded on any instrument of writing, but the declaration contained only the general counts on implied premises, the defendant is not entitled to an order on the plaintiff to produce letters or papers in his possession, or to give copies of them. *Widdis v. Bailey*, 19 J. R. 268.

XIII. Presumption.

171. Where a person might have claimed a conveyance from a devisee, by virtue of a trust

contained in the will of the deviser, and entered on the premises fifty years ago, and he and his heirs had been in the uninterrupted possession, as far as the lands were, from their nature, susceptible of possession, a deed is to be presumed. *Van Dyck v. Van Beuren*, 1 C. R. 84.

172. An ouster was presumed, where no claim had been made for 42 years. *Ibid.*

*173. A grant of lands under [*583] navigable waters to the owners of the adjacent soil, is not presumed, without evidence of long exclusive possession and use, to warrant such a presumption. *Palmer v. Hicks*, 6 J. R. 133.

174. Where an agreement for the sale and conveyance of a piece of land, dated in 1689, was produced in evidence, the jury were allowed, in 1809, to presume a conveyance pursuant to the agreement. *Jackson*, ex dem. *Stoutenburgh v. Murray*, 7 J. R. 5.

175. Where the location of a patent or grant executed nearly a century ago, comes in question, every presumption will be made against a party who neglected to have his land surveyed, and its boundaries accurately defined, or to make an actual location of them, at the time. *Jackson*, ex dem. *Hardenbergh v. Schoonmaker*, 7 J. R. 12.

176. Where M. died in possession of land, and his son and heir at law succeeded to the possession, and continued in the undisturbed possession of it for above eighteen years; held, that a purchase of the title by the ancestor might be presumed. *Jackson*, ex dem. *McDonnell v. McCall*, 10 J. R. 377.

177. And, where there was an order of the council of the colony of *New-York*, in 1764, for the survey of the lot, as allotted to J. P., and a survey thereof made, though no patent could be found on record; held, that a patent to J. P., and a deed to him from the ancestor, might be presumed for the sake of quieting the possession. *Ibid.*

178. Where A., on the 7th of *December*, 1803, sold to B. a farm, the possession of which was to be delivered on the 1st of *May*, 1806, free from all encumbrances, &c., and B. gave to A. his several promissory notes for the consideration money, which were left in the hands of C. until A. should perform his written agreement on the 7th of *December*, 1805, as to the delivery of the farm, &c., and B. took possession of the farm on the 1st of *May*, 1808, the title to which had not been questioned, and all the notes were paid by B. except one, which C. delivered to A.; in a suit on that note by A. against B., held, that a jury might infer from circumstances a re-delivery of the note by the defendant to the plaintiff, and that the facts in the case were sufficient evidence of a performance of the condition on which the note was left in the hands of C., or that the defendant had waived the condition, or dispensed with its performance. *Grote v. Grote*, 10 J. R. 402.

179. Where, in a sale under a power contained in a mortgage, a drain of 10 feet in width was excepted, it was intended, after a lapse of 16 years from the sale, that the drain had antecedently existed, and was founded in

usage, or was an exception in the previous deeds of the land. *Bergen v. Bennett*, 1 C. C. E. 1.

180. Where the mortgagee has never entered into possession of the mortgaged premises, and no demand has been made, or interest paid for twenty years, the mortgage will be presumed to have been satisfied. *Jackson*, ex dem. *People v. Wood*, 12 J. R. 242.

181. And where (the mortgage not having been registered) it is attempted to repel the presumption of payment by the acknowledgment of subsequent purchasers of the land, the evidence of notice to them, of the existence of the mortgage, must be clear and explicit. *Ibid.*

*182. Where it was agreed between a lessor and a lessee, that the [*584] former should surrender or release his lease, and take a new lease, and a new lease is accepted accordingly, the surrender or release of the old lease will be presumed. *Springstein v. Schermerhorn*, 12 J. R. 357.

183. Where, on a petition made in 1765, the several owners conveyed the whole undivided tract to A. in trust, to convey to each of the grantors his proportion in severalty, and the land had been since generally held according to such partition; in an action of ejectment brought in 1807, by a person claiming under one of the parties between whom the partition was made; held, that a conveyance by the trustee, in pursuance of the trust, was to be presumed. *Jackson*, ex dem. *Colden v. Moore*, 13 J. R. 513.

184. Where a partition was made in 1764, under the colonial act of 1762, and on the trial in 1813, the map and field book which had been filed pursuant to the directions of the act were produced in evidence, but the balloting book could not be found; held, after such a lapse of time, and the act of the parties recognizing the partition, that it was to be presumed that every thing was done that was required to render the partition valid; and that it could not now be invalidated merely for the want of the balloting book. *Jackson*, ex dem. *Klock v. Richtmyer*, 13 J. R. 367.

185. Where a married man sailed from *New-York*, on a voyage to *South America*, and neither he nor the vessel was heard of afterwards; held, that this was sufficient presumptive evidence of his death, on a plea of *coverture*, in an action brought against his wife, as a *feme sole*, twelve years after his departure from *New-York*. *King v. Paddock*, 18 J. R. 141.

186. Where a person is bound to do a certain act, the omission to do which would be a culpable neglect of duty, the performance of it will be presumed, unless the contrary is proved. *Hartwell v. Root*, 19 J. R. 345.

When the payment of a bond will be presumed. See *BOND*.

Further as to the presumptions arising from length of possession. See *EJECTMENT*, II. *ACTIONS (REAL)* 17.

When a re-entry will be presumed. See *EJECTMENT*, IX.

See *tit. CHANCERY*, XXII *EVIDENCE*, D.

XIV. *What may be proved by parol.*

187. *Parol* evidence is admissible to prove a resulting trust. *Jackson*, ex dem. *Kane*, v. *Sternbergh*, 1 J. C. 153.

188. Where a written order for insurance was laid before the insurers by the broker, who at the same time verbally communicated to them the facts said to be contained in the order, the broker may give evidence of his verbal communication without producing the order itself, for it is not giving *parol* evidence of the contents of a written paper. *Livingston* v. *Delafield*, 1 J. R. 522.

189. Where a person who gave evidence on a former trial between the same parties is since dead, upon due proof of such trial, and the death of the witness, it is competent to prove what such witness had *formerly sworn. *Jackson*, ex dem. *Potter*, v. *Bailey*, 2 J. R. 17. S. P. [*585]

Powell v. *Waters*, 17 J. R. 176.

190. So, what was sworn to before the *Onondaga* commissioners by a witness since deceased, may be given in evidence in a trial between the persons who were parties to the former proceedings. *Ibid.*

191. *It seems*, that if the testimony of what a witness swore to at a former trial, be unaccompanied with a *postea*, or record of the former suit, and that be made an objection at the time, the objection is good. *Beals* v. *Guernsey*, 8 J. R. 446.

192. But where no objection is made at the time, to the want of the *postea*, the witness's evidence of what he swore to, at the trial, will be received, though unaccompanied with the *postea*; for it will be presumed that the pendency of the former suit or trial was admitted. *White* v. *Kibling*, 11 J. R. 128.

193. A. devised a farm to his wife during her widowhood, and remainder to his children; B. claiming under a conveyance of the land from A., brings an action of ejectment against the widow and another, and recovers on proof of the existence and contents of the deed from A., which was lost, and enters into possession. After the death of the widow, C., claiming under a grantee of some of the devisees in remainder of A., brought an action of ejectment against B., and at the trial B. produced the record of recovery by him, and offered evidence of what had been sworn to on the trial of that action, by a witness since deceased, and whose testimony went to establish the existence of the deed from A. to B.; *held*, that the evidence was admissible; that the widow and devisees in remainder under whom C., claimed were all privies in estate; that the evidence of a witness in a former suit, since deceased, is evidence, not only where the same point in issue afterwards arises between the same parties, but also for B. against all persons standing in the relation of privies in blood, privies in estate, or privies in law. *Jackson*, ex dem. *Bates*, v. *Lawson*, 15 J. R. 539.

194. Evidence of the contents or execution of a deed not produced, cannot be admitted, unless the deed is in the possession of the opposite party, and he refuses to produce it, on

notice for that purpose, or unless it is lost or destroyed. *Jackson*, ex dem. *Livingston*, v. *Frier*, 16 J. R. 193.

195. *Parol* evidence is admissible to show the contents of an instrument which, having been delivered to a third person, he was unable to find, and believed to be lost. *Livingston* v. *Rogers*, in error, 2 J. C. 488. S. C. 1 C. C. E. xxvii.

196. *Parol* evidence is inadmissible to show the contents of a note said to be lost, until sufficient proof on oath has been given of the loss of it. *Cary* v. *Campbell*, 10 J. R. 363.

197. Proof that a trunk of papers belonging to L., in the possession of his widow after his death, was destroyed by fire with her house, is sufficient evidence to entitle the party to give *parol* evidence of the existence and contents of a paper supposed to have been in the trunk. *Jackson*, ex dem. *Livingston*, v. *Neely*, 10 J. R. 374.

198. And where that paper was a power of attorney, the testimony of the attorney that he had executed a deed, which he was authorized *to do by the power, is [*586] sufficient evidence of the existence of the power, and of his authority under it. *Ibid.*

199. Where a note is given to settle an account, the plaintiff cannot give in evidence the account, nor can he give *parol* evidence of the contents of the note, unless he clearly show that the note has been lost or destroyed. *Angel* v. *Felton*, 8 J. R. 149. See 1 J. R. 34.

200. The evidence of the loss of a written instrument, so as to lay a foundation for the introduction of inferior proof of its execution and contents, is addressed solely to the judge before whom the cause is tried, who is to determine exclusively, without the intervention of the jury, whether it is sufficient to authorize the admission of secondary evidence. *Jackson*, ex dem. *Livingston*, v. *Frier*, 16 J. R. 193. See *Chamberlain* v. *Gorham*, 20 J. R. 144.

201. And, in this and similar cases, (such as the service of notice to produce the paper on the trial, or that the subscribing witness to the deed could not be found,) the rules in relation to testimony to a jury, do not apply; but the judge may admit the evidence of an interested witness, or even, *it seems*, that of a party in the cause, to prove the loss of the deed, or other collateral fact. *Ibid.*

202. In regard to the proof of the loss of an instrument, there is a distinction between such papers as have ceased to be of any value, or any evidence of title, and such as are *muniments* of title; as to the former, the slightest proof of loss from lapse of time, &c., is sufficient to entitle the party to give *parol* evidence of their contents; but as to the latter, the rule of evidence is more strict. *Jackson*, ex dem. *Bond*, v. *Root*, 18 J. R. 60.

203. To entitle a party to give evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will, in those places where it would most probably be

found, if in existence; as in the office of the surrogate of the county where the testator died, or in the office of the judge of probates, or of the executor. *Jackson, ex dem. Bush, v. Husbrouck*, 12 J. R. 192. *S. P. Jackson, ex dem. Livingston, v. Frier*, 16 J. R. 193.

204. In an action by the master of a ship for his wages, against the defendant, as owner of the vessel, and who held a bill of sale from M., and also a register of the ship, in his own name, the defendant may prove, by parol, that the bill of sale was given to him merely by way of collateral security or mortgage. *Chapman v. Butler*, 18 J. R. 169.

205. Where it appears, from the evidence in the cause, that the contract on which the action was brought was in writing, the plaintiff is bound to produce it. *Rogers v. Van Hoesen*, 12 J. R. 221.

206. The evidence of a witness called to prove the contents of a deed, which the adverse party has in his possession, and has refused to produce, after notice for that purpose, is not to be rejected, because the witness, though he had often perused the deed, was unable to recollect any of the *courses* stated in the description of the premises contained in the deed; the object of the inquiry being to show, that the premises in question were included in such deed; and, by not producing the deed when called for, a strong

[*587] presumption arises against the *party, that the deed does contain the premises, as testified by the witness. *Jackson, ex dem. Neilson, v. McVey*, 18 J. R. 330.

207. The contents of a writ cannot be proved by parol, so long as the writ itself, or a sworn copy of it, is capable of being produced. *Brush v. Taggart*, 7 J. R. 19.

208. Parol acknowledgments, although they may be good to support a tenancy, or to satisfy doubts in cases of possession, ought not to be received as evidence of title. *Jackson, ex dem. Burr, v. Shearman*, 6 J. R. 19. *S. P. Jackson, ex dem. White, v. Cary*, 16 J. R. 302.

209. Parol evidence of a disclaimer is inadmissible. *Jackson, ex dem. Van Allen, v. Vosburgh*, 7 J. R. 186. *S. P. Jackson, ex dem. Livingston, v. Kisselbrack*, 10 J. R. 336. *S. P. Brant, ex dem. Cuyler, v. Livermore, id.* 358.

210. The execution of an instrument, not under seal, may be proved by the admission of the defendant. *Mauri v. Heffernan*, 13 J. R. 58.

211. Evidence of usage, although it may be resorted to for the explanation of a commercial instrument, ought not to be received to contradict a settled rule of commercial law. *Fritth v. Barker*, 2 J. R. 327. See *ante*, pl. 133. And see *Cott v. Commercial Insurance Company*, 7 J. R. 385.

212. It is inadmissible to show what is commonly understood by a term to which the law has applied a precise and definite meaning. *Slight v. Rhineland*, 1 J. R. 192.

213. Parol evidence of the revocation of a will is inadmissible. *Jackson, ex dem. Coe, v. Kniffen*, 2 J. R. 31.

214. In an action of debt against a sheriff

for the escape of a defendant in custody on a *ca. sa.*, parol evidence is admissible to show the issuing of the execution, its delivery to the sheriff, and the arrest of the party thereon; the defendant having neglected to return and file the *ca. sa.*, and having refused, after due notice for that purpose, to produce it on the trial. *Hinman v. Brees*, 13 J. R. 529.

215. On the trial of an indictment for stealing a bank-bill, note, &c., under the statute, (Sess. 24. c. 88.) parol evidence of the contents of the bills or notes stolen is admissible, without accounting for their non-production. *People v. Holbrook*, 13 J. R. 90.

216. A notice may be proved by parol, or by producing a copy made by a witness at the time of making the original; it is not necessary that notice to produce the original should have been previously given. *Johnson v. Haight*, 13 J. R. 470.

217. Parol evidence is inadmissible to contradict the certificate of a justice, as to proceedings before him. *McLean v. Hugaria*, 13 J. R. 184.

218. Parol proof of a conviction for felony is inadmissible, although it be proved that the clerk's office of the county has been burnt down, and the record probably destroyed; for there is higher evidence of the fact capable of being produced, that is, the transcript delivered into the Court of Exchequer by the district attorney, and which must be presumed to have been delivered there, such being his duty as a public officer. *Hills v. Colvin*, 14 J. R. 182.

219. A parol discharge, without consideration, of one of several obligors in a joint bond for the performance of covenants, cannot be *given in evidence under the general issue. *Devey v. Derby*, 20 J. R. 492.

XV. Confessions and declarations.

220. The whole declaration of a party must be taken together. *Carver v. Tracy*, 3 J. R. 427. *Fenner v. Lewis*, 10 J. R. 38. *Wailing v. Toll*, 9 J. R. 141.

221. So, if the defendant, in an action for money had and received, say that he had received the money, but that it was his due, the whole should be taken together, and is, in fact, a denial of the plaintiff's demand. *Carver v. Tracy*, 3 J. R. 427.

222. So, in trespass for killing the plaintiff's dog, the defendant's confession that he killed the dog, which assaulted him on the highway, must be taken together, and amounts to a justification. *Credit v. Brown*, 10 J. R. 365.

223. So, if the defendant acknowledge that the plaintiff had furnished him medicines and attendance as a physician, as charged in his account, but that he had not employed him, and that he was under the age of 21; the confession must be taken altogether, and is not sufficient to charge the defendant. *Wailing v. Toll*, 9 J. R. 141.

224. Where A. and B. sign a promissory note jointly, and A. admits that B. signed the note jointly with him, but that he signed it as security only, the whole admission must

be taken together. *Hopkins v. Smith*, 11 J. R. 161.

225. Evidence of the confessions of a person who is himself a competent witness, are inadmissible. *Alexander v. Mahon*, 11 J. R. 185.

226. In ejectment, where the plaintiff derived his title from A., who derived it from B., it was held, that he could not give in evidence the declarations of A. and B. as to the loss of the deed from B. to A. *Jackson*, ex dem. *Watson*, v. *Cris*, 11 J. R. 437.

227. The confession of a defendant, that he had purchased the goods, (for the price of which the action was brought,) but that he had paid for them, is not sufficient to entitle the plaintiff to recover. *Smith v. Jones*, 15 J. R. 229.

228. Testimony, as to the declarations of a person deceased, unless made upon oath, or in extremis, when he came to a violent end, is inadmissible. *Gray v. Goodrich*, 7 J. R. 95.

229. The declarations in extremis, of a person who would, if living, be a competent witness, are inadmissible evidence, either in a civil or criminal prosecution, with the single exception of the case of homicide, when the declaration of the deceased, after receiving the mortal blow, is admitted as to the fact of the murder. *Wilson v. Boerem*, 15 J. R. 286.

230. The declarations of a testator, although made in extremis, are inadmissible, to show duress at the time of executing the will. *Jackson*, ex dem. *Coe*, v. *Kniffen*, 2 J. R. 31.

231. Evidence of the declarations of one who has given a deed, with warranty, cannot be received to support a title deduced from such person, though such declarations be made in articulo mortis. *Jackson*, ex dem. *Youngs*, v. *Vredenberg*, 1 J. R. 159.

[*589] 232. But such declarations may be received in evidence, to show in what character, or with what intent, such person entered, and held possession of the land. *Ibid*.

233. The declarations of a tenant, or party in possession, are never received in evidence in support of his title. *Waring v. Warren*, 1 J. R. 340. And see *Stuyvesant v. Tompkins*, 9 J. R. 61.

234. The acknowledgments or confessions of a party, as to title, though they may be good to support a tenancy, or to satisfy doubts in cases of possession, yet they are not to be received against written evidence of title. *Jackson*, ex dem. *Burr*, v. *Shearman*, 6 J. R. 19.

235. Where several persons, being devisees and tenants in common of land, which is sold by two of the executors and devisees, under a power in the will, and, afterwards, one of the executors and devisees purchases from the grantee, and takes a conveyance to himself absolutely, the title becomes vested in him solely; and his declarations, that he held in common with the other devisees, are not sufficient to entitle them to recover a portion of the land, as tenants in common with him. *Jackson*, ex dem. *King*, v. *Burtis*, 14 J. R. 391.

236. The declarations of a person in possession of land, as to his title, are admissible evidence against him, and all persons claiming

under him. *Jackson*, ex dem. *Griswold*, v. *Bard*, 4 J. R. 230.

237. Parol declarations and confessions of a person in possession of land, as to the true boundary line between him and the land of another, are admissible evidence. *Jackson*, ex dem. *McDonald*, v. *McCall*, 16 J. R. 377.

238. Subsequent declarations by a party to a sale or transfer of property, which go to take away a vested right, are not admissible evidence. *Phoenix v. Assignees of Ingraham*, 5 J. R. 412.

239. Where the plaintiff, previous to the suit, had assigned his interest in the debt, or chose in action, of which the defendant had notice, evidence of confessions afterwards made by the plaintiff, as to the demands of the defendant against him, and which might impair the interest so assigned, or prejudice the rights of the assignee, for whose benefit the suit was brought, are inadmissible. *Frear v. Everton*, 20 J. R. 142.

240. A declaration, or confession, by one of the lessors of the plaintiff in ejectment, is evidence against all of them. *Jackson*, ex dem. *Neilson*, v. *McVey*, 18 J. R. 330.

241. In an action to recover the value of property taken under an execution against A., by a person claiming to have purchased the property of A., evidence of a conversation between the plaintiff and A., in which the previous sale was admitted, is not competent evidence of the sale. *Taylor v. Marshal*, 14 J. R. 204.

242. A writing signed by the plaintiffs, in which they admitted the execution of a bond and warrant of attorney to them, and stated the terms and conditions on which they were given, is evidence, on the part of the defendant, of the existence of the bond and warrant, without producing them. *Day v. Leal*, 14 J. R. 404.

243. In an action by a creditor against the heirs and devisees of his debtor, some of whom were also executors, who had petitioned the surrogate for a sale of the debtor's real estate, on the ground of an alleged deficiency of personal assets, the admission made by the executors in their [*590] application to the surrogate, is evidence against all the defendants, to show the insolvency of the debtor, so as to avoid a voluntary conveyance made by him, and to repel the plea of *riens per descent*, or by *devise*. *Manhattan Company v. Osgood*, 15 J. R. 162.

244. In a feigned issue to try the fact of adultery, the confessions of the wife, connected with other proof, are admissible. *Doe v. Roe*, 1 J. C. 25. [See *tit. CHANCERY*, XXXI. F.]

245. But if made with a fraudulent design, or by collusion with the husband, they are of no effect. *Ibid*.

246. If a party in a cause, to substantiate a credit in his own favor, produce an account made out by the opposite party, he renders it evidence against himself, in the first instance, but he is still at liberty to disprove the charges in the account. *Walden v. Sherburne*, 15 J. R. 409.

247. The admissions and declarations of a person who is himself a competent witness, but who kept out of the way to avoid a *subpena*, are not admissible evidence. *Woodward v. Paine*, 15 J. R. 493. See *ante*, pl. 125.

248. In prosecutions for bigamy, the mere confession of the party is not sufficient evidence of the first marriage, but there must be proof of a marriage in fact. *The People v. Humphrey*, 7 J. R. 314.

249. Whether a writing, delivered as an escrow, and not consummated by the performance of the conditions, can be received as evidence to show the declarations and confessions of the party relative to the subject matter of the paper? *Quere. Lansing v. Gaine & Ten Eyck*, 2 J. R. 300.

250. It seems, that the admission of the owner of property attached, that it had been taken under an attachment, is not sufficient evidence of the existence of the attachment, but the record itself ought to be produced. *Jenner v. Jolliffe*, 6 J. R. 9.

251. A confession of the defendant, that he had been served with a *subpena*, is not sufficient evidence of that fact, if the writ is capable of being produced. *Hasbrouck v. Baker*, 10 J. R. 248.

252. In an action against A., B., and C., as secret partners, the declarations and acts of A., though evidence to show that he considered himself a secret partner with B. and C., are not admissible directly to implicate or charge B. as a partner. *Whitney v. Ferris*, 10 J. R. 66.

253. In an action of *assumpsit* against A. and B., as partners, they pleaded, that the promise, if any, was made by A. and B. jointly with one C., and not by A. and B., &c.; held, that the declarations of A. and B. were not admissible evidence in support of the plea. *Sweeting v. Turner*, 10 J. R. 216.

254. An admission by one partner, after a dissolution of the partnership, of a balance due from the firm, does not bind the firm; but entries made by one of the partners, during the partnership, in a book of account, are admissible evidence against both. *Walden v. Sherburne*, 15 J. R. 409.

255. The confessions and declarations of a deputy sheriff, made to the attorney of the plaintiff, in answer to inquiries made relative to an execution delivered to such deputy to be executed, and while the execution was in force, are admissible evidence to charge the sheriff. *Mott v. Kip*, 10 J. R. 478.

[*591] *XVI. Hearsay and general reputation.

256. Hearsay evidence is sufficient to prove a pedigree. *Jackson, ex dem. Ross, v. Cooley*, 8 J. R. 128.

257. The acknowledgment of a deed from persons describing themselves as heirs, taken according to the directions of the act, before the mayor of London, is also a circumstance of weight in evidence of pedigree. *Ibid.*

258. In an action of ejectment, the lessors of the plaintiff resided in England, and claim-

ed to be heirs of the person who died seized of the land in question; a witness here deposed, that he knew the ancestor, and had charge of the land, as his agent, and corresponded with him, and, after his death, with the lessor, who sent him a power to act for him as heir and devisee, and that his information was also derived from persons acquainted with the family of the lessors; held, that this was sufficient evidence, *prima facie*, of pedigree or heirship, to go to the jury. *Ibid.*

259. Though hearsay and general reputation may be received as evidence of pedigree, yet where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard and understood, such evidence is not sufficient for that purpose. *Jackson, ex dem. Garland, v. Browner*, 18 J. R. 37.

260. Hearsay is admissible evidence of the death of a person. *Jackson, ex dem. Miner, v. Boneham*, 15 J. R. 226.

261. In the case of a public officer, as a sheriff, deputy sheriff, justice of the peace, constable, &c., it is sufficient to prove, by reputation, that he acts as a public officer, without producing his appointment. *Potter v. Luther*, 3 J. R. 431.

General reputation, when evidence of marriage, see HUSBAND AND WIFE, I.

XVII. Witness; (a) Who are competent witnesses, either generally or as to particular facts; (b) How a witness is to be examined.

(a) Who are competent witnesses, either generally or as to particular facts.

262. The secrets of his client, which the attorney is bound not to disclose, are communications made to him as instructions for conducting the cause, and not any extraneous or impertinent communications. *Riggs v. Denniston*, 3 J. C. 198.

263. He may be examined whether a note put into his hands to collect, was endorsed or not. *Baker v. Arnold*, 1 C. R. 258.

264. A counsel may be a witness as to information received from the party in the character of a friend, and not as counsel. *Hoffman v. Smith*, 1 C. R. 157.

*265. An attorney or counsel [*592] cannot testify as to communications made to him by his client, whilst the relation of attorney and client exists. *Yordan v. Hess*, 13 J. R. 492.

266. But if, after that relation has ceased, the former client repeat to the attorney, voluntarily, and without any artifice used by the attorney for that purpose, communications previously made, the attorney is a competent witness as to such communications. *Ibid.*

267. An attorney or counsel, who, as such, has been intrusted with papers by a third person, cannot be called upon by the opposite party to

produce the papers in evidence. *Jackson, ex dem. King, v. Burtis*, 14 J. R. 391.

268. Though an attorney, or counsel, cannot be called upon to produce a deed or paper intrusted to him by his client, or to disclose its contents; yet he may be called to prove the existence of such deed or paper, and that it is in his possession, so as to enable the opposite party, on his refusing to produce it at the trial, to give parol evidence of its contents. *Brandt, ex dem. Van Cortlandt, v. Klein*, 17 J. R. 335. *S. P. Jackson, ex dem. Neilson, v. McVey*, 18 J. R. 330.

269. An attorney, or counsel, may be called to testify to a collateral fact within his knowledge, or to a fact which he might know without being intrusted with it by his client. *Johnson v. Davenport*, 19 J. R. 134.

270. As where an attorney or counsel, after the commencement of the suit, without any communication from his client, acquires a knowledge of his hand-writing, he may be questioned as to its identity. *Ibid.*

271. A party to a negotiable note or instrument, which he has made or endorsed, is not competent to impeach its validity, although uninterested in the event of the suit. *Winton v. Saidler*, 3 J. C. 185. *S. P. Coleman v. Wise*, 2 J. R. 165. *Mann v. Swann*, 14 J. R. 270.

272. Although such party had since been discharged under a bankrupt law, and released all interest in his estate. *Winton v. Saidler*, 3 J. C. 185.

273. A party to a negotiable instrument may show that it was endorsed after due. *Baker v. Arnold*, 1 C. R. 258.

274. A party to a negotiable paper may be a witness to prove facts subsequent to the due execution of the note, and which do not invalidate it in its inception, though they go to destroy the title of the holder. *Woodhull v. Holmes*, 10 J. R. 231. *S. P. Skilding v. Warren*, 15 J. R. 270. And which do not involve his own turpitude. *Powell v. Waters*, 17 J. R. 176.

275. The understanding of the rule, that a party to a negotiable instrument cannot be a witness to invalidate it, is, that a person whose name appears on the face of the paper, shall not be admitted to say, that it was tainted with illegality or fraud when it passed from his hands. *Powell v. Waters*, 17 J. R. 176.

276. Thus, a second endorser is a competent witness to prove that the third endorser had said, that he received and discounted the note at usurious interest. *Ibid.*

277. So, where by an agreement with the maker of a note and the payee, the note was to be deemed void and returned, if the maker did not take certain goods of the payee, who immediately endorsed the note to the plaintiff, as security for a debt; the endorser was held to be a competent witness in an action against the maker, to prove that the plaintiff had notice of the condition on which the note was given, and that the maker did not take the goods of the payee, so that the note became void. *McFadden v. Maxwell*, 17 J. R. 188.

278. So, it may be proved by the endorser,

300

that after the note was made and endorsed, it was delivered to a third person to be presented to the bank for discount, who, instead of offering it at the bank, fraudulently put it into the hands of a broker. *Woodhull v. Holmes*, 10 J. R. 231.

279. An endorsee of a promissory note is a competent witness to prove a payment of it by the maker. *White v. Kibbing*, 11 J. R. 128.

280. There is a warranty implied in the transfer of a negotiable instrument that it is not forged; a payee of a note, therefore, is not a competent witness for the holder, in an action against the maker, although the holder took the note at his own risk, as to the solvency of the maker, the payee having a direct interest to charge the maker, so as to protect himself against the implied warranty. *Herrick v. Whitney*, 15 J. R. 240. *S. P. Shaver v. Eble*, 16 J. R. 201.

281. In an action by the holder against the endorser of a promissory note, the maker of the note is a competent witness, as he is indifferent between the parties, and whoever may succeed, is liable only to the losing party for the amount of the note. *Habbly v. Brown*, 16 J. R. 70.

282. But if it is a note made and endorsed for the accommodation of the maker, in which case the endorser is regarded as a surety, and would, if the holder recovered against him, be entitled to charge the maker, not only with the amount of the note, but also with the costs of the suit which he has been compelled to pay, this liability of the maker for the costs renders him interested to defeat the action; and he is not, therefore, a competent witness for the endorser of such note. *Ibid.*

283. The plaintiff requested the defendants and R. to lend him their names for 2,000 dollars; and it was agreed that R. should make a promissory note for that sum, payable to the defendants, and to be endorsed by them; and the defendants accordingly endorsed a blank paper, which the plaintiff, without their privity or consent, procured R. to fill up with a note for 4,000 dollars; held, that D. a subsequent endorser, and R. the maker, were competent witnesses to prove the fraud in filling up the note. *Myers v. Palmer*, 18 J. R. 167.

284. An endorser of a note is a competent witness, in a suit against the maker, to prove that it was given to the plaintiff to take up two other notes endorsed by him, on which the plaintiff received usurious interest. *Tutill v. Davis*, 20 J. R. 285.

285. A person acting under an appointment by an attorney, may testify without showing the letter of attorney. *Renaudet v. Crocker*, 1 C. R. 167.

286. A judge of this state, who has taken the proof of the execution of a deed whilst out of the jurisdiction of this state, is a competent witness as to that fact; but he is not bound to answer any question which may impeach his conduct as a public officer. *Jackson, ex dem. Wychoff, v. Humphrey*, 1 J. R. 496.

287. A person who has been a slave, but has obtained his freedom, is competent to prove facts which took place whilst he was a slave. *Gurnee v. Dessies*, 1 J. R. 508.

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Davis, 20 J. R. 285.

285. A person acting under an appointment

by an attorney, may testify without showing

the letter of attorney. *Renaudet v. Crocker*, 1

C. R. 167.

286. A judge of this state, who has taken the

proof of the execution of a deed whilst out of

the jurisdiction of this state, is a competent

witness as to that fact; but he is not bound to

answer any question which may impeach his

conduct as a public officer. *Jackson, ex dem.*

Wychoff, v. Humphrey, 1 J. R. 496.

287. A person who has been a slave, but has

obtained his freedom, is competent to prove

facts which took place whilst he was a slave.

Gurnee v. Dessies, 1 J. R. 508.

288. A lessor of the plaintiff in ejectment, cannot be a witness in the cause. *Jackson*, ex dem. *Goodrich*, v. *Ogden*, 4 J. R. 140.

289. A party in the same suit or indictment cannot be a witness for his co-defendant, until he has been first acquitted or convicted; and whether the defendants plead jointly or separately, it makes no difference. *The People* v. *Bill*, 10 J. R. 95.

290. An inhabitant of a town who pays taxes to support the poor, is a competent witness in a suit brought by the overseers of that town against the overseers of another town, relative to the settlement of a pauper. *Bloodgood* v. *Overseers of Jamaica*, 12 J. R. 285. *S. P. Falls* v. *Belknap*, 1 J. R. 486.

291. Where the plaintiff was a non-resident, and his attorney was called as a witness at the trial, and objected to on the ground, that no security having been filed for costs, he was liable, and therefore interested, and a bond was thereupon immediately executed, and tendered to the defendant's counsel, who admitted the sufficiency of the security, but refused to accept it, and it was then filed with the clerk; *held*, that as the defendant might have availed himself of the bond, had a verdict been given in his favor, or the plaintiff been nonsuited, the objection to the competency of the witness was removed, and he ought to have been received. *Brandgee* v. *Hale*, 13 J. R. 125.

292. But if the defendant had not admitted the sufficiency of the security, could the judge at the trial have decided upon it? *Quære. Ibid.*

293. If one of the parties, at the request of the other, is sworn and examined as a witness, the latter cannot, afterwards, object to it. *Miller* v. *Starks*, 13 J. R. 517.

294. On an appeal from an order of removal, the Court of Sessions ought not to compel an overseer of the poor, who is a party to the appeal, to testify; but the Supreme Court will not reverse the order of the sessions on that ground, but will reject the evidence so improperly received. *Overseers of Plattekill* v. *Overseers of New-Paltz*, 15 J. R. 305.

295. A party to the record cannot be a witness, unless by consent of the real party in interest. *Frear* v. *Everton*, 20 J. R. 142.

296. As, where the plaintiff had, previous to the suit, assigned all his interest in the debt or chose in action, he cannot be a witness to prove the demands of the defendant against him, by way of set-off. *Ibid.*

297. One of two lessees, after a lease has expired, is a competent witness to prove that he had no beneficial interest in the lease, but joined in the execution of it, merely as a surety for the payment of the rent. *Jones* v. *Clark*, 20 J. R. 51.

298. A party in interest may be a witness to prove the loss of a note, or instrument, on which the suit is brought, in order to introduce parol proof to the jury of the contents of such note or instrument. *Chamberlain* v. *Gorham*, 20 J. R. 144.

[*595] 299. Idiots, lunatics, and madmen, are not competent witnesses. *Livingston* v. *Kiensted*, 10 J. R. 362.

300. And if offered as witnesses, proof is admissible to show their incompetency. *Ibid.*

301. A witness, while in a state of intoxication, ought not to be sworn, nor be permitted, to testify. *Hartford* v. *Palmer*, 16 J. R. 143.

302. And the Court before which the witness is produced, may decide from its own view, whether the witness is in such a situation that he ought to be sworn or admitted to testify. *Ibid.*

303. Persons totally deprived of memory or understanding, or who are suffering under a temporary privation of them, when produced to be sworn, ought not to be admitted. *Ibid.*

304. A person who does not believe in the existence of a God, nor in a future state of rewards and punishments, cannot be a witness in a Court of justice, under any circumstances. *Jackson*, ex dem. *Tuttle*, v. *Gridley*, 18 J. R. 98.

305. Where it was proved, that a person offered as a witness, had, within three months before the trial, often, deliberately and publicly, declared his disbelief in the existence of a God, and a future state of rewards and punishments, he cannot, on being called to be sworn and objected to, be admitted to deny those declarations, or to state his recantation of them, and his present belief in a God, &c. *Ibid.*

306. But a witness may be restored to his competency, on giving satisfactory evidence of a change of mind some time before the trial, so as to repel any presumptions arising from his former declarations of infidelity existing at the time he is called to be sworn. *Ibid.*

307. Where a witness is objected to as incompetent on the grounds of his having been convicted of a felony, parol evidence of the conviction is inadmissible in support of the objection. *Hills* v. *Colvin*, 14 J. R. 182.

308. Whether a copy of the sentence given by the clerk of the Court to the sheriff, and by him delivered to the keeper of the prison, would be sufficient evidence of the conviction? *Quære. Ibid.*

(b) How a witness is to be examined.

309. A party producing a witness may show him papers referred to in his deposition, to enable him to correct any mistake which he may have made. *Steinbach* v. *Columbian Insurance Company*, 2 C. R. 129.

310. So, papers alluded to by a witness, or copies of those papers, the originals being out of the party's power, may be exhibited to him in order to refresh his memory. *Ibid.*

311. When a party cross-examines a witness, he thereby makes him his own, and cannot introduce through him any proof which would not have been legal, had he originally produced him; as, parol proof of a writing, without having given notice to produce it. *Jackson*, ex dem. *Van Slyck*, v. *Son*, 2 C. R. 178.

312. A witness on his *voir dire*, or cross-examination, is not bound to answer any question which may subject him to punishment, or render him infamous or disgraced. *The People* v. *Herrick*, 13 J. R. 82.

313. A witness is not bound to answer whether he had been convicted of petit larceny, but the party who at-

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tempts to exclude him must produce the record of his conviction. *Ibid.*

314. Improper testimony ought not to be suffered to go to a jury; and it is not sufficient, afterwards, to direct the jury not to regard it. *Penfield v. Carpenter*, 13 J. R. 350. *S. P. Irvine v. Cook*, 15 J. R. 239.

315. A witness, with the consent of the parties, may be re-examined by the jury, after they have retired. *Brown v. Cowell*, 12 J. R. 384.

316. Though infants may be examined as to their religious knowledge or belief, it is merely to test their capacity to give evidence, or their understanding of the nature and obligation of an oath. *Jackson, ex dem. Tuttle, v. Gridley*, 18 J. R. 98.

317. But an adult of sound mind, when called upon, is not to be questioned as to his religious creed. *Ibid.*

318. Under the last general interrogatory annexed to a commission to take the examination of witnesses abroad, the witness, in his answer, may state facts not drawn forth by the previous particular interrogatories. *Percival v. Hickey*, 18 J. R. 257.

319. It seems, that a clerk who has sent goods, and made entries in the plaintiff's books, may be allowed to refresh his memory, as to the quantity and quality of the goods, &c., from an extract made by him from the original entries. *Robertson v. Lynch*, 18 J. R. 451.

320. Where the teller or clerk of a bank is called as a witness for the party, to prove the correctness of his entry, he may be asked, on his cross-examination, whether he was not in the habit of making mistakes as teller; for the jury are to decide on the relative accuracy and credibility of the witnesses. *Mechanics' Bank v. Smith*, 19 J. R. 115.

XVIII. When a witness is incompetent on the ground of interest; (a) When a witness's interest will be sufficient to exclude his testimony; (b) When the witness will not be excluded; (c) Agents; (d) Release of a witness's liability.

(a) *When a witness's interest will be sufficient to exclude his testimony.*

321. Where a witness has a direct interest, however small, in the event of a cause, he cannot be admitted to testify in any respect in favor of such interest. *Butler v. Warren*, 11 J. R. 57. See *Marquand v. Webb*, 16 J. R. 89.

322. If a person has given a bond of indemnity to the plaintiff against the costs of the suit, he is an incompetent witness for the plaintiff, as to any point arising on the trial of the cause; such as the service of a notice on the defendant to produce certain papers at the trial. *Ibid.*

323. In ejectment, a witness will not be admitted to show, that he himself, and not the defendant, was tenant in possession. *Brunt, ex dem. Van Cortlandt, v. Dyckman*, 1 J. C. 275.

324. A witness holding an order from a party, or his agent, to pay him a certain sum in an action in which the drawer is plaintiff,

is interested in the event of the cause, although the agent has not accepted the order, and the plaintiff is at all events [*597] responsible to the witness for the amount. *Peyton v. Hallet*, 1 C. R. 364.

325. In an action brought by a father for the seduction of his daughter, the daughter cannot be a witness to prove a previous promise of marriage, in aggravation of the damages; for she has her own right of action for the breach of the promise. *Foster v. Scofield*, 1 J. R. 297.

326. The declarations of a person in possession cannot be given in evidence to support his own possession or title. *Waring v. Warren*, 1 J. R. 340.

327. Whether a person who considers himself under an honorary obligation to indemnify the losing party, is a competent witness? *Quare. Coleman v. Wise*, 2 J. R. 165. See *Gilpin v. Vincent*, 9 J. R. 219.

328. An inhabitant of a place is incompetent to prove a common right of fishery in all the inhabitants of that place. *Jacobson v. Fountain*, 2 J. R. 170.

329. But such an inhabitant is a competent witness for the party denying the right. *Ibid.*

330. A release by such inhabitant either to the opposite party in the suit, or to another person, of his right to the fishery, is inoperative, and will not restore his competency. *Ibid.*

331. A. gave a deed with warranty to B, and afterwards, by another deed with warranty, conveyed land adjoining, to C.; in an action, in which the question was, whether the bounds of the land granted to B. did not extend so as to include the premises granted to C., A. is not a competent witness as to the boundaries, for he is interested to support C.'s title. *Jackson, ex dem. Caldwell, v. Hallenback*, 2 J. R. 394.

332. The vendor of a chattel is not a competent witness in an action against the vendee for taking it away, for he is bound to warrant the title. *Heermance v. Vernooy*, 6 J. R. 5.

333. If a person whose lands are bound by a judgment, execute a deed with warranty of the same lands, and they are afterwards sold under a *fi. fa.* on that judgment, in an action between the vendee and the purchaser at the sheriff's sale, he is an incompetent witness to invalidate the judgment. *Swift v. Dean*, 6 J. R. 523.

334. The witness's interest, in order to exclude him, must not have arisen after the fact to which he is called to testify happened, and by his own act, without the interference or consent of the party by whom he is called. *Jackson, ex dem. Woodhull, v. Rumsey*, 3 J. C. 234.

335. Where a witness is interested in any part of the demand of the plaintiff, he cannot be admitted to testify as to another part. *Gage v. Stewart*, 4 J. R. 293.

336. If a witness declare himself interested on the side of the party who calls him, and his interest is so circumstanced that he cannot be released, he ought not to be sworn, though in

strictness he is not interested. *Trustees of Lansingburg v. Willard*, 8 J. R. 428.

337. Where a witness, in any stage of a cause, in law or equity, discovers himself to be interested, his testimony may be rejected. *Swift v. Dean*, 6 J. R. 523. [And see ante, XVII. (a) as to who are competent witnesses.]

*338. Where a defendant in ejectment sets up as a defence that he was not in possession when the declaration was served, his lessee is not a competent witness to the fact, as he has an interest both in the question and in the event. *Jackson, ex dem. Van Den Bergh, v. Trusdell*, 12 J. R. 246.

339. A person who has become a bankrupt and been discharged in Great Britain, and against whose property an attachment had issued here, under the act giving relief against absent and absconding debtors, cannot be a witness in favor of his trustees under the act, although he has released his interest in the surplus of his estate to his assignees in G. B. and to his trustees here. *Graves v. Delaplaine*, 14 J. R. 146.

340. Where the fact to be proved by a witness is favorable to the party who calls him, and the witness will derive a certain advantage from establishing the fact in the way proposed, he cannot be heard, whether the benefit be great or small. Per *Spencer, J. Marquand v. Webb*, 16 J. R. 89.

341. In an action for the repairs of a vessel, against one part owner, who neglects to plead the non-joinder of the other part owners in abatement, another part owner is not an admissible witness for the plaintiff to prove the ownership of the defendant; for although he would be liable as an owner to the plaintiff, in case he failed, or, if he succeeded, would be answerable to the defendant for contribution, and so far stood indifferent between the parties, yet he had an interest by charging the defendant, (a verdict against whom would be evidence of his joint ownership,) to increase the number of part owners, and thereby diminish the amount of contribution or loss which he would otherwise be obliged to sustain. *Ibid.* See *Hubby v. Brown*, 16 J. R. 70.

(b) *When the witness will not be excluded.*

342. A remote or contingent interest goes only to the credit of the witness, not to his competency. *Stewart v. Kip*, 5 J. R. 256.

343. An interest in the question alone, will not disqualify the witness, but the objection goes to his credit only. *Van Nuys v. Terhune*, 3 J. C. 82. S. P. *Stewart v. Kip*, 5 J. R. 256.

344. If a witness will not gain or lose by the event of the cause, or if the verdict cannot be given in evidence against him in another suit, the objection goes to his credit only, and not to his competency. *Van Nuys v. Terhune*, 3 J. C. 82. S. P. Per *Spencer, J. Case v. Reece*, 14 J. R. 79. 81.

345. If the witness have not a legal and fixed interest in the event of the cause, the ob-

jection goes to his credit, and not to his competency. *Stockham v. Jones*, 10 J. R. 21. See *Gilpin v. Vincent*, 9 J. R. 219.

346. Where the liability of the witness over is doubtful, he is competent. *Stewart v. Kip*, 5 J. R. 256.

347. Although the witness, on his *voir dire*, said, that if the plaintiff should fail, he thought he should, as a member of the society, if asked, give something towards compensating the plaintiff, as he usually did in such cases, but he was no way bound to do so, and should be *governed only by his [*599] general practice and principle. *Gilpin v. Vincent*, 9 J. R. 219.

348. An ideal or honorary obligation does not incapacitate a witness. *Ibid.*

349. A person interested in the event is competent, when called on to give evidence contrary to his interest. *Jackson, ex dem. Youngs, v. Vredenberg*, 1 J. R. 159.

350. If a witness stands in that situation, that which way soever the suit may terminate, he will be equally liable, and to the same extent, to the losing party, he is admissible. *Marquand v. Webb*, 16 J. R. 89.

351. D. and M., being indebted to C., he attached money in the hands of B., in *New-Orleans*, belonging to M.: in an action brought by C. against B., for the money so attached, and held by him to answer to C., it was held, that D. was a competent witness for the plaintiff; for though the recovery of the plaintiff would so far go in discharge of the debt due by the witness, yet he would be liable over for the same amount to M., so that his interest was balanced between the parties. *McLeod v. Johnston*, 4 J. R. 126.

352. But whether M. is a competent witness for the plaintiff? *Quere. Ibid.*

353. A master of a vessel, who had drawn a bill on his owners for the necessary expenditures of the vessel, is a competent witness in an action by the payee against the drawee; for he is alike liable to both parties. *Milward v. Hallett*, 2 C. R. 77.

354. In an action against a master of a vessel, for negligently running foul of and injuring the vessel of the plaintiff, the owner of the vessel under the command of the defendant is a competent witness for him. *Case v. Reece*, 14 J. R. 79.

355. In an action against a sheriff on a bond given for the liberties, a deputy who took the bond is a competent witness for the defendant. *Stewart v. Kip*, 5 J. R. 256.

356. An endorser of a promissory note, in a suit against the maker, is a competent witness to prove that it was given to the plaintiff to take up two other notes, endorsed by the witness to the plaintiff, and on which two notes the plaintiff had received more than the legal rate of interest. *Tuthill v. Davis*, 20 J. R. 285.

357. The owner of a vessel who has overpaid money shipped in the vessel, to the shipper, and been reimbursed the amount by the master, is a competent witness, in an action brought by the master against the shipper for the same money, though, in the first instance,

the owner is liable for the default of the master. *Cortes v. Billings*, 1 J. C. 270.

358. In actions for torts against several defendants, who join in pleading the general issue, if there is no evidence against one of the defendants, the judge ought to discharge him at the trial, that his co-defendant may have the benefit of his testimony. *Van Deusen v. Vanslyck*, 15 J. R. 223.

359. Where two persons are jointly concerned in a contract of sale, and by a parol agreement on good consideration their interest is severed, one of them, after the severance, is a competent witness for the other, in relation to matter growing out of such [*600] contract, he *having parted with all his interest in the contract. *Smith v. Allen*, 18 J. R. 245.

360. In trespass against several joint defendants, if there be no evidence produced against some of them to implicate them in the trespass, they may be struck off the record, and admitted as witnesses for the other defendants. *Brown v. Howard*, 14 J. R. 119.

361. But where there is any evidence against them, this cannot be done. *Ibid.*

362. In trespass *quare clausum fregit*, against three joint trespassers, two are taken and the other returned not found: the one who had not been arrested is a competent witness for the other two. *Stockham v. Jones*, 10 J. R. 21.

363. In an action against an officer for the escape of a defendant in execution, the latter is a competent witness for the officer; for his interest, if any, is against the party calling him. *Waters v. Burnet*, 14 J. R. 362.

364. Where one effects an insurance on account of a third person, as his agent, but without any authority from him, such third person, in an action against the insurer for a return of premium, on being released by the plaintiff from all claim for the premium, is a competent witness. *Steinback v. Rhinelanders*, 3 J. C. 269.

365. In an action *qui tam*, to recover the excess of interest above the legal rate, the borrower, having returned the loan, and the agreement being cancelled, is competent to show the usury. *Pettingal v. Brown*, 1 C. R. 168.

366. That a person is liable to be rated for the support of the poor of a town, does not render him an incompetent witness in a cause in which the town is interested as to the maintenance of a pauper. *Falls v. Belknap*, 1 J. R. 486. S. P. 12 J. R. 285.

367. One seaman is a competent witness for another seaman, in an action for wages earned on board the same vessel, though he may have a common interest with the plaintiff as to the point in controversy; the objection goes to his credit only. *Hoyt v. Wild-fire*, 3 J. R. 518.

368. A *feme covert*, who had executed a deed with her husband, is a competent witness to prove that the deed had been antedated; for if antedated, an acknowledgment made by her at any time would bar her right to dower; and if not acknowledged, her signing was no bar, so that neither way was

she interested. *Jackson, ex dem. Grinwald, v. Bard*, 4 J. R. 230.

369. On an indictment for forging a check in the name of B. on the bank, which check was passed to C., and sent by him to D., to receive the money, but before it came into the hands of C. the forgery was discovered, and the money regained by the bank; B., on being released by the bank, is a competent witness; for he is not answerable to C., the bank having acted without his directions; and C.'s remedy being against the bank, if they had unduly taken the money out of his possession. *The People v. Howell*, 4 J. R. 296.

370. Or, if the check should be good, B. is not an interested witness, because no consideration had passed between him and C., who must be considered as an original party to the instrument. *Ibid.*

371. In criminal cases in general, the rule is, that the witness is to be received, if the verdict in the cause in which he is produced cannot *be given in evidence, in an action in which he is a party; the interest which the witness may have in question is not the test; and it seems fit and proper that the same rule should be applied to the case of forgery. Per *Kent*, Ch. J. *Ibid.*

372. A person having a right of dower in the premises in dispute is a competent witness. *Jackson, ex dem. Van Dusen, v. Van Dusen*, 5 J. R. 144.

373. A grantor in a deed, which is impeached as fraudulent, on being released by the grantee from all claims and demands whatsoever, on account of the covenants, &c., is a competent witness to prove, as well as disprove the fraud: the objection goes to his credit, not to his competency. *Jackson, ex dem. Mapes, v. Frost*, 6 J. R. 135.

374. But a grantor, who has executed a deed set up by the defendant in ejectment, is not a competent witness to prove it fraudulent, especially after the lapse of 26 years, when, by avoiding the deed, the recovery would enure to the common benefit of the plaintiff and himself. *Jackson, ex dem. Hungerford, v. Eaton*, 20 J. R. 478.

375. In trespass for taking and impounding the beasts of the plaintiff, the defendant proved that he acted as the agent and servant of G., on whose land the beasts were found, and offered G. as a witness, after executing a release to him, to prove that they were taken damage feasant; held, that G. was a competent witness. *Hasbrouck v. Lowm*, 8 J. R. 377.

376. In trespass, the father of the defendant, [an infant,] and by whose order the trespass was committed, is a competent witness for the defendant. *Alderman v. Tirrell*, 8 J. R. 418.

377. In a penal action against a member of a religious society or sect, called *Shakers*, a member of that society is a competent witness, although the members hold all things in common, and have a partnership interest in all their concerns, as a religious sect. *Wells v. Lane*, 8 J. R. 462.

378. In an action *qui tam* to recover a pen-

alty given by the act concerning slaves, a member of the *New-York* society for the manumission of slaves, &c., is a competent witness, he being under no legal obligation to contribute to the expenses of the suit, and having no interest in the event of it. *Gilpin v. Vincent*, 9 J. R. 219.

379. Where A. and B. sign a joint note, which is delivered to C. for goods sold by him to A., and A. brings an action against C. for an alleged deficiency in the goods, B. is a competent witness to prove that he signed the note as security only, not as partner, he having no interest in the event of the suit, the note not being in question. *Hopkins v. Smith*, 11 J. R. 161.

380. In an action by a sheriff, who has levied on the goods of a tenant, without notice of any rent being in arrear, against the landlord who had distrained the same goods after the levy, the tenant is a competent witness. *Alexander v. Mahon*, 11 J. R. 185.

381. Although the manumission of a slave by an infant, with the consent of his guardian, is voidable, yet such manumission renders the slave, in the mean time, a competent witness for his former master; the infant's power of revoking the gift on coming of age being an objection to his credit only. *Rogers's Executors v. Berry*, 10 J. R. 132.

*382. A., who had been discharged under the bankrupt law, and whose estate would not, probably, pay more than 25 per cent., was held to be a competent witness in a suit brought by the assignees of B., a bankrupt, against whom A. had proved a debt under the commission. *Phoenix v. The Assignees of Ingraham*, 5 J. R. 411.

383. The landlord of the defendant in ejectment, who himself holds under a devisee, is not disqualified by that relationship from being a witness in a controversy in which a stranger to the relationship is a party, and calls for his testimony to invalidate the will, and thereby defeat his own title, and the title which he had created to the defendant. *Jackson, ex dem. Woodhull, v. Rumsey*, 3 J. C. 234.

(c) Agents.

384. Every agent is a competent witness, ex necessitate. *Mackay v. Rhineland*, 1 J. C. 408. *S. P. Jones v. Hake*, 2 J. C. 60. *S. P. Abbott v. Sebor*, 3 J. C. 39. *S. P. Stewart v. Kip*, 5 J. R. 256. *Cortes v. Billings*, 1 J. C. 270.

385. An agent who had received several sums of money on account of trespasses alleged to have been committed on the lands of his principal, and which he promised to refund, in case his principal should not recover in an action against a particular trespasser, is a competent witness in that action. *Renaudet v. Crocken*, 1 C. R. 167.

386. An agent or servant, in whose favor a written order to receive goods is given, and who endorses a receipt on the order, may be admitted as a witness, from necessity, in a suit relative to the goods. *Burlingham v. Dyer*, 2 J. R. 189.

387. An agent or broker, authorized to purchase goods on certain terms, is a competent witness in a suit between the vendor and the vendee; for, if he had exceeded his authority, he would, at all events, be liable to the losing party, and if he had not, he would be liable to neither. *Bailey & Bogert v. Ogden*, 3 J. R. 399.

(d) Release of a witness's liability.

388. A release to a witness, after his deposition has been taken, is too late, and the deposition cannot be admitted in evidence. *Heyl v. Burling*, 1 C. R. 14.

389. So, a release given after the examination of an interested witness, is too late to render his testimony competent; and where an objection is made to the sufficiency of the release, at the trial, and persisted in, the judge ought not to direct the examination to proceed, and that the testimony of the witness would be relied on, if the party should afterwards give a sufficient release. *Doty v. Wilson*, 14 J. R. 378.

390. But where a release has been objected to on account of some informality, and whilst another release is preparing, the judge suffers the examination to proceed, without any objection being made by the opposite party, it is a proper course. *Ibid.*

391. If the witness have a present beneficial interest in the subject matter of a suit, although the reducing it into possession be future and *contingent, he may [*603] extinguish it by a release. *Woods v. Williams*, 9 J. R. 123.

392. So, in an action by the administrator of the witness's wife, a release, by the witness to the plaintiff, of all right to any sum or sums of money which might be recovered in the cause, renders him competent. *Ibid.*

393. A release to a witness by one joint plaintiff, is sufficient to restore his competency. *Bulkley v. Dayton*, 14 J. R. 387.

394. A release by a plaintiff to a witness, of all demands against the witness, excepting such for which the witness is liable, in conjunction with the defendants in the suit, renders him a competent witness for the plaintiff, as he is thereby discharged from all individual liability, and is not interested to support the plaintiff's recovery against the defendants, admitting that the witness, and not the defendants, was the person chargeable; and if the witness was liable, as a partner, jointly with the defendants, the exception in the release does not affect his competency; for, in that case, if the plaintiff recovered, the witness would be bound to contribute his proportion of the amount, and so his interest is in favor of the defendants, and against the party calling him. *Ibid.*

395. A grantor, who has given a deed with full covenants, is a competent witness for a defendant deriving title under him, though not as his immediate grantee, on being released by the defendant; for the release prevents the defendant from resorting to him, or his immediate grantee, in case a verdict should be found for the plaintiff. *Jackson, ex dem. Bond, v. Root*, 18 J. R. 60.

XIX. Credibility of witnesses, and how impeached.

396. Testimony to impeach the credit of a witness, by showing that she was or had been a common prostitute, is inadmissible. *Jackson, ex dem. Boyd, v. Lewis*, 13 J. R. 504.

397. The evidence stated in a case, made on a former trial, cannot be admitted to impeach the testimony of the same witness, given on a second trial of the same cause. *Neilson v. Columbian Insurance Company*, 1 J. R. 301.

398. The letters of a witness, or an endorsement made by him on a note, may be produced to contradict his testimony. *Baker v. Arnold*, 3 C. R. 279.

399. But which is to be credited, the witness on his oath, or the testimony adduced against him, is for the jury to determine. *Ibid.*

Affidavits; depositions *de bene esse*; examination of witnesses on a commission. See PRACTICE.

[*604] *XX. Evidence in particular cases, and under particular issues.

EVIDENCE in an action for malicious prosecution, see *tit. ACTION ON THE CASE*.

_____ in an action on a promise of marriage, see *tit. ASSUMPSIT, III.*

_____ of a consideration, see *AGREEMENT, II. BARGAIN AND SALE.*

_____ under the money counts, see *BILLS OF EXCHANGE AND PROMISSORY NOTES, III.*

_____ of a partnership, see *PARTNERSHIP.*

_____ of insanity, see *LUNATICS AND IDIOTS.*

_____ in chancery, see *tit. CHANCERY, XXII.*

_____ in *assumpsit*, see *ASSUMPSIT.*

_____ in debt, see *DEBT, II.*

_____ in trespass, see *TRESPASS, III.*

_____ in ejectment, see *EJECTMENT, II. V.*

And see *ACCORD AND SATISFACTION.*

CHANCERY, XXII. COURTS OF JUSTICES OF THE PEACE, VIII. XIV. CORPORATION.

DAMAGES. EXECUTORS AND ADMINISTRATORS. FRAUDS. HIGHWAYS. NEW TRIAL.

PLEADINGS. TRUSTS. WILL.

EXECUTION.

I. (a) *When, and in what order, executions may be issued*; (b) *What amount may be levied under an execution.*

II. *Fieri facias*; (a) *What may be sold under a fi. fa.*; (b) *Levy and sale*; (c) *Sheriff's deed*; (d) *Title of the purchaser of lands and chattels sold under an execution, and how he may obtain possession*; (e) *Application of surplus money.*

III. *Capias ad satisfaciendum.*

IV. *Service and return of an execution.*

V. *When an execution, and the proceedings under it, will be set aside*

VI. *Priority of execution.*

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I. (a) *When, and in what order, executions may be issued*; (b) *What amount may be levied under an execution.*

(a) *When, and in what order, executions may be issued.*

1. Where a plaintiff has obtained a judgment, he may first issue a *fi. fa.*, and if the whole of the debt is not levied on that execution, he may issue a *ca. sa.*, or bring an action of debt, on the judgment, for the residue; and if a *non est inventus* is returned to such *ca. sa.*, he may proceed against the bail. *Olcott v. Lilly*, 4 J. R. 407.

*2. But if he has obtained judgment against the bail, on their recognition, he must elect whether he will have execution against the body of the principal, or of the bail; for if he takes the bail in execution, he cannot resort to the principal, and take him in execution, and so *vice versa*. *Smith v. Rosecrantz*, 6 J. R. 97. [But by the act, passed April 2, 1813, (Sess. 36. c. 50. s. 7.) in actions in which special bail is filed, no *ca. sa.* can issue against the defendant, until a *fi. fa.* has been previously issued, and returned *nulla bona*.]

3. After an escape, by the defendant, from custody, on a *ca. sa.*, the plaintiff may proceed against the sheriff for the escape, and, at the same time, take out a *fi. fa.* against the property of the defendant; for the remedies are not inconsistent with each other. *Jackson, ex dem. McCrea, v. Bartlett*, 8 J. R. 361.

4. It is irregular to issue a second execution until the first is returned. *Cairns v. Smith*, 8 J. R. 337.

5. Where an execution has issued unadvisedly, it may be withdrawn before any thing is done upon it. *Ibid.*

6. But if a sale have been made, and the sheriff die without executing a deed, it is irregular to withdraw and suppress the execution, and issue a second to the new sheriff, for the purpose of selling the property a second time. *Ibid.*

7. And the Court will not decide, on motion, whether the sale under the first execution was *bona fide* or fraudulent. *Ibid.*

8. Though, since the revised act, (Sess. 36. c. 50.) it is irregular to issue a *ca. sa.* before a *fi. fa.* in an action in which special bail has been required, the party only can take advantage of it, not the sheriff against whom an action for an escape has been brought. *Scott v. Shaw*, 13 J. R. 378. *S. P. Hinman v. Brees*, 13 J. R. 521.

9. Where several defendants are arrested on a *capias ad respondendum* at the suit of the plaintiff, in several counties, and all put in special bail; and the plaintiff issues a *fi. fa.* against all the defendants, to the sheriff of the county, in which one of them only is arrested, which is returned *nulla bona, &c.*, and thereupon a *ca. sa.* is issued against all of the defendants, directed to the sheriff of a different county in which none of the defendants were arrested, and one of the defendants, who had been arrested in another county in which no *fi. fa.* had been issued, is taken on a *ca. sa.*, it is irregular;

and the defendant so taken in execution may be discharged on motion. *United States Bank v. Jenkins*, 18 J. R. 305.

(b) *What amount may be levied under an execution.*

10. On a judgment for the penalty of a bond, no more can be levied than the condition, interest, and costs. *Bergen v. Boerum*, 2 C. R. 256.

11. Although the bond was given to secure a larger debt than that mentioned in the condition, and there were other debts due from the defendant to the plaintiff. *Ibid.*

12. Where execution is issued in any action, (except in a debt for a penalty,) the plaintiff cannot levy the interest which has accrued since the judgment. *Watson v. Fuller*, 6 J. R. 223.

And see INTEREST, II.

[*606] *II. *Fieri facias*; (a) *What may be sold under a fi. fa.*; (b) *Levy and sale*; (c) *Sheriff's deed*; (d) *Title of the purchaser of lands or chattels sold under an execution, and how he may obtain possession*; (e) *Application of surplus money.*

(a) *What may be sold under a fi. fa.*

13. Wheat growing is a chattel, and if raised upon the land of another, by virtue of an agreement between him and the defendant, may be levied upon and sold under an execution against the latter. *Whipple v. Foot*, 2 J. R. 418.

14. The purchaser succeeds to all the interest of the original lessee in the crop sown. *Stewart v. Doughty*, 9 J. R. 108.

15. Bank shares, or shares in a public library, cannot be seized, and sold under execution. *Denton v. Livingston*, 9 J. R. 96.

16. Bank bills, or money, and every thing belonging to the debtor of a tangible nature, except mere *choses in action*, and articles expressly exempted by the statute, may be taken and sold under an execution. *Handy v. Dobbin*, 12 J. R. 220. *S. P. Holmes v. Nuncaster*, 12 J. R. 395. *And see Bogert v. Perry*, in error, 17 J. R. 351.

17. By the act, in addition to the act concerning judgments and executions, (Sess. 38. c. 27.) necessary cooking utensils owned by a person being a householder, are exempted from execution and distress for rent; but the party claiming an exemption under the act, must show affirmatively and certainly, that the cooking utensils taken under the execution, or distrained, were in fact necessary; and not merely that they might be useful in cooking. *Van Sickler v. Jacobs*, 14 J. R. 434.

18. An equity of redemption may be sold under a *fi. fa.* against a mortgagor in possession. *Waters v. Stewart*, 1 C. C. E. 47.

19. Lands mortgaged cannot be sold on an execution against the mortgagee, before a foreclosure of the equity of redemption, though the debt be due, and the estate of the mortgagee has become absolute at law. *Jackson, ex dem. Norton, v. Willard*, 4 J. R. 41.

20. If a creditor by bond and mortgage, having obtained judgment on his bond, issue an execution, under which the mortgaged premises are taken, and sold to a person who has notice of the mortgage, and of its being unpaid; it will be deemed merely a sale of the equity of redemption, or the interest of the mortgagor, so as not to affect the mortgagee's lien on the land. *Jackson, ex dem. Ireland, v. Hull*, 10 J. R. 481.

21. Where A. buys land with the money of B., and takes a conveyance to himself, he becomes a trustee for B., whose interest as a *cestui que trust* may be taken, and sold, on an execution under a judgment against him. *Foote v. Colvin*, 3 J. R. 216. [See *tit. CHANCERY, XXIII. EXECUTION. Bogert v. Perry*, 17 J. R. 351.]

22. The resulting trust, or residuary interest, remaining to the assignor, after the purposes of an assignment for the payment of debts are satisfied, is not such an interest as can be taken and sold on execution. *Wilkes v. Ferris*, 5 J. R. 335.

*23. When a person charged in [*607] execution conveys land in trust, to be disposed of for the payment of a debt, with the privity and consent of the creditor, such conveyance is good within the 12th section of the act concerning judgments and executions. (Sess. 36. c. 50. 1 N. R. L. 500.) *Velie v. Myers*, 14 J. R. 162.

24. And in a plea to a *scire facias* against the heirs and terre-tenants of a defendant who died in execution, and who was in possession of the land belonging to the original defendant, at the time of docketing the judgment against him, it is sufficient to state the conveyance by the original defendant, with the consent of B. and the other creditors, to A. in trust to pay B. and his debt, and apply the surplus to the other creditors, &c., without setting forth who were the other creditors, or what was the amount of their debts. *Ibid.*

25. Where a debtor confesses a judgment, and afterwards fraudulently purchases, and procures to be delivered goods without paying for them, with intention to subject them to the execution of the judgment creditor, the title of the goods does not become vested in the purchaser, and they cannot, therefore, be taken on an execution against him. *Van Cleef v. Fleet*, 15 J. R. 147.

26. Where an execution against one partner is levied on the partnership property, the sheriff seizes all, and not a moiety of the goods sufficient to cover the debt, and sells a moiety thereof undivided; and the vendee becomes a tenant in common with the other partner. *Mersereau v. Norton*, 15 J. R. 179.

27. *Personal property* is bound by the execution, from the time it is delivered into the hands of the sheriff. *Cresson v. Stout*, 17 J. R. 116.

28. And whether they are levied upon or not, a subsequent sale of them by the debtor is void. *Beals v. Allen*, 18 J. R. 363. *S. P. Lambert v. Paulding*, 18 J. R. 311.

29. And the creditor, by the delivery of the execution to the sheriff, acquires a *lien*, of

which he cannot be deprived by an act of the debtor; and where goods, after the delivery of the execution to the sheriff, but before an actual levy, were removed by the debtor out of the bailiwick of the sheriff into another county, and were there taken and sold by the sheriff of that county, under an execution, subsequently issued; though the *bona fide* purchaser of such sale acquires a valid title to the goods, yet the *proceeds* in the hands of the sheriff will be ordered to be paid to the plaintiff in the first execution to the amount of his debt, leaving the residue, if any, to the plaintiff in the second execution. *Ibid.*

30. A person in possession of land under a contract for the purchase of it, has an interest in the land which may be sold on execution. *Jackson, ex dem. Stone, v. Scott*, 18 J. R. 94. See *Howard v. Easton*, 7 J. R. 205. Possession being *prima facie* evidence of legal title, and connected with the equity, the party has an interest in the land, within the statute of frauds. [But see *Bogert v. Perry*, 1 J. C. R. 52. 17 J. R. 351. *THE CHANCERY, XXIII.* The vendor does not become seised to the use or in trust for the vendee until the whole consideration money is paid; and therefore, the 4th section of the statute of uses does not apply; and a vendee who has not paid the

[*608] *whole of the consideration has a mere equity which cannot be reached by execution.]

31. The defendant in such case becomes *quasi* tenant to the purchaser, under the execution, and cannot object that he has no title. *Ibid.*

32. The act in addition to an act relative to executions, passed April 18, 1815, (Sess. 38. c. 227.) exempting from execution and distress, "one cow," &c. owned by any person "being a householder," was intended for the benefit of poor families; and the father or head of the family who has left the state, leaving his wife and children living together, is a "householder," within the meaning of the act. *Woodward v. Murray*, 18 J. R. 400.

33. Where the family of *M.* were in the act of removing to the house of another, and while on the road, in a wagon, their household furniture, and an only cow, were seized by virtue of an execution, and the cow sold; held, that the wife and children being together were a family, and the cow was, therefore, exempted from execution. *Ibid.*

34. And the consent of the wife that a cow or a bed might be taken and sold, on the officer releasing other articles not exempted by law, is not valid or binding, without special authority from the husband. *Ibid.*

(b) Levy and sale.

35. No property passes at a sheriff's sale, except what is ascertained and declared at the time. *Jackson, ex dem. Jones, v. Striker*, 1 J. C. 284.

36. The authority of the sheriff, in relation to the property, ceases on the return of the execution satisfied. *Ibid.*

37. Where a sheriff has levied an execution

in due time, he may complete the same by sale, but cannot levy after the return day. *Devoe v. Elliot*, 2 C. R. 243.

38. A sale may be adjourned, after it has been commenced, to a different place; and if there has been no fraud, and the officer has not abused his discretion, he will not be a trespasser, and the sale is valid. *Tinkon v. Purdy*, 5 J. R. 345.

39. A sale by the sheriff will not affect the title to lands not subject to sale under the execution. *Hewson v. Deygert*, 8 J. R. 333.

40. Where lands have been sold under an execution to satisfy an instalment due on a bond, it seems, that the land in the hands of the purchaser is no longer bound by the judgment, and cannot be sold to satisfy a subsequent instalment; that the lands will be presumed to have been sold under the former execution for their value, and that the purchase will be considered as absolute, in respect to the lien or judgment. *Ibid.*

41. The proper course, both on sales of real and personal property, is to sell only so much of the property charged as will probably satisfy the execution, and which can conveniently and reasonably be sold separately. *Ibid.*

42. A seizure of lands by a sheriff, under a *fi. fa.*, does not divest the estate of the debtor. *Callin v. Jackson, ex dem. Gratz*, 8 J. R. 520.

43. Nor does a sale at auction by the sheriff, unless the purchase money is paid, and a deed delivered. *Ibid.*

*44. Where land is sold under a [*609] *fi. fa.*, and a deed executed by the sheriff, the Court may, under the circumstances of the case, presume that it had been levied upon. *Jackson, ex dem. Sternberg, v. Shaffer*, 11 J. R. 513.

45. An actual levy under a *fi. fa.* is necessary, in order to vest the property in the goods in the sheriff. *Hotchkiss v. McVickar*, 12 J. R. 403.

46. The statute concerning judgment and executions, (Sess. 36. c. 50. s. 6.) by which the goods of the debtor are bound upon the delivery of the execution to the sheriff, does not alter the property of the goods; but before and since the statute, the property of the goods continues in the defendant, until execution executed. *Ibid.*

47. Therefore, the sheriff cannot maintain *trover* for goods tortiously taken out of the possession of the defendant in the execution after its teste, but before a delivery of it to the sheriff, or an actual seizure by him. *Ibid.*

48. When an officer has once levied on property sufficient to satisfy the execution, he cannot make a second levy. *Hoyt v. Hudson*, 12 J. R. 207.

49. If an officer deliver the goods taken in execution, to a third person, on his giving a receipt to return them or pay the amount of the execution, the officer cannot, afterwards, take other goods of the defendant in execution. *Ibid.*

50. And in such case, it is immaterial whether the property originally taken was sufficient to satisfy the execution or not, or that the offi-

cer had been unable to recover any thing on the receipt. *Ibid.*

51. Where a sheriff has two executions against the same defendant, and having levied part of the amount of the prior execution, proceeds, after the return day of that execution, to make another levy, he must apply the sum thus made to the junior execution; the latest period allowed by the law for the service of a writ being the day on which it is returnable. *Slingerland v. Swart*, 13 J. R. 255.

52. And in such case, if the plaintiff in the junior execution obtains a rule directing the sheriff to pay over the money so levied, to him, he is not bound to proceed by attachment, but may maintain an action of assumpsit against the sheriff. *Ibid.*

53. And after such rule of the Court, and a demand made of the sheriff of the money, the sheriff, being clearly in default, is chargeable with interest from the time of the demand. *Ibid.*

54. A delay in selling property levied upon under an execution, does not render the sale void in regard to an execution issued subsequent to the sale. *Linnendoll v. Doe*, 14 J. R. 222.

55. Where property is sold under an execution, part of which is present and part absent from the place of sale, the sale is valid as to the property present. *Ibid.*

56. At a sale under an execution, the articles sold must be pointed out to the bidders, and sold specifically and separately. *Sheldon v. Soper*, 14 J. R. 352.

57. If sold without any particular designation at the time of sale, *the purchaser acquires no property, and cannot maintain trover for the goods. *Ibid.*

58. If an officer, having an execution, pays the amount to the plaintiff, with his own money, or with money raised by the defendant and the officer on their joint credit, the judgment is satisfied; and the officer cannot afterwards enforce the execution against the defendant for his own indemnity, notwithstanding an agreement between them that the execution should continue in life in the hands of the officer. *Sherman v. Boyce*, 15 J. R. 443.

59. If a sheriff makes a levy on goods, under one execution, and afterwards, a second execution comes to his hands, the levy is sufficient for both, and he may sell the goods on the second, as well as on the first execution. *Cresson v. Stout*, 17 J. R. 116.

60. The sale of goods under a *fi. fa.* ought to be at the place where the goods are situated, so that they may be specifically seen and examined. *Ibid.*

61. Where the sale was *six miles* distant from the goods, it was held irregular and void. *Ibid.*

62. So, selling real and personal estate, or chattels, together, without discrimination, is irregular. *Ibid.*

63. *Rye growing* in a field, was levied upon under a *fi. fa.*, but not then sold by the sheriff; and afterwards the collector of taxes, distrained upon and sold the rye, as in the possession of

the debtor; held, that after the levy under the execution, the rye was in the custody of the law, and not in the possession of the debtor, so that it could be distrained upon, and that an action could not be maintained by the purchaser under the collector, against a purchaser under a subsequent sale by the sheriff, who cut and carried away the rye. *Hartwell v. Bissell*, 17 J. R. 128.

64. Where the real estate of a debtor consisted of a lot of land divided into separate farms, occupied by several and distinct tenants, the sheriff cannot sell the whole together, under the general description of a lot of land of a certain number, without specifying the parcels occupied as separate farms, &c., and if he does so, the Supreme Court, on motion, will set aside the sale. *Jackson, ex dem. Vanderlyn, v. Newton*, 18 J. R. 355.

65. A sheriff, under a *fi. fa.* issued on a judgment against the heirs of M., sold a parcel of land of which the ancestor was seised at the time of his death, as an entirety, and filed a certificate of the sale, &c. pursuant to the "act in addition to the act concerning judgments and executions," passed April 12, 1820. (Sess. 44. c. 184. s. 1.) E. having a judgment in his favor against W., one of the heirs of M., tendered and paid to the sheriff the amount for which the land was bid off by the purchaser, and ten per cent. interest for the redemption of the land sold, and demanded a deed for the whole of the land sold, pursuant to the third section of the act; held, that E., as a judgment creditor, could not be entitled to redeem more of the land, than to the extent of his lien, on the share of W. as a tenant in common. *Matter of Erwin v. Schriver*, 19 J. R. 379.

66. But, it seems, that the act has not provided for a redemption of *part of the premises sold under an execution; and, therefore, E. had no right of redemption whatever. *Ibid.*

67. Where an execution creditor bids at the sheriff's sale, and the goods are knocked down to him, the sheriff may lawfully deliver the goods to him, without receiving the money. *Nichols v. Ketcham*, 19 J. R. 84.

68. Where the sheriff sold the property of the defendant in an execution for a larger sum than was due on the execution, and executed a conveyance to the purchaser, without receiving from him the surplus money, (though requested by the defendant not to give a deed, until the money was received,) contrary to his duty as a sheriff, an action on the case lies against him at the suit of such defendant. *Coats v. Stewart*, 19 J. R. 298.

69. Where the sheriff had sold the property of the debtor to his creditor as the highest bidder, and delivered it, without receiving the money, and the judgment and execution were afterwards set aside as fraudulent and void, and the sheriff directed to apply the money collected on the execution to satisfy other executions in his hands, and the sheriff, not having actually received the money, returned to an execution delivered to him prior to the order of the Court, *nulla bona*, &c.; held, that

the sheriff was not liable to an action for a false return. *Nichols v. Ketcham*, 19 J. R. 84.

(c) *Sheriff's deed.*

70. No title to real estate passes to the purchaser under a sheriff's sale, without a deed or note in writing. *Simonds v. Callin*, 2 C. R. 61. *S. P. Jackson*, ex dem. *Gratz*, v. *Callin*, 2 J. R. 248. S. C. in error, 8 J. R. 520.

71. The sheriff's deed, or note in writing, must specify, with sufficient certainty, the lands sold, and who was the purchaser. *Jackson*, ex dem. *Gratz*, v. *Callin*, 2 J. R. 248.

72. The recital of the execution in a sheriff's deed is not necessary, and a mistake, or variance in the recital, is not material, and does not affect the validity of the deed, so long as there was an existing and sufficient authority to the sheriff, to warrant the sale. *Jackson*, ex dem. *Martin*, v. *Pratt*, 10 J. R. 381.

73. A deed, executed to the purchaser by the deputy sheriff, is good. *Jackson*, ex dem. *Masten*, v. *Bush*, 10 J. R. 223.

74. A subsequent deed by the sheriff, founded on the antecedent execution and sale, will not pass land, unless included under the description of the premises sold and conveyed by the first deed. *Jackson*, ex dem. *Jones*, v. *Striker*, 1 J. C. 284.

75. In a sheriff's deed, the land sold must be described with reasonable certainty, and he can sell nothing under an execution, which the creditor cannot enable him to describe. *Jackson*, ex dem. *Livingston*, v. *De Lancy*, 13 J. R. 537.

76. Nothing will pass under a general clause of "all other the lands, &c. of the defendant." *Ibid.*

77. If the premises sold are no [*612] otherwise described than as "all the lands and tenements of the defendant, situate, lying and being in the Hardenbergh patent," the deed is void for uncertainty. *Jackson*, ex dem. *Carman*, v. *Rosevelt*, 13 J. R. 97.

78. A sheriff's deed relates back to the time of sale, although not executed until after the date of the sale. *Jackson*, ex dem. *Noah*, v. *Dickinson*, 15 J. R. 309.

79. But under the act, passed April 12, 1820, (Sess. 43. c. 184.) allowing the debtor a year within which to redeem the lands sold under an execution, the deed of the sheriff does not retrospect, and must be dated after the time for redemption has expired; the sale being, in such case, conditional only, and the purchaser having merely a lien on the land. *Bissell v. Payn*, 20 J. R. 3.

(d) *Title of the purchase of lands or chattels sold under an execution, and how he may obtain possession.*

80. The title of a purchaser under a *fi. fa.* is derived from the sale and the sheriff's deed. *Jackson*, ex dem. *Kane*, v. *Sternbergh*, 1 J. C. 153. S. C. 1 J. R. 45. n.

81. It will not be affected by an incorrect return to the *fi. fa.* *Ibid.*

82. A sale under execution to a *bona fide* purchaser, cannot be defeated for error or irregularity in the judgment or execution, or on

the ground that no levy was made until after the return day. *Jackson*, ex dem. *Carman*, v. *Rosevelt*, 13 J. R. 97.

83. A plaintiff's attorney, purchasing under an execution against the defendant, is chargeable with notice of every irregularity attending the execution. *Simonds v. Callin*, 2 C. R. 61.

84. A purchaser of land, under an execution, becomes substituted in the place of the defendant, and if he was merely a tenant, the vendee becomes *quasi* a tenant to the landlord. *Jackson*, ex dem. *Klein*, v. *Graham*, 3 C. R. 188.

85. A purchaser, under a *fi. fa.*, of real estate, may enter and take possession of the premises, in a peaceable manner, though some goods of the former proprietor are left on the premises, and though they may be occasionally occupied by his servants. *McDougall v. Sitcher*, 1 J. R. 42.

86. But the purchaser has no right to enter, unless the premises are vacant. *The People v. Nelson*, 13 J. R. 340.

87. The sheriff can deliver only the legal possession, and to obtain *actual possession*, he must resort to his action of ejectment. *Ibid.*

88. A sheriff's deed for lands in the military tract must be recorded; and if after a conveyance by the sheriff to a purchaser, and before the deed is recorded, the defendant in the execution, or prior owner, sells and conveys it to a *bona fide* purchaser for a valuable consideration, who has his deed first recorded, such subsequent purchaser will gain a priority. *Jackson*, ex dem. *Merritt*, v. *Terry*, 13 J. R. 471.

89. Even if a special return upon an execution were sufficient to pass a title to the land, (which it is not,) such return, in order to give the purchaser a priority, must be recorded. *Ibid.*

90. If a sheriff execute a deed for land sold by him under a *fi. fa.*, and deliver it to a third person to be delivered to the vendee, on the payment of the purchase money, no estate passes by the deed, until the [*613] purchase money is paid, or condition performed. *Jackson*, ex dem. *Gratz*, v. *Callin*, 2 J. R. 248. S. C. in error, 8 J. R. 520.

91. A sheriff may deliver a deed as an *escrow*, but the money must be paid at a day certain, or within a reasonable time, or the sale will be void. *Ibid.*

92. And what is a reasonable time depends on circumstances; but, it seems, that it cannot extend beyond the return day of the *renditioni exponas*, or, at most, the next vacation. *Ibid.*

93. In an action of ejectment, by the purchaser of land under a sheriff's sale, the regularity of the execution cannot be questioned. *Jackson*, ex dem. *McCrea*, v. *Bartlett*, 8 J. R. 361.

94. The purchaser cannot be affected by any matter subsequent to the sale arising between the parties to the judgment to which he is a stranger. *Ibid.*

95. In an action of ejectment by a purchaser under a sheriff's sale against a person in possession under the debtor, without title or conclusively, the defendant cannot set up an out-

standing title in a third person, to defeat the recovery of such purchaser. *Jackson*, ex dem. *Masten*, v. *Bush*, 10 J. R. 223.

96. The purchaser of a chattel under an execution has the legal property. *Storm* v. *Livingston*, 6 J. R. 44.

97. No title vests in a purchaser when the sheriff acts without authority. *Carter* v. *Simpson*, 7 J. R. 535.

98. So, in trespass, by a purchaser of a chattel under an execution, for the destruction of it by the defendant, the chattels never having been in the possession of the plaintiff, he is bound to prove his property, by showing not only a purchase by himself, but an authority in the officer to sell. *Ibid*.

99. Where land of a debtor is sold under an execution, pending a lease by the debtor, and before the rent has accrued, and a certificate given to the purchaser, pursuant to the act passed April 12, 1820, (Sess. 43. c. 184.) the debtor, notwithstanding the sale and certificate, is entitled, until the time allowed by the statute for redemption has expired, and the sheriff's deed executed, to receive and sue for the rents which have in the mean time accrued; for the possession and enjoyment of the land, after the sale, and until the time of redemption has expired, remains in the same state as before the sale. *Bissell* v. *Payn*, 20 J. R. 3.

100. The sheriff's deed in such case does not retrospect, but must be dated after the time of redemption has expired. *Ibid*.

101. Such a sale is conditional merely, and until the sheriff's deed is executed, the purchaser has a lien only on the land. *Ibid*.

(e) Application of surplus money.

102. If the sheriff has a surplus in his hands, arising from a sale on execution, the Court will order it to be paid over on a *fi. fa.* issued at the suit of another plaintiff. *Ball* v. *Ryers*, 3 C. R. 84.

103. The Supreme Court will not order a sheriff, who has overplus money in his hands arising from an execution, to pay it over to a plaintiff on a subsequent execution against the same defendant, especially *in a [*614] case where an assignee of the first judgment, and who was a purchaser at the sheriff's sale, claimed the surplus money, and the equitable rights of the parties were not clearly ascertained; though the Court might, perhaps, in a case where the rights of the parties were clear, and there were no other means of satisfying the plaintiff in the second execution. *Williams* v. *Rogers*, 5 J. R. 163.

III. *Capias ad satisfaciendum*.

104. A defendant in execution, who has given security for the liberties, on being superseded, may leave the limits without any formal discharge from the sheriff, for the delivery of the supersedeas destroys the operation as well of the defendant's bond as of the *ca. sa.* *Warne* v. *Constant*, 4 J. R. 32.

105. Where a plaintiff agreed with a de-

fendant, who was in custody on a *ca. sa.*, that he might go beyond the liberties of the jail for his convenience, on the defendant's covenanting that he would continue in the custody of the sheriff on the *ca. sa.*, and not go beyond the limits prescribed by the plaintiff; and that, if he did go further, the plaintiff might retake him on the same *ca. sa.*, or issue another *ca. sa.*, and commit him again to the custody of the sheriff until the debt and costs were paid: and the defendant, having violated his agreement, by going beyond the bounds prescribed, the plaintiff issued a second *ca. sa.*, on which the defendant was again taken in custody by the sheriff: on a motion of the defendant to be discharged, *held*, that the agreement of the plaintiff amounted to a permission to the defendant to go at large, and that he was not liable to be retaken on the *ca. sa.*, but was entitled to his discharge; which was granted, however, on condition that he should not bring an action for false imprisonment. *Yates* v. *Van Rensselaer*, 5 J. R. 364.

106. The authority of a person, as agent for the plaintiff, to discharge a defendant from custody on execution, without satisfaction of the debt, must be clearly and fully proved, and strictly pursued. *Crary* v. *Turner*, 6 J. R. 51.

107. The attorney of the plaintiff on record has no power to discharge a defendant from custody on execution, without payment of the debt; his general authority as attorney ceases with the judgment, or at least with the issuing of an execution within the year. *Jackson*, ex dem. *M'Crea*, v. *Bartlett*, 8 J. R. 361.

108. If a *ca. sa.* be issued against one joint obligor for the costs, who, on payment of them, is discharged, it will not be a discharge or release of the other obligor who had been taken on an execution for the debt. *M'Lean* v. *Whiting*, 8 J. R. 339.

Admitting a prisoner on execution to the jail liberties. See SHERIFF.

Superseding a prisoner for not being charged in execution. See PRISONERS.

Ca. sa. against principal to charge bail. See BAIL, VII. 76, 77.

*IV. Service and return of an execution. [*615]

109. The latest period which the law allows for the service of an execution, is the day on which it is returnable. *Vail* v. *Lewis*, 4 J. R. 450.

110. An execution cannot be executed after the day on which it is returnable. *Devoe* v. *Elliot*, 2 C. R. 243. *S. P. Vail* v. *Lewis*, 4 J. R. 450.

111. An inquisition made by a sheriff's jury, to ascertain whether the property in goods taken on a *fi. fa.* is in the defendant or not, if found not to be in him, though not conclusive as to the right of property, is a justification to the sheriff, for returning *nulla bona*, and a conclusive defence in an action against him for a false return; unless it be shown that he did not act with good faith. *Bayley* v. *Bates*, 8 J. R. 185. *Townsend* v. *Phillips*, 10 J. R. 98. *S. P. Van Cleef* v. *Fleet*, 15 J. R. 147.

112. But if an adequate indemnity is tendered by the plaintiff to the sheriff, and he should unreasonably refuse it, *it seems*, that he is bound to proceed and sell the goods, or be liable for a false return. *Bayley v. Bates*, 8 J. R. 185. *S. P. Van Cleeve v. Fleet*, 15 J. R. 147.

113. Where the sheriff returns that he has a certain sum made by virtue of the execution ready to deliver to the party entitled, this is a sufficient evidence of the receipt of the money to charge him with the amount, though, in fact, no money was actually received by him. *Doty v. Turner*, 8 J. R. 20.

114. Where a sheriff returns that he has levied on the goods of the defendant, to the value of the debt or damages in the execution, whether he is bound by the value returned or not? *Dubitatur*. *Denton v. Livingston*, 9 J. R. 96.

115. A return by a deputy sheriff, in his own name, and not in the name of the sheriff, is void. *Simonds v. Callin*, 2 C. R. 61.

116. Where a sheriff returns to a *fi. fa.* that he had paid part of the money levied by the execution, for rent due the defendant's landlord; the return will be taken to be true, and the whole construed together, and the rent being due, and notice of the claim for it to the plaintiff to be presumed, the sheriff was deemed to have paid the rent in his behalf, and for his benefit; and, therefore, in an action against the sheriff, the plaintiff is entitled to recover no more than the residue of the money, after deducting the rent. *Griffith v. Kelchum's Administrators*, 12 J. R. 379.

117. An execution against C. was delivered to a deputy sheriff in *December*, returnable in *February* following; and in *March*, C. sold a pair of horses, of which he was in possession when the execution was delivered to the sheriff, and until the return day; and the deputy afterwards took and sold the horses under the execution. In an action of trespass, by the person who bought the horses of C. against the officer; *held*, that in the absence of all positive proof, it was fairly to be presumed from the circumstances, that a levy had been lawfully made by the officer on the horses, before the return day of the execution. *Hartwell v. Root*, 19 J. R. 345.

[*616] *V. When an execution, and the proceedings under it, will be stayed or set aside.

118. An execution irregularly issued is a nullity: but it is otherwise with an erroneous execution or process, and the party may justify under it, until it be reversed. *Read v. Markle*, 3 J. R. 523.

119. An execution issuing in a county other than that in which the venue is laid, without a *testatum*, will be set aside after it has been executed and returned. *Simonds v. Callin*, 2 C. R. 61.

120. If an execution was originally issued for too much, but the sheriff was afterwards directed not to levy more than was due, it will not be set aside, but the plaintiff must pay the

defendant the costs of the application. *Green v. Beale*, 2 C. R. 254.

121. Where a judgment was obtained in a Justice's Court, on which a *certiorari* was brought to the Supreme Court, and the defendant, being taken on a *ca. sa.* in the Court below, paid the money into that Court and was discharged, and afterwards, the judgment below being affirmed in the Supreme Court, the attorney of the defendant in error issued a *ca. sa.* on the judgment in the Supreme Court against the plaintiff in error, for the amount of damages and costs recovered in the Court below, and the costs in error, which were paid to the sheriff; the Court ordered the money, except the costs in error, to be refunded, with costs of the application to be paid by the attorney, and a satisfaction to be endorsed on the *ca. sa.* *Hoyt v. Peterson*, 4 J. R. 188.

122. An execution was set aside with costs, in an action of debt on a bond conditioned for the performance of the covenants, in which the plaintiff had neglected to assign breaches, and the jury finding a verdict of six cents for him, he had issued his execution for the whole amount of the penalty. *Caverly v. Nichols*, 4 J. R. 189.

123. If a sheriff, with his own money, pay the plaintiff on an execution, and afterwards levy the execution on the property of the defendant, the Court will set it aside. *Reed v. Pruyn*, 7 J. R. 426.

124. So, if he takes a bond or other security, and detains the execution in his hands, and uses it afterwards to enforce the payment of the money advanced by him. *Ibid.*

125. The Court will not interfere, on motion to prevent the sheriff from selling property on execution, which is alleged not to belong to the defendant: but the party having title has his remedy by action. *Hewson v. Deygert*, 8 J. R. 333.

126. If an execution issues after a year and day, without a revival of the judgment by a *scire facias*, it is only voidable at the instance of the party against whom it issued. *Jackson, ex dem. McCrea, v. Bartlett*, 8 J. R. 361.

127. And, in an action by the purchaser under such an execution, its regularity cannot be questioned. *Ibid.* *S. P. Jackson, ex dem. Livingston, v. De Lancy*, 13 J. R. 537.

128. And *it seems*, that after the lapse of twenty years, it cannot be *avoided on the direct application of [*617] the party, so as to defeat the title of a purchaser under it. *Ibid.*

129. If the execution varies from the sum mentioned in the clause of *in toto se attingunt*, but agrees with the sum in the judgment, it is immaterial. *Jackson, ex dem. Martin, v. Pratt*, 10 J. R. 381.

130. A *ca. sa.* issued before a *fi. fa.* in an action in which special bail has been filed, is not void, but voidable only at the instance of the party against whom it issued. *Scott v. Shaw*, 13 J. R. 378.

131. And in an action for an escape, the sheriff cannot take advantage of the irregularity. *Ibid.* *S. P. Hinman v. Brees*, 13 J. R. 529.

132. P. was seized of two farms, which were bound by a judgment in favor of S.; P. afterwards sold one of the farms to W., and the other to T., who, for part of the consideration money, gave P. a bond conditioned to pay off and discharge the judgment to S.; T. neglected to pay off the judgment, and procured R. to advance the money due on it, and take an assignment thereof for his security; and, afterwards, the judgment was assigned to the son of T., who issued an execution thereon, and caused the same to be levied on the farm purchased by W. of P. On motion of W., a rule was granted to stay proceedings on the execution, as it respected the farm of W., until the further order of the Court. *Smith v. Page*, 15 J. R. 395.

133. To prevent fraud, or great injustice, the Court will order a perpetual stay of execution, provided the facts are made clearly to appear to the Court, so that complete justice can be done to all parties concerned; otherwise, the execution may be stayed for a definite time, so as to give the party an opportunity of applying to a Court of Chancery for relief. *Lansing v. Orcutt*, 16 J. R. 4.

134. Where a sheriff, under an execution, sold the house and lot of the defendant, and executed a deed to the purchaser, and afterwards seized and sold the same house and lot, on another execution issued on a prior judgment against the same defendant, and advertised the same for sale, the Court refused to stay proceedings, on application of the purchaser under the execution first issued, but left him to seek his remedy by action. *Myers v. Kelsey*, 19 J. R. 197.

VI. Priority of executions.

135. If a creditor cause the goods of his debtor to be seized under a *fi. fa.*, and suffer them afterwards to remain in the possession of the debtor, the execution will be deemed fraudulent and void, as against a subsequent execution. *Storm v. Woods*, 11 J. R. 110. *S. P. Farrington v. Sinclair*, 15 J. R. 420.

136. Where the goods of the defendant are levied on under an execution, but the sale delayed, and the goods left for more than a year in the possession of the defendant, by the direction of the plaintiff, when a second execution, in favor of another plaintiff, is issued, and the sheriff sells under both executions, but returns *nulla bonis* to the first, no action will lie against him for a false return, as the first execution is to be deemed dormant, and must be postponed in favor of the second.

[*618] *Ibid.* *S. P. Dickenson v. Cook*, 17 J. R. 332. And see *Kellogg v. Griffin*, 17 J. R. 274.

137. A sale of chattels on a junior execution is valid, and the only remedy of the party whose execution was first delivered, is by action against the sheriff. *Sandford v. Roosa*, 12 J. R. 162.

138. Where the property levied upon consists of ponderous articles, not easily removable, and the creditor allows them to remain

in the possession of the debtor, this is not *per se* evidence that the execution and levy were fraudulent, so as to render the property liable to be levied on under a junior execution against the same debtor; but, if the first execution creditor permits the debtor to consume the property, (as firewood, or provisions,) this is, constructively, if not actually, fraudulent, as against a subsequent execution or attachment; and to prove the fraud, the creditor in the junior execution may produce evidence of a permission given by the first creditor to the debtor, to use other property levied on at the same time. *Farrington v. Sinclair*, 15 J. R. 428. *Farrington v. Caswell*, 15 J. R. 430.

139. If the officer who made the levy on the first execution, brings trover against the parties making the levy on the second, they may show circumstances of fraud to defeat the levy, equally as if it had been brought by the creditor himself. *Ibid.*

140. So, if a party purchasing goods on a sale under an execution issued by him, suffers them to remain in the possession of the debtor, it is *prima facie* evidence of fraud, as against a subsequent execution. *Ibid.*

141. The plaintiff, having a prior judgment, issued a *fi. fa.* thereon, in January, with instruction to the sheriff, "to make a levy on the property of the debtor, but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference." The sheriff did nothing, except merely to receive an inventory of the personal property of the debtor, until another execution was delivered to him, in May following, at the suit of a subsequent creditor; held, that the first execution was dormant, and constructively fraudulent, as against the subsequent execution. *Kellogg v. Griffin*, 17 J. R. 274.

142. Where two several executions, at the suit of different plaintiffs, against the same defendant, are delivered to the sheriff at different times, and the sheriff takes and sells the goods of the defendant, and applies the proceeds in satisfaction of the first execution, leaving the other unsatisfied, though he is accountable to the plaintiff in the first execution, for having so sold and misapplied the property of the defendant to the last execution; yet a third creditor, who has got possession of the goods subsequent to the delivery of the first execution, but prior to the second, cannot avail himself of such act of the sheriff, or call in question the regularity of the sale. *Beals v. Allen*, 18 J. R. 363.

143. Where the maker of a promissory note, protested for non-payment, confessed a judgment in favor of the endorser for his security, and the holders, who had previously sued the maker, afterwards recovered judgment against him, and executions on both judgments were in the hands of the sheriff, though the execution on the judgment in favor of the endorser was first delivered, the Court, on motion of the holders, plaintiffs, [*619] the second suit, ordered the sheriff, out of moneys arising from a sale of the defendant's property, first to pay and satisfy

the second execution in favor of the holders of the note. *Bank of Auburn v. Throop*, 18 J. R. 505.

See further, tit. FRAUDS, I. II. JUDGMENT, I. II.

Execution in a Justice's Court, see COURTS OF JUSTICES OF THE PEACE.

in ejectment, see EJECTMENT.

See tit. CHANCERY, XXIII. Execution.

EXECUTORS AND ADMINISTRATORS.

I. Administration and administrator.

II. What goes to the heir, and what to the executor.

III. Payment of debts.

IV. When executors and administrators are personally liable.

V. Actions by and against executors and administrators.

VI. When executors and administrators shall pay, and when recover costs.

VII. Authority of an executor or administrator.

VIII. Action on the administration bond.

I. Administration and administrator.

1. The surrogate may, in his discretion, grant administration to any one of the next of kin to the testator, to the exclusion of all the rest. *Taylor v. Delancy*, 2 C. C. E. 143.

Where an inhabitant of this state went into another state, leaving his wife and property here, and resided there seven years, and died intestate; held, that he had ceased to be an inhabitant of this state, (there being no evidence of an *animus revertendi*;) and the judge of the Court of Probates only, not the surrogate, had power to grant administration of his goods and chattels within this state. *Weston v. Weston*, 14 J. R. 428.

2. Whether the exercise of that discretion may be reviewed upon appeal? *Quære. Ibid.*

3. The intestate confessed a fraudulent judgment, to defeat his creditors, to A., on which an execution was issued, and the goods of the intestate were bought in by A. for the same fraudulent purpose; after the death of the intestate, a creditor took out administration, and seized and took the goods in the possession of A., as the property of his intestate; held, that the creditor, in his character of administrator, could not impeach the judgment, and that he had no right to take the goods, as a creditor, without suit, but was a trespasser. *Osborne v. Moss*, 7 J. R. 161.

4. But though he was administrator, he might, as creditor, have sued A. as executor *de son tort. Ibid.*

5. If an executor, *de son tort*, take out letters of administration, it makes legal all acts which were before tortious. *Ratloot v. Overacker*, 8 J. R. 126.

6. If a person, who is sued as executor *de son tort*, takes out administration pending the suit, though it will not defeat the suit which

was well commenced, yet it will legalize all intermediate acts, *ab initio*, and justify a retainer. *Ibid.*

*II. What goes to the heir, and [*620] what to the executor.

7. Real covenants, such as run with the land only, go to the heir. *Hamilton v. Wilson*, 4 J. R. 72.

8. But where a covenant of seisin was broken in the lifetime of the ancestor, as where the grantor, at the time of executing the conveyance, was not seised, the right of action for the breach goes to the personal representatives of the grantee, and not to his heir. *Ibid.*

III. Payment of debts.

9. If one of several joint makers of a promissory note dies solvent, and the survivors become insolvent, the estate of the deceased is, in equity, chargeable with the payment of the note. *Jenkins v. De Groot*, 1 C. C. E. 122.

10. The whole real estate of the testator was sold, under an order of the surrogate, by his executors, at auction, to A., who purchased on behalf of the executors, for 25 dollars, and was reconveyed by A. to the executors, who afterwards sold the same for 2,500 dollars, but the money was not paid into the office of the surrogate. A judgment was recovered against the executors for 129 dollars; and, at the time of the judgment, they had administered assets to the amount of 2000 dollars, but the amount of the inventory was 381 dollars. The judgment was revived against the executors by *scire facias*, who pleaded *plene administravit*, under the act for the amendment of the law; held, that though the executors were liable for the whole proceeds of the estate sold, being 2,500 dollars, yet that under the act, (Sess. 36 c. 79. s. 26. 1 N. R. L. 452.) they were not responsible immediately to the creditors of the testator, but to the surrogate, as trustees commissioned by him to sell; and that when the whole real estate is sold by order of the surrogate, the money paid into his office becomes equitable assets, and is to be distributed *pari passu*, and not according to the rule of the common law. *Tappen v. Kain*, 12 J. R. 120.

IV. When executors and administrators are personally liable.

11. Suffering a judgment by default is an admission of assets, and cannot be denied in an action on that judgment. *Platt v. Robin*, 1 J. C. 276.

12. And such judgment, and a return of *nulla bona* to a *fi. fa.* issued thereon, are conclusive evidence of a *devastavit. Ibid.*

13. Where an executor does an act in good faith, but under a mistake, he will not be liable; as for making a surrender of a term, on the supposition that it was forfeited, for a less consideration than it was worth. *The People v. Pless*, 2 J. C. 376.

14. But if, while the agreement continues executory, he discovers his mistake, and then executes a release of the term, he [***621**] is chargeable *with a *devastavit*, for the difference between the sum received or the surrender, and the real value of the estate. *Ibid.*

15. If an executor has been robbed of money belonging to his testator's estate, he will be exonerated from accounting for it. *Furman v. Coe*, 1 C. C. E. 96.

16. And, after his death, his personal representative may avail himself of the excuse, though uncorroborated by the oath of him whom he represents. *Ibid.*

17. If an executor or administrator compounds, and releases a debt, he is responsible, at law, for the whole amount which was due. *De Diemar v. Van Wagenen*, 7 J. R. 404.

18. A note made by an administrator, as administrator, by which he promises to pay, &c. for value received, by the intestate and his heirs, is void, for want of consideration. *Ten Eyck v. Vanderpoel*, 8 J. R. 120.

19. Where a suit is brought by an executor or administrator before a Justice's Court, and the defendant pleads a set-off, and a balance is found in his favor, the judgment for the defendant is absolute and peremptory against the plaintiff, who becomes thereby charged for the judgment, *de bonis propriis*. *Smith v. Lockwood*, 10 J. R. 366. And see *Wells v. Newkirk*, 1 J. C. 228.

20. A co-executor or co-administrator is chargeable only for the *assets* which come to his hands, and not for those in the hands of his companion, and is answerable only for the goodness of his own plea. *Douglass v. Satterlee*, 11 J. R. 16.

21. So, one executor is not chargeable with the *devastavit* of the other. Per *Kent*, Ch. J. *Ibid.*

22. But when *assets* have once come to his possession, he is answerable for the due administration of them, even if he deliver them over to his co-executor. Per *Kent*, Ch. J. *Ibid.*

23. A., the administrator of an intestate, under an order of the surrogate, sold certain land of the intestate, and took a bond and mortgage from a purchaser, to secure the consideration. He afterwards drew an order upon the purchaser, in favor of B., for part of the debt, stating in the order, that the amount should be credited on the bond and mortgage; but the purchaser refused to pay the order, as the bond and mortgage had been assigned to C. Held, that A., having received the full amount of the bond and mortgage from the assignee, and being credited for the amount of the debt to B., in his account with the surrogate, was liable, in his individual capacity, to B. for the amount of the order, as for so much money had and received to the use of B. *Mosher v. Hubbard*, 13 J. R. 510.

24. The plaintiff, and the defendants, who were executors, agreed to submit a difference between them, as to the accounts between the plaintiff and the testator, to the award of E., and executed promissory notes to each other,

signed by them, individually, for 1,500 dollars, payable on demand, which were delivered to the arbitrator, who was to endorse his award, and the arbitrator endorsed on the note given by the defendants his award, finding a balance due to the plaintiff, from the estate of the testator, of 97 dollars and 38 cents, and endorsed a payment on the note, so as to reduce it to that sum; in an action *brought on the note to recover the sum so [***622**] awarded, held, that the defendants were not liable *personally*, and that the action could not be maintained against them, as executors, without proving *assets*. *Schoonmaker v. Roosa*, 17 J. R. 301.

25. Where an executor or administrator pleads a false plea, the judgment is *de bonis testatoris, si non, de bonis propriis*, &c.; and, under the statute, if sufficient goods and chattels cannot be found, then of the *lands and tenements*, &c. *Lansing v. Lansing*, 18 J. R. 502.

V. Actions by and against executors and administrators.

26. Executors may have trespass for wasting and destroying, as well as taking and carrying away, the goods of their testator. *Snyder v. Croy*, 2 J. R. 227.

27. Covenant lies by executors, on an express covenant for rent accrued during the life of the testator. *Executors of Van Rensselaer v. Executors of Platner*, 2 J. C. 17.

28. But not for rent afterwards becoming due. *Ibid.*

29. Debt will not lie against the executors or administrators of a sheriff, for an escape, in the lifetime of their testator or intestate. *Martin v. Bradley*, 1 C. R. 124.

30. Actions arising from tort or misfeasance do not survive against executors. *Franklin v. Lou*, 1 J. R. 396.

31. So, an action on the case will not lie against the representatives of a deceased postmaster, for money feloniously taken out of a letter by one of his clerks. *Ibid.* [See 20 J. R. 33. pl. 50.]

32. Covenant lies against executors and administrators of a grantee in fee, where the grantee covenants for himself, his executors, &c., to pay a rent in fee, although the land goes to the heirs. *Executors of Van Rensselaer v. Executors of Platner*, 2 J. C. 17.

33. Covenant does not lie by the devisees of the lessor against the executors of the lessee, for rent accrued since the death of the testator. *Devisees of Van Rensselaer v. Executors of Platner*, 2 J. C. 24.

34. If the endorser of a note die before it becomes due, in an action by the holder against his executor, the promise to pay must be alleged to have been made by the defendant; if by his testator, it will be fatal. *Stewart v. Eden*, 2 C. R. 121.

35. In an action against an executor, the plaintiff, in order to save the statute of limitations, may state, that the testator being indebted, &c. the executor, after the death of the testator in consideration, &c., promised to

pay: and the defendant may set up every defence which he could have done, if the *assumpsit* had been laid from the testator, and the judgment will be *de bonis testatoris, si non, &c.* *Whitaker v. Whitaker*, 6 J. R. 112.

36. A count on a promise made by an executor or administrator, as such, and in which he is not charged as personally liable, may be joined with a count on a promise made by the intestate. *Carter v. Phelps's Administrator*, 8 J. R. 440.

37. Whether the promise by the testator, and subsequently by the *executor for [*623] the same cause, be in one, or in distinct counts, is not material. *Ibid.*

38. On the plea of *plene administravit*, the *onus probandi* lies on the defendant. *Platt v. Robins*, 1 J. C. 276.

39. Where a default, regularly entered against an administrator, was set aside, on sufficient excuse, the Court ordered the judgment to stand as security for the assets remaining, after payment of prior judgments confessed, and for assets *quando acciderint*, and, also, that he disclose by affidavit the state of the assets. *Nichie v. Smith*, 2 J. C. 286.

40. If a regular judgment has been obtained against an administrator, by default, and more than a term has elapsed since the defendant knew of the default, yet the Court will set aside the default, on payment of costs, to let in the administrator to plead, so as to prevent his being made liable, *de bonis propriis*, through the ignorance or negligence of his attorney. *Phillips v. Hasley*, 6 J. R. 129.

41. The truth or falsehood of the plea of *plene administravit* is to be determined by reference to the inventory only. *Tuppen v. Kain*, 12 J. R. 120.

42. Where an executor pleads several outstanding judgments, or other debts of a higher nature than that for which he is sued, and *plene administravit prater*, and some of the judgments are badly pleaded, but others are well pleaded, the plaintiff cannot have judgment generally for his whole demand; but if the judgments or debts, well pleaded, are sufficient to absorb the assets confessed, he may take judgment for *assets in futuro*: or if the assets confessed are more than sufficient to satisfy the well-pleaded judgments, he may take judgment for the overplus. *Douglass v. Satterlee*, 11 J. R. 16.

43. The plaintiff in such case should not demur to the whole plea, but only to such of the judgments or debts as are badly pleaded, and traverse the residue of the plea. *Ibid.*

44. When outstanding judgments recovered against the testator or intestate, jointly with other persons, are pleaded, the defendant must aver that the testator, or intestate, was the survivor, without which he was not chargeable at law. *Ibid.*

45. It seems, that on a plea of *plene administravit*, if the plaintiff prove *assets*, the defendant is liable only to the extent of the *assets* proved, and not for the whole demand. *Ibid.*

46. An admission by one of several executors or administrators, of a debt due from the testator or intestate, does not conclude the

others from showing that the debt has been paid. *James v. Hackley*, 16 J. R. 273.

47. One of several administrators, having assumed the payment of a debt due from the intestate to the plaintiff, received the money of the estate, to the amount of the debt, in order to pay it, and gave his note to the plaintiff for the amount. He continued solvent for three years afterwards, during which time, the plaintiff extended their credit to him, by receiving a new note, and he then failed without having paid the debt; *held*, that under the circumstances of the case, it might be intended that the note of the plaintiff was accepted in full satisfaction of the debt; especially after the plaintiff had indulged the administrator for so long a time. *Ibid.*

*48. A., one of three executors, [*624] and indebted to the testator, at the time of making his will, by simple contract, refused to act, and the other two executors proved the will and administered. A., afterwards, gave a bond to the two acting executors for the debt due by him to the testator; and more than a year thereafter, took upon himself the office of executor, and cancelled the bond; *held*, that the bond was to be considered as given to the two executors, for a valuable consideration, in their private capacity; the addition of executors, &c. being merely words of description; and that A. could not avail himself of the privilege of executor, as to the debt; and that the other executors therefore might maintain their action against him, and recover the amount of the bond, so destroyed. *Gardner v. Miller*, 19 J. R. 188.

49. In an action of *assumpsit* against an administrator, the defendant pleaded *non assumpsit—non assumpsit infra sex annos*, and *plene administravit*, and a verdict was found for the plaintiff on the two first pleas, and for the defendant on the third plea; *held*, that the plaintiff was entitled to judgment of *assets, quando acciderint*, &c. for the amount of the damages assessed on the first issue; but that the defendant should have judgment for his costs. *Osterhout v. Hardenbergh*, 19 J. R. 266.

50. Though an action will not lie against executors and administrators, for a *fraud* of the testator or intestate, which does not benefit the *assets*; yet it will lie against his representatives on a contract fraudulently performed, by him. *Troup v. Executors of Smith*, 20 J. R. 33. See *ante*, pl. 30, 31.

51. In an action brought by an administrator for a debt due to his intestate, the defendant cannot set off a debt due from the intestate and purchased by the defendant after the death of the intestate. *Root v. Taylor*, 20 J. R. 137.

52. Where there are creditors, in equal degree, of a testator or intestate, the one who commences an action against the executor or administrator, is entitled to priority of satisfaction, which the defendant cannot defeat by a voluntary payment to another creditor. *Rugles v. Sherman*, 14 J. R. 446.

53. Where two creditors commence actions, the executor or administrator may give a preference to one, by confounding judgment to

him, which he may plead in bar of the action by the other. *Ibid.*

54. But he cannot take advantage of such judgment in any other way, than by pleading it. *Ibid.*

55. If an executor or administrator confesses a judgment, or suffers a judgment to pass by default, he is estopped from denying assets to the amount of such judgment, as far as regards the plaintiff. *Ibid.*

56. But it is no estoppel as to another plaintiff. *Ibid.*

57. A. commences an action against an administrator, and then B. commences an action, and the defendant confesses judgment to B.: in the action at the suit of A. he pleads outstanding debts of a higher degree, and a debt due to himself of equal degree, but does not plead the judgment recovered by B.; held, that the defendant, not having pleaded B.'s judgment, cannot avail himself of it as [*625] a defence, but *that it is an admission of assets, so as to entitle A. to a judgment on the plea of *plene administravit*, and that the defendant might, notwithstanding, take advantage on his defence of the debts he had pleaded. *Ibid.*

58. Such judgment, although not an estoppel in the suit by A., is, it seems, evidence of assets to a jury. *Ibid.*

59. It seems that the neglect of the executor or administrator to file an inventory, is, also, a circumstance of some weight to charge him with assets. *Ibid.*

60. An outstanding debt due to the testator or intestate, is not assets in the hands of his executor or administrator, where there has not been gross negligence, or collusive, fraudulent and unreasonable delay in collecting it. *Ibid.*

VI When executors and administrators shall pay, and when recover, costs.

61. Where an executor, plaintiff in the Supreme Court, recovers less than 50 dollars, he shall not pay costs; nor is he entitled to recover costs from the defendant. *Executors of Mahany v. Fuller*, 2 J. C. 209. *S. P. Carlile v. Bates*, 8 J. R. 379.

62. But an executor, recovering less than 25 dollars in the Common Pleas, is entitled to costs. *Executors of Mahany v. Fuller*, 2 J. C. 209. [But since the act of 5th April, 1820, (Sess. 36. c. 53.) gives to justices of the peace jurisdiction of suits brought by executors and administrators, it would seem, that the executor would not be entitled to costs in such case.]

63. Where an executor or administrator has recovered less than 25 dollars in the Common Pleas, the Supreme Court will not grant a *mandamus* to compel the Court below to give judgment for the plaintiff, for costs, but will leave him to his remedy by writ of error. *The People v. The Judges of Ulster*, C. C. 117.

64. Costs were refused against an executor, plaintiff, who was nonsuited for a variance between the declaration and writing declared upon. *Fleming v. Tyler*, 1 J. C. 102. *S. C. C. C. 63.*

65. If judgment be given against administra-

tors, when plaintiffs, on demurrer, they must pay costs. *Administrators of Kellogg v. Wilcocks*, 2 J. R. 377. *S. P. Salisbury's Executors v. Heirs of Philips*, 12 J. R. 289.

66. Where a wrong action is brought by mistake, administrators may discontinue without costs. *Phanix v. Hill*, 3 J. R. 249.

67. In an action of trover by an administrator, when the declaration contains only one count, stating the trover and conversion to have been in the lifetime of the intestate, the plaintiff, although he fails in his action, is not subjected to the payment of costs. *Administrators of Tilton v. Williams*, 11 J. R. 403.

68. But when the trover and conversion are laid to have been after the death of the intestate, and after letters of administration granted, if the plaintiff fails, he must pay costs. *Ibid.*

*69. Where the declaration contains several counts, in some of [*626] which the trover and conversion are laid before, and in others after, the death of the intestate, and the granting letters of administration, and the plaintiff fails, the certificate of the judge who tried the cause, as to which of the counts the plaintiff's proof applied, will be received, and the defendant will recover costs, or not, accordingly. *Ibid.*

70. Executors and administrators, plaintiffs, are only excused from costs when they necessarily sue in their representative capacity. *Ibid.*

71. On being nonprossed, executors must pay costs. *Rudd v. Long*, 4 J. R. 190.

72. So executors and administrators, plaintiffs, on a judgment of *nonsuit*, for not prosecuting the cause to trial, must pay costs. *Brown v. Lambert*, 16 J. R. 148.

73. On a *scire facias* by executors to revive a judgment, where issue is joined on a plea of payment, and the plaintiffs are *nonsuited*, at the trial, they must pay costs. *Hogeboom v. Clark*, 17 J. R. 268.

See ante, I. 3. 5.

VII. Authority of an executor or administrator.

74. Each executor has the control of the estate, and may release, pay, or transfer, without the agency of the other. Per *Kent*, Ch. J. *Douglass v. Satterlee*, 11 J. R. 16.

75. Where K. subscribes to a work, to be published in numbers, the publisher dies before the work is completed, and his administratrix afterwards completes it, and sends the numbers to K., he is bound to pay for the numbers so delivered by her, after the death of the intestate. *Kline v. Low*, 11 J. R. 74.

VIII. Action on the administration bond.

76. In an action against the surety on an administration bond, it is sufficient for the plaintiff to state, that the goods and chattels and sums of money of the deceased, to a large amount, to wit, to the amount of, &c. had come into the hands of the administratrix, which she had converted and disposed of to her own use, &c.; the creditor not being presumed to know precisely what goods, &c. the adminis-

tratrix had; that fact lying more properly in the knowledge of the defendant. *The People v. Dunlap*, 13 J. R. 437.

77. The non-payment of a judgment obtained against the administratrix, may be assigned as a breach of the condition of such bond. *Ibid.*

78. The surety in an administration bond is liable for a mal-administration of the effects of the deceased; and the condition of the bond is not to be restricted, merely to the exhibiting of an inventory within six months from the date, in the office of the surrogate of the county. *Ibid.*

79. Such bond may be put in suit against the sureties, at the instance, and for the benefit, of creditors. *Ibid.*

*80. The Supreme Court, if they [*627] see that the right of suing on the administration bond is abused, will interfere and set aside the proceedings. *The People v. Duncan*, 1 J. R. 311.

See tit. CHANCERY, *Executors and Administrators*.

EXTINGUISHMENT.

1. A specialty executed by one partner, though binding on him alone, is an extinguishment of a debt from the partnership to the obligee. *Clement v. Brush*, 3 J. C. 180. *S. P. Tom v. Goodrich*, 2 J. R. 213.

2. Taking a bond and mortgage is not an extinguishment of a sealed note, previously given for the same debt. *Phelps v. Johnson*, 8 J. R. 54.

3. A personal action, once suspended by the voluntary act of the party entitled to it, is forever gone and discharged. *Thomas v. Thompson*, 2 J. R. 471.

4. If a creditor appoint his debtor his executor, the debt is extinguished. *Ibid.*

5. And it is the same where other persons are joined with the debtor as executors. *Ibid.*

6. So, where A. recovered judgment against B., an administratrix of C., and afterwards appointed B., and two others, his executors, and died, the judgment debt against B. was thereby extinguished. *Ibid.*

7. The deacons and elders of a church, not incorporated, called the plaintiff as their minister, and entered into an agreement with him for a stipulated yearly salary, which he regularly received from the deacons and elders for the time being, both before and after the church was incorporated, without ever looking to the individuals with whom he made the agreement, for payment of his salary; and, when the church was incorporated, he was a party to the act of incorporation, and had afterwards frequently recognized it as a corporation; on being dismissed, he brought an action against the surviving parties to the original call or agreement, in their individual capacity; held, that, by the mutual understanding of the parties, the original contract was waived; and

that, after the incorporation of the church, the previous contract became extinguished, as a private and simple contract, and the corporation acting by their seal, having assumed the contract, and become the debtor of A., with his assent and concurrence, the defendants were not responsible to him, in their individual capacity. *Van Vlieden v. Welles*, 6 J. R. 85.

8. A new security of an equal or inferior degree is not an extinguishment of a prior debt. *Jackson, ex dem. Sternberg, v. Shaffer*, 11 J. R. 513.

9. A bond and warrant of attorney on which the judgment is entered, are not an extinguishment of a previous judgment against the same defendant. *Ibid.* See 14 J. R. 404.

*10. A judgment without satisfaction, is not an extinguishment of a collateral remedy for the same cause of action. *Chipman v. Martin*, 13 J. R. 240.

11. So, an unsatisfied judgment, in an action brought for the recovery of rent, does not preclude the plaintiff from distraining for the same rent. *Ibid.*

12. So, a collateral security of a higher nature, as a bond and warrant of attorney, on which judgment is entered, does not extinguish the original contract, as long as it remains unsatisfied. *Day v. Leal*, 14 J. R. 404. See 11 J. R. 513.

13. And, where the higher security is between different parties, and for other debts than the original one, and not for the exact amount of that debt, it will be taken as intended to be collateral only. *Ibid.*

FALSE IMPRISONMENT.

- I. *When an action for a false imprisonment lies.*
- II. *Justification.*

I. *When an action for a false imprisonment lies.*

1. Trespass for a false imprisonment lies against a justice of the peace, who voluntarily, and without the request or authority of the plaintiff, in an action before him, issues execution against the body of a defendant who is privileged from imprisonment, who claims his privilege, and is taken on the execution. *Perceival v. Jones*, 2 J. C. 49.

2. It is otherwise, where he does not claim his exemption. *Hess v. Morgan*, 3 J. C. 84.

3. If a defendant in execution, who has given security for the liberties, and resides within the limits, be superseded, and, on demanding his discharge, the sheriff refuses to give it until his poundage fees are paid, he may immediately depart; and if he continue on the limits under a belief that the discharge was requisite, he cannot bring an action for false imprisonment against the sheriff. *Warne v. Constand*, 4 J. R. 32.

4. No action lies for imprisoning the plaintiff on process, voidable only as long as it appears regular upon the record; but he should first

apply to the Court to have it set aside. *Reynolds v. Corp*, 3 C. R. 267.

5. Especially, if the plaintiff has waived the error, by availing himself of his imprisonment, for the purpose of obtaining the benefit of an insolvent act. *Reynolds v. Church*, 3 C. R. 274.

6. The party who sues out process from a competent Court, is responsible only for the validity of the process, and for good faith in suing it out. *Adams v. Freeman*, 9 J. R. 117.

*7. He is not to answer for the [*629] acts of the officer, beyond the authority of the precept, unless done by his direction. *Ibid*.

8. So, if an officer, without the authority of the plaintiff, executes a writ after the return day, he alone is liable. *Ibid*.

9. Where a warrant is issued from a justice's Court, against a person having a family, at the instance of the plaintiff, without the proof required by the act, it is at the peril of the party; and if the defendant has been arrested, he may have an action of false imprisonment against the plaintiff. *Curry v. Pringle*, 11 J. R. 444.

II. Justification.

10. The defendant may justify under process voidable only whilst it continues without being set aside by the Court. *Reynolds v. Corp*, 3 C. R. 267.

11. So, he may justify under a *ca. sa.*, issued against the plaintiff, after he had been superseded in execution. *Ibid*.

12. Especially, if the plaintiff had affirmed the execution, by availing himself of it, to obtain his discharge under the act for the relief of insolvent debtors, &c. *Reynolds v. Church*, 3 C. R. 274.

13. Where the sheriff is endeavoring to make an arrest, or preserve the peace, and has commanded others to assist him, he is, although absent in some other place, if such absence be for the purpose of furthering the design, to be deemed constructively present, so as to justify his assistants. *Coyles v. Hurin*, 10 J. R. 85.

14. So, where a sheriff, having a warrant to apprehend several persons who had riotously assembled together, and committed an assault, &c., came to the house where they were assembled, and being resisted, and unable to make the arrest, commanded A., and others, to guard the house in which the persons were assembled, and prevent their escape, while he went to the next town, about four miles distant, to get a sufficient force to enable him to execute the warrant; *held*, that the sheriff was to be deemed constructively present, so as to justify A. and others in arresting the offenders during his temporary absence. *Ibid*.

15. In an action for an assault and false imprisonment, it is no justification that the plaintiff, being engaged in an affray, was taken into custody, until he could be brought before a justice, without stating that the defendant was an officer, or acted under a warrant. *Phillips v. Trull*, 11 J. R. 486.

16. Where a soldier had been arrested and committed to the custody of the commandant

of a garrison, who ordered him to do certain duty, which was reasonable, and warranted by military usage; *held*, that the disobedience of the soldier justified the officer in causing him to be tied to a gun, and was a defence in an action for false imprisonment. *Schuneman v Diblee*, 14 J. R. 235.

And see PLEADING. TRESPASS. JUSTICE OF THE PEACE.

*FELONY. [*630]

1. A breach of prison by a person in jail, on a charge of felony, is itself a felony above the degree of petit larceny, and punishable by imprisonment in the state prison, for a period not exceeding 14 years. *The People v. Duell*, 3 J. R. 449.

2. If, on examination of a charge of suspicion of felony, or of having stolen goods, the magistrate be satisfied that there is no ground for suspicion, he may dismiss the person accused. *Secor v. Babcock*, 2 J. R. 203

And see BURGLARY. FORGERY INDICTMENT. LARCENY.

FENCE VIEWERS AND PARTITION FENCES.

1. The existence of a dispute about a partition fence, is sufficient to enable the fence viewers to interpose. *Burger v. Kortright*, 4 J. R. 414.

2. In an action to recover the defendant's proportion of the expenses of putting up a partition fence, if no dispute had existed as to the proportion, a decision of the fence viewers need not be shown. *Willoughby v. Carleton*, 9 J. R. 136.

3. And in such case, the costs and expenses of repairing are not to be settled by the fence viewers. *Ibid*.

4. *Parol* proof of a written notice to repair is sufficient. *Ibid*.

And see DISTRESS.

FERRY.

A person having a right of ferry granted under the act to regulate ferries in this state, (Sess. 20. c. 64. 2 N. R. L. 210.) cannot maintain an action on the case for the disturbance of his right; his only remedy is for the penalty given by the statute. *Almy v. Harris*, 5 J. R. 175.

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*FINE.

1. The last proclamation of a fine having been omitted at the proper time, was allowed to be made, *nunc pro tunc*. *Van Ness v. Gardiner*, 1 C. R. 59.

2. A fine, and five years' non-claim, are conclusive evidence of title in the cognizee, against all persons not under any legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered during the five years without title. *Jackson, ex dem. Watson, v. Smith*, 13 J. R. 426.

3. A person holding land by *deforcement* merely, cannot levy a fine, so as to affect or bar a stranger to it. *Lion, ex dem. Eden, v. Burtiss*, 20 J. R. 483.

FISHERIES.

1. Clearing out a fishing-place in a river does not give an exclusive right of fishery. *Westfall v. Van Anker*, 12 J. R. 425.

2. Where an island, commonly called and known by the name of *Green Flats*, was granted by patent, it was held good, though the *Green Flats* was sometimes covered with water; but this is not a grant of a fishery, but of the land only, subject, however, to be used as a common highway and public fishery, until otherwise appropriated by the private owner. *Brink v. Richtmyer*, 14 J. R. 255.

3. And, it seems, that an action will not lie for taking fish on such island. *Ibid*.

4. But the public fishery does not give fishermen the right of drawing their nets upon the *Flats*. *Ibid*.

5. A grant of the exclusive privilege of fishing on the *Green Flats* for ten years, is not a lease of the fishery, but of the right of drawing nets upon the *Flats*, such being the purpose for which they had been used, and this being in the power of the lessor to grant; but the fishery on the *Flats* still continues common. *Ibid*.

6. Fishing on a *Sunday*, in the channel of the *Hudson River*, between the city of *New-York* and *Baker's Falls*, is a violation of the act to protect the fishing in *Hudson River*, &c. (Sess. 38. c. 146. s. 4.) *Sickles v. Sharp*, 13 J. R. 497.

7. The *Saranac* not being a navigable river, the erection of a dam by the patentee (*Z. Platt*) of a tract of land, lying on both sides of the river, in 1786, near the mouth of the river, by which the *salmon* are prevented from passing up the river from *Lake Champlain*, is not indictable as a public nuisance, either at common law, or under the statute for the preservation of fish in certain waters, passed April 3, 1801, (Sess. 24. c. 127.) and re-enacted the 5th of April, 1813, (Sess. 36. c. 62. s. 3.) which required the owners of mills, or other

[*632] dams, which, on the 28th of March, 1800, were made across any river or creek, running into Lakes Ontario, Erie, or

Champlain, so as to obstruct the usual course of *salmon* in going up those rivers or creeks, to alter their dams, by making slopes to them, in the manner prescribed, so that *salmon* might freely pass over the dam. *The People v. Platt*, 17 J. R. 195.

8. These statutes ought to be construed with an implied exception of such rivers or creeks, not being navigable, as had been fully and absolutely granted by the state without any reservation or limitation in the use of them. *Ibid*.

9. And those acts, so far as they affect the rights of *Z. Platt*, the patentee, and his assigns, to the absolute and exclusive enjoyment of the *Saranac*, within the bounds of the patent to him, or impair the obligation of the contract, are unconstitutional and void. *Ibid*.

10. The fishery in *Salmon River*, in the county of *Oswego*, emptying into *Lake Ontario*, belongs exclusively to the owners of the adjacent lands. *Hooker v. Cummings*, 20 J. R. 90.

11. In rivers which are navigable, that is, as far as the tide ebbs and flows, the right of fishing, as well as of navigation, is common to all; but in rivers not navigable in that sense, or above the flow and reflow of the tide, the proprietors of the soil have the exclusive right of fishing opposite to their land, to the middle of the river. *Ibid*.

FORCIBLE ENTRY AND DETAINER.

(Sess. 11. c. 6. 1 N. R. L. 96.)

(a) *Proceedings under the first section of the act on the view of the justice; (b) Proceedings to have restitution under the second and subsequent sections of the act; (c) Removal of proceedings into the Supreme Court.*

(a) *Proceedings under the first section of the act on the view of the justice.*

1. Although the statute of forcible entry and detainer renders the forcible entry of a person having right, indictable, yet it does not extend so far as to authorize an action of trespass against him. *Hyatt v. Wood*, 4 J. R. 150.

2. The record of conviction, under the first section, is not traversable; and if it show that the justice had jurisdiction, and proceeded regularly, it is conclusive, and a bar to any suit brought against the justice. *Mather v. Hood*, 8 J. R. 44.

3. Where the justice acts on his own view, without any inquiry by a jury, he can only punish the party guilty of the force, but cannot meddle with the possession. *In the Matter of Shotwell*, 10 J. R. 304.

*4. And if he order or permit a restitution of possession, it is irregular. *Ibid*.

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(b) *Proceedings to have restitution under the second and subsequent sections of the act.*

5. Where the justice proceeds under the second section of the act, it is not necessary that he should previously go in person, and record the force. *The People v. Anthony*, 4 J. R. 198.

6. The remedy afforded by the second section of the act is distinct from that contained in the former section. *Ibid.*

7. The indictment may state a seisin in the prosecutor at the time of the entry. *The People v. Shaw*, 1 C. R. 125. *The People v. King*, 2 C. R. 98.

8. Also, an entry either peaceable or forcible by the defendant; that he detains only, is insufficient. *The People v. Shaw*, 1 C. R. 125.

9. In the indictment, it is enough, if the complainants, or party injured, and the injury, are stated with sufficient certainty to enable the Court to ascertain the injury, and award restitution; and any variance, not essential, in the name or description of a corporation, will not vitiate the proceedings. *The People v. Runkle*, 9 J. R. 147.

10. The defendant's landlord may be let in to defend his right, as in ejectment. *The People v. Burtch*, 2 J. C. 400.

11. If twenty-four persons are sworn on the grand jury, the conviction will be bad. *The People v. King*, 2 C. R. 98.

12. A conviction will be bad, where the defendant, voluntarily appearing, was not permitted to traverse the indictment. *Ibid.*

13. It seems, that the traverse to the indictment need not be in writing. *The People v. Anthony*, 4 J. R. 198.

14. The jury may find the defendant guilty of the detainer only. *Ibid.*

15. A fine is required to be imposed against the party, only where there is a conviction, upon view, according to the first section of the act. *Ibid.*

16. Where the indictment is not traversed, or no traverse is returned, costs are not allowed. *The People v. Shaw*, 1 C. R. 125.

17. On an indictment for a forcible entry and detainer, the title to the premises does not come in question, but it is sufficient for the complainant to recover, if he shows himself to have been in peaceable possession before the defendant's entry. *The People v. Leonard*, 11 J. R. 504.

18. Peaceable possession is evidence of seisin to support the allegation in the indictment, that the complainant was seised. *Ibid.*

19. The service of notice of inquiry, in a case of forcible entry and detainer, must be either by affixing a notice in writing, on a public and suitable place on the premises, as the front door of the house, or by delivering the notice personally to the party against whom the complaint is made. *Forbes v. Glashan*, 13 J. R. 158.

20. Where the affidavit of service of notice stated, that the party was not on the premises, and that the notice was put upon [*634] the house in "a conspicuous place, it was held not to be sufficient, and the conviction was set aside, and re-restitution awarded. *Ibid.*

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21. An indictment for a forcible entry and detainer, under the statute, must set forth a seisin or possession within the purview of the act, or whether the estate of the relator be a freehold or term of years; and on the traverse, the allegations as to his estate, must be proved by the prosecutor. *The People v. Nelson*, 13 J. R. 340.

22. Though the defendant cannot justify the force by showing a title in himself, he may controvert the facts by which the prosecutor attempts to show a title in himself. *Ibid.*

23. A purchaser of land under a *fi. fa.* cannot enter upon the land, being in the actual possession of another, without rendering himself liable to an indictment. *Ibid.*

24. On the trial of the traverse of an indictment for a forcible entry and detainer, the justice before whom it is tried is authorized, by the 5th section of the act, to assess the costs and damages of the party complaining: held, that the justice cannot, under the act, award to the party a gross sum, independently of his costs, as a compensation for the injury he has sustained. *Fitch v. The People*, ex relatione Platt, 16 J. R. 141.

25. The damages given by the statute were intended to reimburse the party prosecuting, after the trial of the traverse, for the costs he has been put to, on that particular occasion; for other damages arising from the wrongful entry, he must resort to his action of trespass. *Ibid.*

(c) *Removal of proceedings into the Supreme Court.*

26. The granting a *certiorari*, to remove a forcible entry and detainer, is a matter of course. *The People v. Runkle*, 6 J. R. 384.

27. Where the indictment is removed into the Supreme Court, the prosecutor cannot rule the defendant to assign errors; such a rule would be a nullity, and the subsequent proceedings would be set aside; but the prosecutor should either call on the defendant to plead, or abide by his former plea, or, if he was not entitled to plead *de novo*, should proceed to trial. *The People v. Burtch*, 2 J. C. 400.

28. Bail is not required where the indictment is removed, by *certiorari*, from before the justice. *Case v. Shepherd*, 2 J. C. 27.

29. Where restitution has been improperly awarded, or the proceedings below were irregular, the Supreme Court will, of course, award a re-restitution. *The People v. Shaw*, 1 C. R. 125. *S. P. in the Matter of Shotwell*, 10 J. R. 304. See 13 J. R. 158.

30. The Supreme Court, on awarding restitution, is not required by statute to impose a fine. *The People v. Runkle*, 9 J. R. 147.

31. Where a *certiorari* has been issued to return the proceedings, and the justice dies before any return is made, the Supreme Court will hear and decide the case, on motion and affidavits. *In the Matter of Shotwell*, 10 J. R. 304.

32. And the proceedings may be quashed, on motion and affidavits, for irregularity, and re-restitution awarded; but the Court will not investigate the title. *Ibid.*

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[*635] *33. Where the record of the indictment, after being removed into the Supreme Court, had been lost, the Court gave leave to file one, *nunc pro tunc*. *The People v. Burdock*, 3 C. R. 104.

FOREIGN LAWS.

1. The *lex loci contractus* governs, as to the nature and construction of the contract, and its legal effects. *Lodge v. Phelps*, 1 J. C. 139. *Smith v. Smith*, 2 J. R. 235. *Ruggles v. Keeler*, 3 J. R. 263.

2. But not as to the mode of enforcing the agreement. *Lodge v. Phelps*, 1 J. C. 139. *Smith v. Spinolla*, 2 J. R. 198. *Ruggles v. Keeler*, 3 J. R. 263. *Scoville v. Canfield*, 14 J. R. 338.

3. So that the statute of limitations of this state will be a bar to an action on a contract made in another state, and on which, by the laws of that state, the time of limitation had not yet expired. *Nash v. Tupper*, 1 C. R. 402.

4. The statute of limitations of another state is not a bar here to demands arising in that state, and which, if sued upon there, would be barred by their statute. *Ruggles v. Keeler*, 3 J. R. 263.

5. And the defendant, in an action in this state, may set off demands arising in any other state, and which are barred by the statute of limitations of that state. *Ibid*.

6. A discharge under the insolvent act of another state, will not take away the right of a citizen of this state to sue here upon a contract made here, and which is binding by our laws. *Van Raugh v. Van Arsdaln*, 3 C. R. 154.

7. So, a discharge under the insolvent law of another state, by which the person of the debtor is protected from arrest and imprisonment, from any debt due to any creditor named in the insolvent's petition, is no bar to a suit brought by any such creditor against such debtor in this state. *White v. Canfield*, 7 J. R. 117.

8. Such discharge is limited to the person only, without discharging the debt, and is local in its effect. *Ibid*.

9. On a contract made in a foreign country, a creditor suing his debtor here, is entitled to the same remedies as are given by our law in cases of contracts entered into here. *Smith v. Spinolla*, 2 J. R. 198. *S. P. Sicard v. Whale*, 11 J. R. 194.

10. Where the creditor and his debtor reside in another state, and the debtor there obtains his discharge under the insolvent law of that state, and is afterwards arrested at the suit of the creditor, in this state, for the same debt, the Supreme Court will not discharge the defendant on filing common bail, nor order an *exoneretur* to be entered on the bail piece, but will leave the effect of the discharge to be considered when it shall be pleaded. *Sicard v. Whale*, 11 J. R. 194.

11. Where A., residing in *New-Orleans*,

drew a bill of exchange in favor of C., an inhabitant of *Tennessee*, on B., of *Pennsylvania*, which was protested for non-acceptance, due notice of which was given *to B., at *New-Orleans*; held, that the [*636] drawing of the bill, and the notice, which were the essential parts of the transaction whereby A. was rendered liable, having taken place at *New-Orleans*, the law of that state must govern, and, consequently, that the discharge of A., as an insolvent, obtained there, was a good defence in this state to an action on the bill. *Hicks v. Brown*, 12 J. R. 142.

12. So, the endorsee of a promissory note, given in *Connecticut*, where promissory notes are not negotiable, may maintain an action in his own name, in this state, against the maker. *Lodge v. Phelps*, 1 J. C. 139. S. C. 2 C. C. E. 321.

13. It is a principle of general practice among nations to admit and give effect to the title of foreign assignees in case of bankruptcy; but the mode of proceeding to recover the debts of the bankrupt, whether in his own name or the name of the assignees, depends on the form of proceedings in the country, and in the forum where the suit is instituted. *Bird et al. v. Carlat*, 2 J. R. 342. (See *tit. CHANCERY, X. Bankrupt.*)

14. So, where a contract is made in one country, but to be performed in another, the law of the place of performance is to govern in the construction. *Smith v. Smith*, 2 J. R. 235. *S. P. Hicks v. Brown*, 12 J. R. 142.

15. As, where A., residing in *Rhode-Island*, gives his promissory note, dated in *Massachusetts*, to B., residing there, and A. is afterwards discharged under an insolvent law, in *Rhode-Island*, and removes to this state, where an action is brought against him on the note; the discharge is no bar here, since it would not be a bar in *Massachusetts*, where the note was given, and as the law of the place where the contract was made must in such case govern. *Smith v. Smith*, 2 J. R. 235.

16. A contract made in a foreign country, but to be performed here, and invalid in the place where made, by reason of some formal defect, is not, in consequence, to be deemed invalid here. *Ludlow v. Van Rensselaer*, 1 J. R. 94.

17. Our Courts do not take notice of the revenue laws of foreign countries. *Ibid*.

18. A contract made in a foreign country, but to be executed here, is to be governed by the laws of this state; so that the defendant may avail himself of a defence permitted by our law, but which he would not be allowed to use in the place where the agreement was entered into. *Thompson v. Ketcham*, 4 J. R. 255.

19. But the *lex loci* will govern, unless the parties, by the terms of the contract, had in view a different place. S. C. 8 J. R. 169.

20. Where the defendant, in an action brought here on a promissory note, made in another country, and payable there, sets up any matter in discharge of his liability, he is bound to show that the same would be a defence in the place where the note was made. *Ibid*.

21. Whether the question of usury, arising on an agreement made in another state, but relating to the sale of lands situated in this state, is to be decided according to the law of that or of this state? *Quere. Van Schaick v. Edwards*, 2 J. C. 355. See *Scoville v. Canfield*, 14 J. R. 338.

22. An act of the legislature of the state of Connecticut prohibits and renders penal the purchase of any *choses in action* by [*637] any attorney, *or counsellor at law, sheriff, deputy sheriff, or constable, &c., and provides that in any action founded upon a *choses in action*, purchased contrary to the intent of the statute, the plaintiff shall be nonsuited. In a suit brought here on a judgment obtained in Connecticut, the defendant pleaded that the judgment had been purchased by A. B., a constable of S. in that state, contrary to the provisions of the act, and that the suit here, though prosecuted in the name of the plaintiff, was for the benefit of A. B.; *held*, that the plea was not a bar to the suit, because that, admitting that full effect is to be given here to that statute, still it does not extinguish or invalidate the debt assigned, and the plaintiff, on being nonsuited, is not prevented, after disaffirming the sale, from bringing a new suit; but the statute, without affecting the validity of the debt, operates only on the remedy, and makes the assignment penal: the doctrine of the *lex loci* does not apply. *Scoville v. Canfield*, 14 J. R. 338.

23. A penal law is strictly local, and cannot have any operation beyond the jurisdiction of the state or country where it was enacted. *Ibid.*

24. A person who has been arrested in another state, and discharged from imprisonment under an act of the legislature of that state, may be arrested and held to bail here, for the same cause of action, at the suit of the same plaintiff. *Peck v. Hoxier*, 14 J. R. 346.

See *tit. CHANCERY, X. Bankrupt. XXV. Foreign Laws.*

FORGERY.

1. Forging the following order: Sir, the bearer, Mr. R., being our particular friend, having occasion, &c., we have requested him to call on you, desiring you to accept his draft on us, on demand, for 15 dollars; your compliance will much oblige, &c., is not forging an order for the payment of money, within the statute; but by a subsequent statute, (Sess. 24. c. 54. See 1 N. R. L. 405.) it is declared to be forgery. *The People v. Thompson*, 2 J. C. 342.

2. A check upon a bank is not a bill of exchange within the meaning of the act to prevent forgery and counterfeiting, but it is an order for the payment of money. (See Sess. 36. c. 44. s. 1. and Sess. 36. c. 29. s. 4, 5.) *The People v. Howell*, 4 J. R. 296.

3. A paper in the following words: Mr. A. B., let the bearer trade 13 dollars and 25 cents, and you will oblige, &c. is an order for the de-

livery of goods within the statute. *The People v. Shaw*, 5 J. R. 236.

4. A paper in the following words: Due A. B. one dollar, &c., is a note for the payment of money within the statute. *The People v. Finch*, 5 J. R. 237. *S. P. Mackey's case, Ibid. cit.*

5. Since the act, (Sess. 30. c. 173. s. 1.) it is not felony to utter and publish a forged bank note of another state for the payment of a less sum than one dollar, nor is the person possessing such note, with [*638] intent to utter it, indictable under the act, (Sess. 31. c. 155. s. 7.) *The People v. Wilson*, 6 J. R. 320.

6. Forging an order in these words: "Pay to John Low, or bearer, 1500 dollars, in N. Myer's bills or yours," is not within the act to prevent forgery, it not being an order for the payment of money or the delivery of goods. *The People v. Farrington*, 14 J. R. 348.

7. Forging a deed in this state, for lands lying in the Missouri territory, or in another state, is an offence indictable and punishable under the acts to prevent forgery, and declaring the punishment of crimes. *The People v. Flanders*, 18 J. R. 164.

FRANCHISES.

1. Privileges and immunities of a public nature, which cannot be legally exercised without a legislative grant, are *franchises*, although they never existed in the people, or could be exercised by them in their political capacity. *People v. The Utica Insurance Company*, 15 J. R. 358.

2. Since the acts to restrain incorporated banking associations, (Sess. 27. c. 117. and Sess. 36. c. 71.) the right or privilege of carrying on banking operations by an associated company is a franchise. *Ibid.*

3. An information in the nature of a *quo warranto*, may be filed by the attorney-general, against persons usurping such franchise. *Ibid.*

And see *tit. QUO WARRANTO.*

*FRAUDS.

[*639]

I. *Frauds at common law, how relieved against.*

II. *Conveyances of lands, sales of chattels, judgments, executions, and other acts to defraud creditors and purchasers at common law, and under the act for the prevention of frauds, (s. 11. c. 44. 1 N. R. L. 76.)*

III. *Action under the fourth section of the statute, to recover the penalty for maintaining fraudulent conveyances.*

IV. (Sect. 9 and 10.) *Leases, &c. by parol only; assignments, grants, or surrenders of interests in land.*

V. (Sect. 11.) (a) *What writing is sufficient within this section; (b) Promise to an-*

over for the debt, default, or miscarriage of another person; (c) Contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (d) Agreement not to be performed within a year.

VI. (Sect. 15.) Contracts for sale of goods.

VII. What will take a case out of the statute.

I. Frauds at common law, how relieved against.

1. Questions of notice and fraud are cognizable at law as well as in equity. *Jackson*, ex dem. *Gilbert v. Burgott*, 10 J. R. 457. *S. P. Fleming v. Slocum*, 18 J. R. 403.

2. Where a judgment has lain more than a year, and the defendant afterwards consents that an execution issue without the judgment being revived by *sci. fa.*, the execution will not be set aside for irregularity at the instance of a third person, who alleges that the judgment has been kept on foot collusively, and that the execution has been issued fraudulently to injure him; but he must be left to seek his relief in Chancery against the fraud, or by bringing the question of fact, as to the fraud, to a trial, by an issue at law. *Howland v. Ralph*, 3 J. R. 20.

3. Where mortgaged premises were put up for sale at public auction, pursuant to advertisement and notice, by virtue of a power of sale, contained in the mortgage; and the assignee of the mortgagee, acting as auctioneer, while the premises were up, on seeing the defendant, who had purchased under the mortgage, approaching the place of sale, immediately knocked down the premises, for half the sum due on the mortgage, to his brother, as the highest bidder, so as to prevent competition; *held*, that the sale was fraudulent and void, and that the purchaser, to whom a deed had been executed, acquired no title under it. *Jackson*, ex dem. *Bowers v. Crafts*, 18 J. R. 110.

4. Where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable to recover damages; but the fraud must be clearly proved, and cannot be presumed. *Ibid.*

5. A. and B. applied to C., to purchase from him goods for A., who *was recommended by B., and by their direction, the goods were sent to B.'s house, and B. took a bill of sale of them from A., who absconded without paying for them; *held*, that C. may maintain trover for the goods, against B., by showing that the goods had been obtained fraudulently, and by collusion between A. and B., under pretence of a purchase; for fraud avoids the contract of sale. *Allison v. Mathieu*, 3 J. R. 235.

6. And the plaintiff may give evidence of subsequent acts of collusion and fraud by A. and B., to obtain goods from other persons, in order to show the previous intention of A. and B. *Ibid.*

7. A purchaser for a valuable consideration, without notice, has a good title, though he purchased of one who had obtained a con-

veyance by fraud. *Jackson*, ex dem. *Barlett v. Henry*, 10 J. R. 185.

8. Evidence of general character is admissible to repel a charge of fraud founded on circumstances alone. *Ruan v. Perry*, 3 C. R. 120.

Frauds in sales of chattels. See SALE OF CHATTELS.

Fraudulent representations as to the credit of a third person. See ACTION ON THE CASE, I.

See tit. CHANCERY, Fraud.

II. Conveyances of lands, sales of chattels, judgments, executions, and other acts to defraud creditors and purchasers at common law, and under the act for the prevention of frauds.

(Sess. 11. c. 44. 1 N. R. L. 75.)

9. Where a creditor takes security on land for an actual debt, and, without any secret understanding or trust, permits his debtor to remain in possession, it is not a fraud on the other creditors. *Jackson*, ex dem. *Wilber v. Brounell*, 3 C. R. 222.

10. So, where a debtor confessed a judgment, on which a *fi. fa.* was issued, and his land sold by the sheriff, at auction, to a daughter of the debtor, with the consent of the creditor, to whom he gave a receipt for the purchase money, although no consideration passed between them, and the debtor's family remained in possession after the sale, it is not fraudulent. *Ibid.*

11. It is otherwise, where there is not an existing debt. *Ibid.*

12. Or, in the case of personal property, per *Livingston, J. Ibid.*

13. Though a purchaser of goods knows of a judgment against the vendor at the time of the sale, that fact will not, of itself, render the sale fraudulent or void; but if he knows of the judgment, and purchases with the view and for the purpose of defeating the creditor's execution, it is fraudulent, and the sale is void, notwithstanding a full price has been paid by the purchaser. *Beals v. Guernsey*, 8 J. R. 446. *S. P. Wickham v. Miller*, 12 J. R. 320.

14. So, where a conveyance of land is made between the time of rendering and the docketing of the judgment, with a view to defeat the judgment creditor, the conveyance is void as against the creditor. *Jackson*, ex dem. *Merrit v. Terry*, 13 J. R. 471.

*15. So, a conveyance made with intent to defeat the effect of a re- [*641] covery by a plaintiff in an action of tort, then pending against the grantor, but before trial or judgment, is fraudulent and void, under the second section of the statute. *Jackson*, ex dem. *Van Buren v. Myers*, 18 J. R. 425.

16. Notice to the subsequent grantee, before the execution of the conveyance, of a prior grant made by the grantor when an infant, does not render the deed fraudulent and void.

Jackson, ex dem. Brayton, v. Burchin, 14 J. R. 124.

17. A purchaser for a valuable consideration, without notice, has a good title, though he purchased of one who obtained a conveyance by fraud. *Jackson, ex dem. Colden, v. Walsh*, 14 J. R. 407.

18. A. and B. assigned their property to C. and D. in trust, to pay a certain debt due from them to C., and to pay their other creditors, on condition of their releasing their demands; and in case any of those creditors should refuse to give such discharge, then in further trust, after paying the debt to C., to pay such of the creditors of A. and B. as they should appoint. Certain of the creditors refused to accede to the terms of the assignment, and, having recovered judgments against them, levied executions on their property in the hands of C. and D.; *held*, that, though a debtor may lawfully prefer one of his creditors to another, yet that this was an attempt to keep the property in the power of the debtors, to enable them to give such preference at a future period, and to compel their creditors to acquiesce in the terms offered them; and that when any of the creditors dissented, the trust failing as to all, except C., resulted for the benefit of the assignors; that, therefore, the assignment, as regarded the other creditors, was void by the statute; that, part being void, the whole must be void; and that the assignment could not be used by C. and D. to protect the property in their hands against the executions of the other creditors, until the trust in favor of C. had been satisfied. *Hyslop v. Clarke*, 14 J. R. 458. *S. P. Austin v. Bell*, 20 J. R. 442.

19. And in that case, it was *held*, that if the deed of assignment in trust contains a *proviso*, that, in case any of the creditors named should not, within the time limited in the deed, (which contained a release of the debtor from his debts,) become parties to it, the shares or proportions of such creditors so neglecting or refusing to execute the deed, should be paid by the trustees to the assignor himself, such deed is fraudulent and void under the statute. *Austin v. Bell*, 20 J. R. 442.

20. And so a judgment creditor, who has refused to become party to such deed, may, before the time limited for the creditors to come in and execute it, take the property in the possession of the trustees, by execution, and sell the same in satisfaction of his debt. *Ibid*.

21. A conveyance without any actual consideration, by a person indebted at the time, absolute on the face of it, but intended to enable the grantee to sell the land and pay the debts of the grantor, rendering the surplus, if any, to him, is fraudulent and void, as against creditors. *Jackson, ex dem. Sherrill, v. Brush*, 20 J. R. 5.

22. A voluntary conveyance by a grantor who is at the time insolvent, *is void, as respects creditors; and the land, after the death of the grantor, is assets by descent or devise in the hands of the heirs or devisees of the residuum of his estate, in an action by the creditor against the heirs or devisees; and where some of the de-

fendants were, also, the executors of the grantor, and petitioned the surrogate, for the purpose of obtaining a sale of the real estate of the grantor, on account of an alleged deficiency of personal assets, this is evidence against the defendants to show the insolvency of the grantor. *Manhattan Company v. Osgood*, 15 J. R. 162.

23. A., in 1810, conveyed a lot of land to B. for the purpose of qualifying him to become a voter, no consideration being paid, and A. still remaining in possession. An action for a *tort* was, afterwards, commenced against B., and, during its pendency, in 1814, B. re-conveyed the lot to A. Judgment was obtained against B. and the lot sold under an execution; *held*, in an action of ejectment brought by the purchaser, against the tenant in possession, that the re-conveyance by B., not being made to defraud creditors, was not void by the statute; nor could it be avoided by the purchaser under the execution, though he was a *bona fide* purchaser for a valuable consideration; for those *voluntary* deeds which the statute avoids as against subsequent purchasers, must have been made with intent to deceive, the evidence of which is the voluntary conveyance, coupled with a subsequent agreement to sell again, which cannot be the case where the purchase is made, not of the party, but through the intervention of law.* *Jackson, ex dem. Van Allen, v. Ham*, 15 J. R. 261.

24. A party making a voluntary conveyance, and his heirs, are bound by it; and in an action of ejectment by the grantee against the heir of the grantor, the latter cannot set up the want of consideration, in bar of the recovery. *Jackson, ex dem. Malin, v. Garnsey*, 16 J. R. 189.

25. Nor can the heir of such grantor take advantage of a judgment against himself, under which the land so conveyed by his ancestor had been sold, as an outstanding title, in order to defeat the grantee's action, as the sale could operate only upon the interest which he had in the land, and which was no more than a naked possession. *Ibid*.

26. A conveyance, void as to creditors, is, notwithstanding, good against the party himself, and his executors and administrators. *Osborne v. Moss*, 7 J. R. 161.

27. A bill of sale of goods, made to secure the vendee from his liability as endorser of a promissory note made for the accommodation of the vendor, is not fraudulent under the statute, as against an execution subsequently issued by a judgment creditor. *Weller v. Wayland*, 17 J. R. 102.

28. And if the vendee allows part of the goods comprised in the bill of sale to remain in the possession of the vendor, or re-deliver them to him, though these goods are subject to the execution so issued, yet the right of the vendee to the residue of the goods is unimpaired, and they cannot be taken in execution. *Ibid*.

29. Possession of chattels, continuing in the vendor after sale, is only *prima facie* evidence of fraud, and may be explained. *Barrow v. Paxton*, 5 J. R. 258. *S. P. Beals v. Guernsey*, 8 J. R. 446.

[*643] *30. A bill of sale of chattels, made to secure the payment of rent, and so expressed on the face of the instrument, is a mortgage, and the subsequent possession of the mortgagor being consistent with the deed, is not fraudulent; and if the mortgagor afterwards sells the goods, the mortgagee may bring trover against the vendee. *Ibid.*

31. The mere possession of a personal chattel, with the consent of the true owner, will not render the chattel liable to the debts or disposition of the reputed owner; but there must be a fraudulent or deceptive purpose in view, or implied from the special circumstances of the case. *Craig v. Ward*, 9 J. R. 197.

32. Where the parties do not stand in the relation of debtor and creditor, and the object is not to defraud creditors, goods may be left in the hands of the original owner, without its being considered fraudulent. *M'Instry v. Tanner*, 9 J. R. 135.

33. Fraud is a question of law, especially where there is no dispute about facts; it is the judgment of law on facts and intents. *Sturtevant v. Ballard*, 9 J. R. 337.

34. A voluntary sale of chattels, with an agreement contained in the deed, or out of it, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown and approved of by the Court, fraudulent and void, as against creditors. *Ibid.*

35. So, where A., by a regular bill of sale, sold to B. certain articles, for the consideration of a sum of money paid by B. to A. and also, in consideration that A. was to have the use and occupation of the articles, for the term of three months from the date, viz. the 29th August; and C. had obtained a judgment against A., on the 2d of August, on which a *fi. fa.* was issued, and delivered to the sheriff on the 28th November, who took the articles then in the actual possession of A., and sold them to satisfy the execution of C.; *held*, that the sale of the goods to B., unaccompanied with the actual delivery of them, was fraudulent and void, as against C., a judgment creditor. *Ibid.*

36. The creditor cannot take the goods fraudulently conveyed without suit; if he do, he is a trespasser. *Osborne v. Moss*, 7 J. R. 161.

37. If, after the death of the person making the fraudulent conveyance, his creditor take out administration on his estate, he cannot take the goods of his intestate, in the hands of the person to whom they had been fraudulently conveyed; but his proper course is to proceed against such person as executor *de son tort*. *Ibid.*

38. If a creditor seize the goods of his debtor, on execution, and suffer them to remain in his hands, the execution is fraudulent, and void against a subsequent execution. *Whipple v. Foot*, 2 J. R. 418.

39. But if all the possession of the chattel be taken of which it is susceptible, as if wheat growing be levied upon, and left until ripe for harvest, and be then cut and carried away, and sold, the execution is not fraudulent, and void as against a subsequent execution. *Ibid.*

40. The agent of the plaintiff delivered an execution to a sheriff, and directed him to levy it on the property of the defendant, but said to the sheriff, that he supposed the plaintiff did not wish to distress the defendant, and that, if the property remained in the possession of the defendant after the [*644] levy, the plaintiff would not hold the sheriff responsible, if it was squandered, and that he need not take a receipt for it. The sheriff, after levying on the goods of the defendant, did nothing further until after the execution had expired, and a second execution was delivered to him by another plaintiff, when he sold the property on both executions; *held*, that, as there were no instructions from the plaintiff to delay the execution after the seizure, nor any agreement between the plaintiff and defendant to let the first execution sleep in the sheriff's hands, nor any evidence of such delay as would afford a legal presumption of fraud, the first execution did not lose its preference. *Doty v. Turner*, 8 J. R. 20.

41. A judgment was confessed, without process, by B., in favor of A., before a justice, and execution taken out immediately, by consent, and delivered to a constable, and, before any levy made, C. gave the constable a receipt for the household goods, &c. of B., and the goods were afterwards sold by the constable in mass, by the consent of B., after the execution had expired, without seeing them. A. became the purchaser, and the goods were left in the possession of B., and C. gave a receipt to A. to account for them; *held*, that the transaction was fraudulent, and that the goods, while in the hands of C., were liable to a subsequent execution. *Burnell v. Johnson*, 9 J. R. 243.

42. A debtor may, where no bankrupt law intervenes, lawfully prefer one creditor to another. *Wilkes v. Ferris*, 5 J. R. 335. *S. P. Jackson, ex dem. Wilber, v. Brownell*, 3 C. R. 222. *S. P. M'Menomy v. Ferrers*, 3 J. R. 71. *S. P. Phoenix v. The Assignees of Ingraham*, 5 J. R. 412.

43. If a person, when in contemplation of bankruptcy, pay money, or give security to a creditor, it will be valid, if the effect of measures taken by the creditor. *Ogden v. Jackson*, 1 J. R. 370. *S. P. Phoenix v. The Assignees of Ingraham*, 5 J. R. 512.

44. But if done without compulsion, and to prefer one creditor to another, it will be fraudulent and void. *Ibid.*

45. The possession of an insolvent after a *bona fide* assignment of all his estate, for the benefit of all his creditors, is not fraudulent, when continued at the request, and for the benefit of his assignees, who had used reasonable diligence to get the possession. *Vredenberg v. White*, 1 J. C. 156.

46. Where the purposes of an assignment for the payment of debts are satisfied, a resulting trust, or residuary interest, remaining to the assignor, is not void on account of such residuary interest, unless the assignment was merely colorable, and for the sake of the resulting trust. *Wilkes v. Ferris*, 5 J. R. 335.

See tit. EXECUTION, VI.

III. *Action under the 4th section of the act to recover the penalty for maintaining and defending fraudulent conveyances.*

47. The plaintiff in an action of ejectment, is a creditor within the meaning of the statute, and may maintain an action of debt under the fourth section of the statute, to recover the amount of a bond, executed *by [*645] the defendant, on which a judgment was entered up, and execution issued with intent to defraud creditors. *Wilcox, qui tam, &c. v. Fitch*, 20 J. R. 472.

48. A *qui tam* action under the fourth section of the statute, which gives a moiety of the sum recovered to the people, and the other moiety to the party aggrieved, is not within the statute of limitations, and may be brought at any time. *Ibid.*

IV. (Sect. 9 and 10.) *Leases, &c. by parol only; assignments, grants, or surrenders of interests in lands.*

49. No title passes to the purchaser, under a sheriff's sale, of real estate, without a deed or note in writing. *Simonds v. Callin*, 2 C. R. 61. *S. P. Jackson, ex dem. Gratz, v. Callin*, 2 J. R. 248. See EXECUTION, II.

50. The loan officers cannot sell land without deed. Per *Kent, J. Jackson, ex dem. L. O. of Rensselaer, v. Bull*, 1 J. C. 81. *S. C. 2 C. C. E. 300.*

51. An assignment of a lease by writing not under seal, is good. *Holliday v. Marshall*, 7 J. R. 211.

52. If a person affix his signature and seal to the back of a lease, it is not an assignment of the lease. *Jackson, ex dem. Lloyd, v. Titus*, 2 J. R. 430.

53. And if it be agreed between him and the person to whom it is intended to be assigned, that C. should write an assignment over the signature and seal, which he does, and delivers the deed to the assignee, the assignment is a nullity. *Ibid.*

54. An incorporeal hereditament, as a right to erect mills and mill-dams, can, at common law, pass only by deed; and were it otherwise, the assignment of such an interest, since the statute of frauds, must be in writing. *Thompson v. Gregory*, 4 J. R. 81.

V. (Sect. 11.) (a) *What writing is sufficient within this section; (b) Promise to answer for the debt, default or miscarriage of another person; (c) Contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (d) Agreement not to be performed within a year.*

(a) *What writing is sufficient within this section.*

55. In the note or memorandum required by the 11th section of the statute of frauds, the consideration, as well as the promise, must be expressed in writing. *Sears v. Brink*, 3 J. R. 210. *Quere.*

56. Where the promise is by covenant or writing under seal, no consideration need be

expressed, for the seal itself imports a consideration, and the statute has made no variation in the common law, in this respect. *Livingston v. Tremper*, 4 J. R. 416.

57. It is sufficient if the agreement be signed by one only of the parties who are to be charged, and accepted by the other. *Ballard v. Walker*, 3 J. C. 60. *Roget v. Merritt*, 2 C. R. 117.

58. If a promissory note, payable to bearer, or not negotiable, is *endorsed in blank, the holder may write over [*646] the name of the endorser a guaranty, or promise to pay the note, so as to take the case out of the statute; and this may be done at any time before, or at the trial of the cause. *Nelson v. Dubois*, 13 J. R. 175.

59. A warranty in a writing, not under seal, for the quiet enjoyment of land, must express the consideration on which it is founded. *Kerr v. Shaw*, 13 J. R. 236.

60. Every agreement required by the statute to be in writing, must be certain itself, or be capable of being made so, by a reference to something else, whereby the terms can be ascertained with reasonable precision; otherwise, it cannot be carried into effect. *Abel v. Radcliff*, 13 J. R. 297.

61. Where, in shipping articles of seamen, a person has signed his name under a column headed "sureties," but there was no explanation added, as to the extent of this undertaking, it is not a sufficient writing within the statute of frauds, and the undertaking is void. *Dodge v. Lean*, 13 J. R. 508.

62. Where the land of A. is about to be sold by the loan officers, for the arrears due on a mortgage to the state, and it is agreed by parol, between A. and B., that B. should purchase the land for A., and reconvey it to him, on being paid the purchase money, such agreement is void, within the statute. *Sherwill v. Crosby*, 14 J. R. 358.

(b) *Promise to answer for the debt, default, or miscarriage of another person.*

63. A promise to pay the debt of a third person must be in writing, notwithstanding it is made on a sufficient consideration. *Simpson v. Patten*, 4 J. R. 422. *Jackson v. Rayner*, 12 J. R. 201.

64. Where it is an original undertaking, it need not be in writing, as where the defendant promises the plaintiff to indemnify him for an act to be done as his servant. *Allaire v. Ouland*, 2 J. C. 52.

65. Where the guaranty or promise to pay the debt of another, is made at the same time with the contract to which it is collateral, is incorporated into it, and becomes part of it, the whole is one contract, and the want of consideration, as between the plaintiff and the guarantor, cannot be alleged. *Leonard v. Vredenburg*, 8 J. R. 29.

66. The plaintiff sold goods to A. on a credit, and A. gave his promissory note for the amount, under which the defendant, as his security, wrote, *I guaranty the above*: this was held to be a collateral undertaking; but that

there was no necessity for any distinct consideration passing directly between the plaintiff and defendant, for, being all one entire transaction, the delivery of the goods to A. supported the promise of the defendant as well as the promise of A.; and that the words *value received*, in the note, were sufficient evidence of a consideration on the face of the writing; but, if any doubt existed, *parol* evidence is admissible to show the consideration, or that it was an original and entire transaction. *Ibid.*

67. If the whole credit is not given to the person who comes in to answer for another, his undertaking is collateral. Per *Kent*, Ch. J. *Ibid.*

*68. If a promise to pay the [*647] debt of another be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not within the statute, but is an original promise. Per *Kent*, Ch. J. *Ibid.*

69. Where A. in consideration that B. would deliver him all his household goods, and that C. would discharge B. from execution, promises to pay C. the amount of the execution, this is an original undertaking, and not within the statute. *Skelton v. Brewster*, 8 J. R. 376.

70. If A., being bound to indemnify B. in a certain suit in which he was arrested, request C. to become special bail for B., and promise to indemnify him, this is an original undertaking by A. *Harrison v. Savetel*, 10 J. R. 242.

71. If A., in consideration of a sale of land to him by B., promise C. to be accountable to him for debts due him from B., it is an original undertaking, and not within the statute. *Gold v. Phillips*, 10 J. R. 412.

72. Where A. gave a promissory note to B., and C. told B., that he had taken an assignment of A.'s property, and meant to pay his debts, and would pay the debt due from him to A.; *held*, that the promise of C. was within the statute. *Jackson v. Rayner*, 12 J. R. 291.

73. Where B., by a written agreement, promises to deliver A. a certain quantity of goods, and also to pay the costs on an execution issued by A. against B., which B. was to have returned *nulla bona*, and F., at the bottom thereof, signs a written guaranty, *I guaranty the performance of the above agreement*; the guaranty of F. is an original collateral agreement, and not a promise to pay a previously subsisting debt of B. *Bailey v. Freeman*, 11 J. R. 221.

74. And the guaranty is part of the entire contract, consisting of the agreement of B., and F.'s guaranty; and the credit being originally given to F., as surety; and the agreement and guaranty being simultaneous, the consideration of the former supports the latter. *Ibid.*

75. And if there had been no consideration expressed in the written agreement, a consideration might be proved by *parol*. *Ibid.*

76. Where A. sold a horse to B., at the request of C., and on his promise to guaranty the payment of B.'s note for the payment of the money; and B. gave a note payable to A.,

or bearer, in 12 months, which C. endorsed in blank; this was *held* to be an original undertaking by C. as surety, and that he was equally responsible as if he had signed the note with B. *Nelson v. Dubois*, 13 J. R. 175.

77. Where the plaintiff promises not to require from the defendant payment of a certain note, in consideration of which the defendant promises to indemnify the plaintiff against one third of all loss in consequence of his endorsement of certain notes for a third person; this is not a case within the statute, there being an original consideration moving between the contracting parties. *Myers v. Morse*, 15 J. R. 425.

78. The defendant, in consideration of 25 dollars, verbally agreed to indemnify the plaintiff, who had subscribed a certain sum to be paid annually to the trustees of a religious society, for the support of a *minister, against any claim arising from [*648] his subscription; *held*, that this was a valid agreement. *Conkey v. Hopkins*, 17 J. R. 113.

79. Where the defendant inquired of the plaintiff the terms on which he would let C., (the defendant's nephew,) who was a news-carrier, have newspapers to sell, &c., and on being told the terms, said, "If my nephew calls for the papers, I will be responsible for the papers he shall take;" *held*, that this was an original and absolute contract in the defendant, and not a collateral agreement for the debt or default of C., and, therefore, not within the statute. *Chase v. Day*, 17 J. R. 114.

80. The security taken by a justice of the peace on granting an adjournment at the request of the defendant, must be a recognizance, or at least a written engagement of the bail; if verbal, it is void. *M'Nutt v. Johnson*, 7 J. R. 18.

81. Where a landlord distrained the goods of his tenant for rent in arrear, and A. signed an agreement on the back of the inventory, by which he *promised* to deliver all the goods contained in the inventory to the landlord, in six days after demand, or pay him 450 dollars, being the amount of the rent due; *held*, that this was an original and not a collateral undertaking, and an action might be maintained against A. for a breach of the promise. *Slangerland v. Morse*, 7 J. R. 463.

82. The plaintiff was endorser of a promissory note, made by B. for his accommodation; and B., who was also indebted to the plaintiff, having a sum of money and goods with which he was ready to pay the note, and to secure the plaintiff, it was agreed between the plaintiff B., and the defendant, that B. should place the money and goods in the hands of the defendant, who should pay the note and debt due to the plaintiff, and indemnify the plaintiff against the note, &c.; B. accordingly delivered the money and goods to the defendant, who, thereupon, undertook and promised to pay the note, &c.; *held*, that this was not a promise or undertaking for the debt of another, within the statute of frauds. *Olmstead v. Greenly*, 18 J. R. 12.

83. In assumpsit, where the declaration sets

forth an agreement to answer for the debt, default or miscarriage of a third person, the defendant may plead the statute of frauds especially in bar. *Myers v. Morse*, 15 J. R. 425.

(c) *Contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.*

84. A *parol* promise made by the owner of lands to a person who had entered into possession without title, and made improvements, to sell them to him, is void. *Frear v. Hardinburgh*, 5 J. R. 272.

85. But a promise to pay for the improvements made on the land, is not within the statute. *Ibid.* *S. P. Benedict v. Beebe*, 11 J. R. 145.

86. A growing crop may be sold by *parol*. *Newcomb et al. v. Ramer*, 2 J. R. 421. *note*.

87. Possession is an interest in land, within the meaning of the statute. *Howard v. Easton*, 7 J. R. 205.

88. *So, a contract for the sale [649] and delivery of the possession of land, and the improvements thereon, must be in writing. *Ibid.*

89. Where A. leases land to B., and it is afterwards agreed between them that the lessee shall not use the pasture of the land without paying for it, such an agreement requires not only a consideration, but also a promise in writing, to give it validity. *Tryon v. Mooney*, 9 J. R. 358.

90. An agreement to remove a fence and open a road, is not an agreement concerning an interest in land. *Storms v. Snyder*, 10 J. R. 109.

91. *It seems*, that an agreement to run a new boundary line between the lands of the parties, and to abide thereby, is within the statute. *Jackson*, ex dem. *Nellis v. Dyeing*, 2 C. R. 198. [See *Shuyesant v. Tompkins*, 9 J. R. 61.]

92. An agreement for the exchange of lands is within the statute of frauds, and must be in writing: therefore, where, on a *parol* agreement for such exchange, the plaintiff delivered to the defendant the promissory note of a third person, as a pledge, to be forfeited in case of the plaintiff's non-compliance with the agreement, and the defendant received payment of the note, the plaintiff may recover the amount from the defendant, the delivery of the note being without consideration. *Rice v. Peet*, 15 J. R. 503.

93. A *parol* agreement to extend the time of performance of a contract for the conveyance of land, is void. *Hasbrouck v. Tappen*, 15 J. R. 200.

(d) *Agreement not to be performed within a year.*

94. To bring an agreement within the statute, it must be express and specific, and not to be performed within a year. *Moore v. Far*, 10 J. R. 244.

95. If the thing promised may be performed within a year, it is not within the statute. *Ibid.*

96. Where A. promised to pay B. two dollars a year for his services as minister in a certain

church, and had paid for several years half yearly, *held*, that this was a valid promise; for the jury might infer that it was a promise to pay half yearly. *Ibid.*

VI. (Sec. 15.) *Contracts for the sale of goods.*

97. The statute applies as well to the case of executory, as of executed contracts. *Bennett v. Hull*, 10 J. R. 364.

98. But it must distinctly appear, that the value of the goods sold was above 25 dollars. *Crookshank v. Burrell*, 18 J. R. 58.

99. So, in an action for the non-delivery of goods above the value of 25 dollars, it is necessary to show a note or memorandum in writing, or part delivery, or earnest. *Ibid.*

100. Where the party who is to deliver the goods alone signs the agreement, which is accepted by the other party, such contract is mutually obligatory. *Rogel v. Merritt*, 2 C. R. 117.

101. An entry made by the vendor, in a memorandum book, of the *name of the purchaser, and of the terms [650] of the contract of sale, which was read to the agent of the vendee, who made the purchase, and assented to by him as correct, is not sufficient, it not being signed by the party to be charged, or by his agent. *Bailey v. Ogden*, 3 J. R. 399.

102. Whether the vendor is bound by such memorandum, so that the vendee could enforce the contract against him? *Quare. Ibid.*

103. The form of the memorandum of the bargain is not material, but it must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without having recourse to *parol* proof. *Ibid.*

104. Whether an agreement to sell, or let, the services of a negro slave, is within the statute of frauds? *Dubitatur. Babcock v. Stanley*, 11 J. R. 178.

105. A memorandum of a contract for the purchase of goods, written by the broker employed to make the purchase, with a lead pencil, in his memorandum book, in the presence of the vendor, the names of the vendor and vendee, and the terms of the purchase, being in the body of the memorandum, but not subscribed by the parties, is a sufficient memorandum or writing. *Merritt v. Clason*, 12 J. R. 102. S. C. 14 J. R. 484. in error.

106. The authority of the broker to make the contract, need not be in writing. *Ibid.*

107. A broker is the agent of both parties; and the neglect of the agent to give a copy of the memorandum of the contract to the vendee will not affect the rights of the vendor. *Ibid.*

108. A contract to deliver, at a future day, a thing not then existing, but to be made, is not within the statute; for it is a contract for work and labor, not for the sale and purchase of goods. *Crookshank v. Burrell*, 18 J. R. 58.

109. As, where the plaintiff contracted to make a wagon for the defendant by a certain day, when he was to come and pay for it in

lambs at a certain price per head; *held*, that this was a contract for work and labor, not for the sale of goods. *Ibid*.

110. Where, on a sale of cattle, no earnest money was paid, nor any memorandum in writing made, but the cattle were to remain in the possession of the vendor at the risk of the vendee, until he called for them, and the vendee, afterwards, called and took the cattle away, without saying any thing to the vendor; *held*, that this was a sufficient delivery of the cattle, within the statute. *Vincent v. Germond*, 11 J. R. 283.

As to declarations and assignment of trusts under the 12th, 13th, and 14th sections of the statute, see *tit. TRUST. CHANCERY, XXVI*, and *LXXII. Frauds.—Trust*.

VII. What will take a case out of the statute.

111. Though consideration money paid, possession taken, and valuable improvements made, under a parol contract for the conveyance of lands, on the ground of a part performance, may, in equity, take a case out of the statute, (2 C. C. E. [651] 87.) yet a part performance of a parol agreement will not, at law, take it out of the statute. Per *Kent, Ch. J. Jackson*, ex dem. *Smith, v. Pierce*, 2 J. R. 221.

See further *tit. CHANCERY, III. Agreement, E.* and *XXVI. Frauds*.

FUGITIVE FROM JUSTICE.

If a person commits a crime in one state, and flies into another, where he is taken, he is merely a fugitive from justice, and cannot be proceeded against in the state in which he is taken. *The People v. Wright*, 2 C. R. 213. *The People v. Gardner*, 2 J. R. 477. *The People v. Schenck, Id.* 479.

See *tit. CHANCERY, XXVII. Fugitives from Justice*.

GAMING.

1. Under the second section of the act to prevent excessive and deceitful gaming, (Sess. 24. c. 46. 1 N. R. L. 152.) a common informer cannot declare generally for money had and received; that form of declaring is given to the losing party only. *Cole v. Smith*, 4 J. R. 193.

2. The informer must declare in debt, stating the special matter upon which his cause of action arose. *Ibid*.

3. In an action under the second section of the act brought by the losing party, against the winner, to recover back money lost at play,

and paid, the plaintiff may declare generally, in debt for money had and received, without stating his case specially, or referring to the statute; but it is otherwise, when an action is brought by a common informer. *Collins v. Ragren*, 15 J. R. 5.

4. In an action for money had and received, to recover back money deposited with a stakeholder, as a bet on a horse-race, under the act, (Sess. 25. c. 44.) the defendant cannot set up in his defence that he has paid over the money to the winner without notice. *Simmons v. Borland*, 10 J. R. 468.

See also *AGREEMENT, 57. WAGER*.

GIFT

1. A delivery of possession of the thing given, is essential to the validity of a gift. *Noble v. Smith*, 2 J. R. 52. *S. P. Pearson v. Pearson*, 7 R. 26. *S. P. Grangiac v. Arden*, 10 J. R. 293. [5 J. C. R. 21.] See *tit. CHANCERY, XX. Devise, A.*

*2. Until delivery of the thing [652] promised, the party may revoke his promise. *Pearson v. Pearson*, 7 J. R. 26.

3. A promise to pay money as a gift, is not a ground of action. *Ibid*.

4. So, a note to pay money as a gift, is without consideration. *Ibid*.

5. So, if A. say to B., *I will give you the corn growing in that field*, this is not sufficient without a delivery; and if B. afterwards, when the corn is ripe, enter the field, and cut and carry it away, he renders himself a trespasser. *Noble v. Smith*, 2 J. R. 52.

6. Whether corn growing in a field is susceptible of any other delivery than putting the donee in possession of the land? *Quere. Ibid*.

7. Where a father bought a ticket in a lottery, which he declared he gave to his infant daughter E., and wrote her name upon it, and after the ticket had drawn a prize, he declared that he had given the ticket to his child E., and that the prize money was hers; this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. *Grangiac v. Arden*, 10 J. R. 293.

8. Where a mother promised to give to her son, a child (not then born) of a slave, and after the birth of the child, it continued with and under the control of the mother, but was called in the family the slave of the son: *held*, that this was not a valid gift, there being no delivery of possession. *Cook v. Husted*, 12 J. R. 188.

9. A. told B. that if he would take one of his mares to horse, and pay for the same, the foal should be his property. B. did so; and afterwards had the complete and uncontrolled possession of the foal; *held*, that, though this was not a gift, yet the property in the foal be-

came vested in B. *Linnendell v. Doe*, 14 J. R. 222.

10. But admitting that it was a gift, every thing was done which the law required to vest the property in B. *Ibid*.

11. A father, from affection merely, gave to his son a promissory note for 1000 dollars, payable to his son, or order, sixty days after date. In an action brought by the son against the executor of the father, to recover the amount of the note; *held*, that the action was not maintainable; for it was not a *donatio mortis causa*, nor a gift of so much money, but a mere promise to give; and blood, or natural affection, is not a sufficient consideration to support a simple executory contract. *Fink v. Coz*, 18 J. R. 145.

GOVERNMENT.

Although the Convention of Delegates of this state, of the 9th July, 1776, adopted the Declaration of Independence, and there were committees, or temporary bodies of men, who took charge of the public safety, yet there was no regular organized government, or any executive, legislative or judicial authority of the state, until the adoption of the constitution on the 20th April, 1777. *Jackson*, ex dem. *Russell*, v. *White*, 20 J. R. 313.

[*653]

*GOVERNOR OF THE STATE.

No action lies against the governor of this state, in the name of the people, to recover back any part of money received by him, under acts of the legislature, to defray the incidental charges arising in and about administering the government of the state; for what shall be deemed incidental charges not being defined by law, they must necessarily be left to the discretion of the executive, under the control only of the legislature, and the propriety of the expenditures is not a subject of judicial cognizance. *The People v. Lewis*, 7 J. R. 73.

GRANT.

1. A right of egress and regress over land, or of fishing and fowling, does not give the right of taking wood, grass, or any thing appurtenant to the ownership of the soil. *Emans v. Turnbull*, 2 J. R. 313.

2. A right of fishing in any water gives no power over the land. *Cortisyou v. Van Brundt*, 2 J. R. 357.

3. Nor will prescription, in any case, give a right to erect a building on another's land. *Ibid*.

4. The grant, or laying out of a highway,

gives only a right of way to the p. fee, or right of soil, remains in the owner; and an action of trespass will not lie for an exclusive appropriation of the soil. *Ibid*.

5. A grantor cannot, after the execution of his deed, lawfully do any act to prejudice the rights of his grantee. Per *Thompson*, Ch. J. *Jackson*, ex dem. *Phillips*, v. *Aldrich*, 13 J. R. 106.

6. And no declarations, admissions or confessions of the grantor are admissible against the grantee. *Ibid*.

7. A grantor conveying with covenants of seisin, &c., is not bound to deliver the title deeds to the grantee. *Abbott v. Allen*, 14 J. R. 248.

8. The grantee is not bound to wait until he has discovered the real state of his title; but if he suspects it to be defective, he may bring his action for a breach of seisin, at once, which is the only mode to compel the grantor to explain his title. *Ibid*.

*GUARDIAN. [*654]

1. Guardianship is a trust coupled with an interest; and where two guardians are appointed, and one of them dies, it continues to the survivor. *The People v. Byron*, 3 J. C. 53.

2. A guardian in *socage* has the custody of the land, and is entitled to the profits for the benefit of the heirs. *Byrne v. Van Hoesen*, 5 J. R. 66.

3. He may lease the land, avow, or bring trespass in his own name. *Ibid*.

4. Guardianship in *socage* ceases when the infant arrives at the age of 14; and yet, if no other guardianship succeeds, this will continue. *Ibid*.

5. Where the husband dies leaving a widow and infant children, and she enters upon the land of which her husband was possessed, it will be intended that she is in possession by right, and that she entered as guardian in *socage*, where the entry and perception of profits are unaccompanied with acts or declarations inconsistent with that character. *Ibid*. And see *Jackson*, ex dem. *Youngs*, v. *Vredenberg*, 1 J. R. 159. *S. P. Jackson*, ex dem. *Davy*, v. *De Walts*, 7 J. R. 157.

6. A guardian may submit to arbitration on behalf of his ward. *Weed v. Ellis*, 3 C. R. 253.

7. A guardian can do no act to the injury of his ward. *Jackson*, ex dem. *Sinsabaugh*, v. *Sears*, 10 J. R. 435.

8. An attornment by the husband of a guardian in *socage*, is void, as against her children. *Ibid*.

9. Where, on the appointment of a guardian to an infant, by the surrogate, a bond with sureties is taken, for the faithful performance of the guardianship, and to render an account, &c.—an action at law cannot be maintained on the bond, until the guardian has been called to an account in the Court of Chancery, to

lands, the jurisdiction of such trusts exclusive-
 belongs. *Stilwell v. Mills*, 19 J. R. 304.
 [See tit. PARDON.]

10. Where a father died intestate, leaving a
 large real and personal estate, and his infant
 children were maintained by their mother,
held, that the mother was not bound to main-
 tain the children out of her third of the estate,
 but was entitled to be allowed out of the por-

tion of the infants for their maintenance
 during infancy; and that for the time past
 as well as the time to come; and that she
 was to be charged with interest, on two thirds
 of the money which she had received in man-
 aging the estate, and to be allowed interest on
 all the sums expended by her. *Wilkes v.*
Rogers, 6 J. R. 566. [See further tit. CHAN-
 CERY, XXVIII. *Guardian and Ward*.]

END OF THE FIRST VOLUME.

A
D I G E S T
OF THE
CASES DECIDED AND REPORTED
IN THE
SUPREME COURT OF JUDICATURE,
THE
COURT OF CHANCERY,
AND THE
COURT FOR THE CORRECTION OF ERRORS,
OF THE
STATE OF NEW-YORK;
FROM 1790 TO 1823;
WITH
TABLES OF THE NAMES OF THE CASES,
AND OF
TITLES AND REFERENCES.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

— UT EX HIS RECOLATUR JUS, NON PERDISCATUR.....BAC

IN TWO VOLUMES.

VOL. II.

Second Edition, Corrected.

PHILADELPHIA:
PUBLISHED BY E. F. BACKUS.

1837.

SOUTHERN DISTRICT OF NEW-YORK, ss.

(L. S.) BE IT REMEMBERED, That on the sixteenth day of November, A. D. 1825, in the fiftieth year of the Independence of the United States of America, William Johnson, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit :

"A Digest of the Cases decided and reported in the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New-York ; from 1799 to 1823 ; with Tables of the Names of the Cases, and of Titles and References. By William Johnson, Counsellor at Law.

"—*Ut ex his recolatur Jus, non perdiscatur*.....Bac.

"In two volumes."

In conformity to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned." And also to the act, entitled, "An act, supplementary to an act, entitled, An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,

Clerk of the Southern District of New-York.

D I G E S T,

&c.

VOLUME II.

HABEAS CORPUS.

1. A *habeas corpus*, to bring up a person stated to be a soldier enlisted in the army of the *United States*, was refused. *Husted's Case*, 1 J. C. 136.

2. The allowance of a *habeas corpus*, in term time, is a matter of sound legal discretion. *Matter of Ferguson*, 9 J. R. 239.

3. And when it appeared, on an application for the allowance of such a writ, that the party was a soldier in the army of the *United States*, enlisted by one of the officers of the *United States* army, the Court refused to grant the allowance, as it was a matter arising under, or by color of, the authority of the *United States*, and a judge of the Supreme or District Court of the *United States* had clear and unquestionable jurisdiction in the matter, and could afford the party the requisite relief. *Ibid*.

4. And whether a state Court has jurisdiction in such a case? *Dubitatur. Ibid*.

5. A sheriff is bound to bring up a person, in execution on a civil suit, on a *hab. corp. ad test.* in a civil suit, on being tendered the expenses of bringing up and returning the prisoner. *Noble v. Smith*, 5 J. R. 357.

6. Where a sheriff returned to a *habeas corpus*, that he held the prisoner by virtue of an order of the Court of Chancery, which order referred to a former attachment, setting forth the grounds of commitment, and from which the prisoner had been discharged by a judge of the Supreme Court in vacation, on another *habeas corpus*, and the sheriff also returned the attachment and proceedings prior to the last order of commitment; *held*, that the sheriff could not return the true cause of caption without also stating the original attachment and subsequent orders; and that the whole return might be received and examined into by the Court. *Case of J. V. N. Yates*, 4 J. R. 317.

7. A *habeas corpus*, allowed by a commissioner of the Supreme Court, was directed to I. C., commander of the navy of the *United States* on lake *Ontario*, and to M. L., commanding the troops of the *United States* at *Sackets' Harbor*, and to their subordinate officers, to bring the body of A., &c. The following return was endorsed on the writ:

[*2] *I, M. L. general, &c., do return to the within writ, that the within named A. is not in my custody. This was held, to be an eva-*

sive and insufficient return; and that the officer, to excuse himself for not producing the body of the prisoner, ought to have returned that he was not in his custody, possession or power; and it appearing from affidavits, the party was, in fact, in the custody of a subordinate officer acting under the order of General M. L., and that the return was intentionally eluded and disregarded, the Court ordered an attachment immediately against General L. for a contempt. *In the Matter of Stacy*, 10 J. R. 328.

8. In ordinary cases, the attachment does not issue until after a rule to show cause; but where the case is urgent, and the contempt flagrant, it may be issued in the first instance. *Ibid*.

9. Where the chancellor committed one of the officers in Chancery, for mal-practice and contempt, and a judge of the Supreme Court, on a *habeas corpus*, discharged the officer, and he was afterwards recommitted by the chancellor for the same offence; *held*, that the chancellor was not liable to an action by the officer for the penalty given by the fifth section of the *habeas corpus* act. (1 N. R. L. 355.) *Yates v. Lansing*, 5 J. R. 282. S. C. 9 J. R. 395.

10. The penalty given by the statute is imposed on individuals acting ministerially out of Court, and does not apply to the acts of a Court done of record. *Yates v. Lansing*, 5 J. R. 282.

11. Though a judge in vacation, who refuses to allow a writ of *habeas corpus*, is liable to an action on the statute, as the allowance by him in vacation is not a judicial act, yet the judges of the Supreme Court, or the chancellor, sitting as a Court, in term time, may, in their discretion, refuse a *habeas corpus*. *Ibid*.

12. But the proceedings, when the prisoner is brought before the judge, on the return of the *habeas corpus*, are judicial, and he is, consequently, not liable to a prosecution for what he may then do, or refuse to do. *Per Kent, Ch. J. Ibid*.

13. Where a *habeas corpus* is directed to a private person to bring up an infant, the Court are bound, *ex debito justitiae*, to set the infant free from improper restraint; but whether they shall direct the infant to be delivered over to any particular person, rests in their discretion, under the circumstances of the case; and that although the person making the application be

the father of the infant. *Matter of Waldron*, 13 J. R. 418.

14. Where an infant was in the custody of the grandfather, and it appeared, that it would be more for the benefit of the infant to remain with her grandfather, than with her father, and no improper restraint being shown, the Court refused to direct the infant to be delivered to her father. *Ibid*.

15. *It seems*, that the *habeas corpus* act does not apply to cases of imprisonment on civil process. *Cable v. Cooper*, 15 J. R. 152. *S. P. United States Bank v. Jenkins*, 18 J. R. 305.

16. Where a debtor in execution is discharged from imprisonment, under the act for the relief of debtors, with respect to the imprisonment of their persons, and is again imprisoned on an execution issued on the same original judgment, a judge or commissioner has no authority to discharge him under the *habeas corpus* act, and such a discharge [*3] is no protection to the sheriff, in an action for an escape. 15 J. R. 152.

17. A discharge on *habeas corpus*, where the judge has no jurisdiction, is void. *Per Van Ness*, J. S. C. 15 J. R. 156.

18. Though the Supreme Court has power, at common law, to relieve against all illegal imprisonments, in civil and criminal cases; yet a *habeas corpus* is not the remedy for the defendant, imprisoned on a *ca. sa.* irregularly issued before a previous *fi. fa.* according to the provisions of the act, (Sess. 36. c. 50. a. 7.) but the party may be discharged on motion and affidavit for that purpose. *United States Bank v. Jenkins*, 18 J. R. 305.

And see CONTEMPT. EXECUTION. TŪ. CHANCERY, XXIX. Habeas Corpus.

Habeas Corpus to remove a cause from a Court of Common Pleas, *see tit. PRACTICE.*

Removing proceedings on *Habeas Corpus*, by writ of error, *see tit. ERROR, II.*

HEIR.

1. Where an heir is sued on his promise to pay the debt of his ancestor, the question of assets does not arise, (heirs being liable by statute for the simple contract debts of their ancestors,) and the plaintiff need not allege that the defendant had assets. *Elting v. Vanderlyn*, 4 J. R. 237.

2. Where an heir, sued on the bond of his ancestor, pleads *non est factum*, and the issue is found against him, this is not such a false plea as will render him liable *de bonis propriis*. *Jackson*, ex dem. *Carman*, v. *Rosevelt*, 13 J. R. 97.

3. Heirs being liable to the creditors of their ancestor in respect to lands descended to them, no alienation by them, after the suit brought, can protect them or the purchaser. *Covell v. Weston*, 20 J. R. 414.

4. But, where land is sold by the order of the Court of Probates or a surrogate, at the application of an executor or administrator,

for want of sufficient personal assets, under the statute, (Sess. 36. c. 79. a. 23, 24, 25.) such sale being declared valid and effectual against the heirs and devisees, and all persons claiming by, from or under them, is also valid and conclusive against a creditor who had brought his action against the heirs, and may be pleaded by them in bar of such action. *Ibid*.

5. Such creditor, by bringing his action against the heirs, does not acquire a *lien* upon the land descended to them; but his lien is merely on the heirs, in respect to the land descended, so that they cannot alienate it, after the action brought, and defeat his claim. *Ibid*.

6. The heir of an intestate takes the land of his ancestor, subject to the right of the administrator, to apply to a Court of Probates, or *surrogate, for the sale of it, [*4] in order to pay the debts; and when the power given to the Court of Probates or surrogate, for that purpose, has been executed, the title of the heir is gone, and he has nothing by descent. *Ibid*.

And see EXECUTORS AND ADMINISTRATORS. TŪ. CHANCERY, XXX. Heir.

HIGHWAY.

I. Highways generally.

II. *Proceedings under the act to regulate highways*; (Sess. 36. c. 33. 2 N. R. L. 270.) (a) *Laying out highways, and assessments for labor*; (b) *Obstructing and encroaching upon a highway*; (c) *Removing proceedings into the Supreme Court.*

III. Public rivers.

I. Highways generally.

1. The grant, or laying out of a highway, gives only a right of way to the public; but the fee, or right of soil, remains in the original owner, and an action of trespass will lie for any exclusive appropriation of the soil. *Cortelyou v. Van Brundt*, 2 J. R. 357. *S. P. Jackson*, ex dem. *Yates*, v. *Hathaway*, 15 J. R. 447.

2. If a person over whose land a highway is laid out, conveys the land on each side of it, and describes it by such boundaries as do not include the road or any part of it, the property in the road does not pass to the grantee, as it is excluded by the description in the grant; and it cannot pass as an incident, being, in itself, a distinct parcel of land, the fee of which cannot pass as appurtenant to the other. *Jackson*, ex dem. *Yates*, v. *Hathaway*, 15 J. R. 447.

3. Where an old road, the fee of which is in one person, is discontinued, and a new road laid out over the land of another person, contiguous to the old road, the latter is not entitled to the old road, as a compensation for the land taken for the new road, under the 17th section of the act, (Sess. 36. c. 33.) which applies only

where another road is substituted over the land of the same proprietor. *Ibid.*

4. As a public highway is a mere *easement*, and the seisin and right to convey still continue in the owner of the land over which it is laid out, it is no breach of the covenant of seisin and power to convey contained in a deed, that part of the land conveyed was a highway, and used as such. *Whitbeck v. Cook*, 15 J. R. 483.

5. A road used as a public highway for 20 years next preceding the 21st March, 1797, (Sess. 24. c. 186 s. 18.) becomes a public highway, though not recorded, and it does not cease to be a public highway, though originally leading to a dock, landing, or ferry, and such ferry has been changed, and though some part of the way has been *appropriated and built upon, if the passage continues open to the same dock and landing. *Galatian v. Gardner*, 7 J. R. 106.

6. That a road has been used as a public highway for 12 years, is *prima facie* evidence that it was opened by authority, and is to be deemed a public highway, within the cases contemplated by the first section of the act for regulating highways. (Sess. 24. c. 186.) *Calden v. Thurbur*, 2 J. R. 424.

7. A road laid out previously to the passing of that act, but not conformably to the law then existing, and afterwards ascertained and recorded by the commissioners of highways according to the provisions of the act, becomes a public highway, and is a justification, in an action of trespass, for passing over it. *Ibid.*

8. Where a person has been appointed as overseer of the highways under the act relative to duties, &c. of towns, (Sess. 36. c. 35.) and neglects or refuses to serve, whereby he incurs the penalty imposed by the act, he cannot be again appointed an overseer under the act, (Sess. 36. c. 33.) and be made liable to a second penalty for a second refusal to act. *Haywood v. Wheeler*, 11 J. R. 432.

II. *Proceedings under the act to regulate highways*; (Sess. 36. c. 33. 2 N. R. L. 270.) (a) *Laying out highways, and assessments for labor*; (b) *Obstructing and encroaching upon a highway*; (c) *Removing proceedings into the Supreme Court.*

(a) *Laying out highways, and assessments for labor.*

9. The proceedings, on a complaint in writing by an overseer, against a person who had been assessed, but neglected to work on the highway, are summary. *Bouton v. Neilson*, 3 J. R. 474.

10. The overseer is the sole judge of the delinquency of the party, and the justice, in issuing a warrant, acts ministerially, and is not bound to give the party notice of the complaint, or to summon him to appear, or show cause against the charge. *Ibid.*

11. So, the justice issuing the warrant, and the constable executing it, being merely ministerial officers, and having no discretion, are not responsible to an injured party. *Beach v. Furman*, 9 J. R. 229.

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12. But his remedy is either by an action against the overseer, or by removing the proceedings, by *certiorari*, into the Supreme Court, where they may be quashed. *Ibid.*

13. Whether a female, though a freeholder, is liable to be assessed to work on the public highways? *Quere. Ibid.*

14. An overseer of the highway is not liable, in a private action, for any error of judgment in the execution of his trust. *Freeman v. Cornwall*, 10 J. R. 470.

15. He is only responsible for any neglect or refusal, under the 11th section of the act, (2 N. R. L. 274. s. 14.) which subjects him, in such case, to a penalty. *Ibid.*

16. Perhaps his proceedings may be reviewed on a *certiorari*, and set aside, if not well founded. *Ibid.*

17. An alternative *mandamus* had been directed to a town-clerk, commanding him to record the survey of a road, or show cause, &c.; *the clerk returned, *inter* [*6] *alia*, that he did not record the survey, because the commissioners had not taken the oath of office, and filed a certificate of the oath with the clerk, according to the act; *held*, that the return was insufficient, and a peremptory *mandamus* was awarded. *The People v. Collins*, 7 J. R. 549.

18. Any person conceiving himself aggrieved by the decision of the commissioners of highways, may appeal to three judges of the Court of Common Pleas of the county; and where the commissioners, on due application, refuse to lay out a road, and their determination is reversed on appeal, the judges of the Court of Common Pleas may proceed to lay out the road. *People v. Champion*, 16 J. R. 61.

19. And where the commissioners refuse to open the road so laid out by the judges of the Common Pleas, a *mandamus* lies to compel them to do it. *Ibid.*

20. A *mandamus* need not, in the first instance, be directed to the commissioners, by their individual names; it is only in case of disobedience to the writ, that they are to be proceeded against personally. *Ibid.*

21. If the owner or occupant through whose improved land a public highway has been laid out, does not, within seventy days after the determination of the commissioners of highways, (or thirty days after the expiration of the forty days allowed to the party to appeal from such order,) elect the mode in which he would have the damages assessed, he loses the right of having them assessed by three commissioners appointed by a judge of the Court of Common Pleas; but the damages may, afterwards, be assessed in the ordinary way, by two justices of the peace and a jury of twelve freeholders; and if so assessed, the board of supervisors are bound to have the amount levied and collected according to the act. *Johnston v. The Supervisors of Herkimer*, 19 J. R. 272.

(b) *Obstructing and encroaching upon a highway.*

22. In an action for the penalty for obstructing a highway, it is sufficient for the plaintiff, in support of his action, to produce a copy of

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the record of the establishment of the road as a public highway, without proving all the proceedings preliminary to the laying out of the road. *Sage v. Barnes*, 9 J. R. 365.

23. The penalty for obstructing highways, given by the 19th section of the act, (s. 25.) relates only to obstructions of highways or public roads, and not of a private road. *Fowler v. Lansing*, 9 J. R. 349.

24. To bring a person in default for not obeying the order of the commissioners of highways, and render him liable for the penalties for an encroachment on the highway, it is necessary that the commissioners should meet, deliberate, and decide on the alleged encroachment, and give notice to the party to remove his fence in 60 days, which notice ought to state specially the breadth of the road originally intended, the extent of the encroachment, and the place or places where, so that the party may know how to obey the order for removing his fence. *Spicer v. Slade*, 9 J. R. 359.

25. An action to recover a penalty [*7] for encroaching on the highway, "must be brought in the name of the person making the complaint, and be prosecuted according to the twenty-five dollar act, and not in a summary way. *Rue v. Sprague*, 1 J. R. 510. *S. P. Bennett v. Ward*, 3 C. R. 259.

26. In case of an encroachment on a highway, (2 N. R. L. 277.) where the fact is not denied, all the commissioners must confer together in regard to making an order for its removal, and the majority may act; but when the encroachment is denied, and the fact is to be inquired into by a jury, one of the commissioners only may act, and make complaint to a justice of the peace; or, at least, the want of joint consultation of all the commissioners will not vitiate an inquest subsequently found. *Bronson v. Mann*, 13 J. R. 460.

27. The certificate of a jury finding the encroachment, is conclusive evidence of that fact, in an action brought to recover the penalty for removing the encroachment. *Ibid.*

28. According to the true construction of the 20th section of the act, (Sess. 36. c. 33.) a person on whose application a private road is laid out, has the sole and exclusive right to use it, (unless the occupant of the land, at the time the road was laid out, signify his intention to make use of it,) and may maintain an action of trespass on the case against the occupant of the land through which the road was laid out, or any other person making use of it. *Lambert v. Hoke*, 14 J. R. 383.

29. The proper form of action in such a case, is trespass on the case, not trespass. *Ibid.*

30. A road used as a common highway, since the year 1777, but not recorded as such, is not a public highway, within the meaning of the act, (Sess. 36. c. 33. s. 24.) so as to render the obstruction of it a nuisance. *The People v. Lawson*, 17 J. R. 277.

(c) *Removing proceedings into the Supreme Court.*

31. A *certiorari* lies to the judges of a Court of Common Pleas, to remove proceedings, on an appeal to them from the commissioners of

highways. *Lawton v. Commissioners of Cambridge*, 2 C. R. 179.

32. Where the commissioners are silent as to the width of a road, the Court will intend it to be of the legal width. *Ibid.*

33. Where an inquisition for an encroachment on the highway, taken under the 20th section of the act, (2 N. R. L. 277. s. 26.) is removed into the Supreme Court by *certiorari* and quashed, the appellant is not entitled to costs. *Low v. Rogers*, 8 J. R. 321.

34. On an appeal from the decision of the commissioners of highways to three judges of the Court of Common Pleas, under the 36th section of the act, (Sess. 36. c. 33.) if the decision of the commissioners is reversed, a *certiorari* will lie on behalf of the commissioners to remove the proceedings into the Supreme Court; the right to bring a *certiorari* being reciprocal, and belonging as well to the commissioners as to the appellants. *Commissioners of Kinderhook v. Claw*, 15 J. R. 537.

35. On an appeal from the decision of the commissioners as to laying out, altering, &c. a highway, the appellant must give notice of the [*8] appeal to the commissioners; and if such notice is not given, the commissioners may bring a *certiorari*, on which the proceedings on the appeal will be reversed. *Ibid.*

36. It is not sufficient that notice of the appeal was given to the town clerk. *Ibid.*

37. Where the trustees of the village of *Newburgh*, by an ordinance duly made, direct a street or road in that village, which had been used as a highway, to be shut up and discontinued, no appeal lies from the order or decision of the trustees to the judges of the Court of Common Pleas. *The People v. Lawson*, 17 J. R. 277.

38. But, if such an appeal would lie, it must be made within forty days after the decision of the trustees. *Ibid.*

III. *Public rivers.*

39. It seems, that the *Hudson*, even above tide water, is a public river. *Palmer v. Mulligan*, 3 C. R. 307.

40. Rivers are to be considered navigable, as far as the sea ebbs and flows; and so far the right of fishing as well as of navigation is common to all; and in rivers not navigable in that sense, or above the flow and reflow of the tide, the proprietors of the adjoining soil have the exclusive right of fishing opposite their land, to the middle of the river; but the public have an easement or servitude in such rivers, as highways for passing and repossing in boats, &c.; and all rivers which are in fact navigable, whether above the flow of the sea, or unaffected by the tide, in their whole extent, are, in regard to their use, *public rivers*, and subservient to the public use and accommodation, and subject to regulation by the legislature. *Hooker v. Cummings*, 20 J. R. 90.

41. If a river, not a public highway, has been used for more than 26 years by the public, for the purpose of rafting down boards and timber, a public right is thereby created, and an action will lie against an owner of a mill-

dam for so obstructing the navigation as to injure the raft of the plaintiff in passing over. *Shaw v. Cranford*, (case of the *Battenkill*, in the county of *Washington*, which was not enumerated in the statute, Sess. 24. c. 186., declaring certain rivers and streams public ways,) 10 J. R. 236.

42. In an action for a penalty under the 35th section of the act, (Sess. 24. c. 186. Sess. 36. c. 47. s. 2 2 N. R. L. 287.) the plaintiff need not negative the proviso in his declaration. *Bennet v. Hurd*, 3 J. R. 438.

And see tit. FISHERIES.

HOMINE REPLEGIANDO.

1. The condition of the recognizance in *hom. repleg.* being forfeited, the bail are not exonerated by a subsequent surrender of [*9] the principal, *and acceptance by the other party. *Covenhoven v. Seaman*, 1 J. C. 23. S. C. 2 C. C. E. 322.

2. The condition of the recognizance was, that the plaintiff should prove his liberty, &c. and personally appear in Court and prosecute his suit to effect, and the plaintiff suffered a nonsuit, and then surrendered himself to the defendant, who accepted him, and the bail paid the costs of suit; held, that by suffering a nonsuit, the recognizance was forfeited, and the bail liable. *Ibid.*

3. Where a writ of *homine replegiando* has been issued, and the party has been claimed as a slave, it is the duty of the sheriff to return that fact; he is not authorized to set him at liberty, but he should bring the party into Court on the return of the writ, when he is to enter a recognizance, with sufficient sureties, to the person claiming him to be a slave, to prove his liberty, personally to appear in Court and prosecute his suit with effect. *Skinner v. Fleet*, 14 J. R. 263.

4. A bond taken by the sheriff to himself, with sureties for the prosecution of the suit with effect, and that the party should prove his liberty, and for his return, if return should be adjudged, is of no avail, the sheriff having no right or power to take such a bond; and it is no defence to an action against the sheriff for the escape of the slave. *Ibid.*

HUSBAND AND WIFE.

I. Marriage.

II. Husband's interest in the wife's estate, and conveyances and leases by husband and wife.

III. Husband's liability for the wife.

IV. Actions by and against husband and wife.

V. Separation and separate maintenance.

VI. Divorce.

I. Marriage.

1. The statute of bigamy does not render a second marriage legal, notwithstanding the

former husband or wife may have been absent above five years, and not heard of. It merely purges the felony. *Fenton v. Reed*, 4 J. R. 52.

2. Except in cases of prosecutions for bigamy, and in actions for criminal conversation, a marriage may be proved from cohabitation, reputation, acknowledgment of parties, reception in the family, and other circumstances. *Ibid.*

3. No formal solemnization of marriage is requisite. *Ibid.*

4. A contract of marriage made *per verba de presenti*, amounts to an actual marriage, and is as valid as if made *in facie ecclesie*. *Ibid.*

*5. Though cohabitation, and the declaration of the parties, are *prima* [*10] *facie* evidence of marriage; yet where, without any apparent rupture, the parties, after a cohabitation of about two years, separated, nearly forty years ago, and continued separate, without any claims or pretensions on each other, as husband and wife; it seems, that the presumption of marriage, arising from their cohabitation, will be rebutted. *Jackson, ex dem. Van Buskirk, v. Claw*, 18 J. R. 346.

6. A. and B., after cohabiting as husband and wife, separated in 1781, and the wife went to visit her friends in 1783, when she removed out of the state, and was never heard of afterwards. A. her husband, in 1781, married another woman, with whom he cohabited thirty-eight years, and died, leaving children by her; held, that the absence of the first wife for seven years, from 1783 to 1790, without being heard of during that time, was sufficient to afford a presumption of her death; and, though the second marriage of A. in 1781, was void, his first wife being then living, yet his continued cohabitation with his second wife for 27 years after 1790, and until his death, and the reputation of their marriage, and the good character of the parties during all that time, and until the husband's death, afforded sufficient ground to presume an actual marriage between them after 1790, so as to entitle the second wife to dower in the lands of which her husband was seized during that period. *Ibid.*

7. Marriage, where one or both parties are slaves, is legal by the statute. (Sess. 36. c. 88.) *Marbletown Overseers v. Overseers of Kingston*, 20 J. R. 1.

II. Husband's interest in the wife's estate, and conveyances and leases by husband and wife.

8. A husband who survives his wife is entitled to all her *choses in action*, whether reduced into his possession in her lifetime or not. *Whitaker v. Whitaker*, 6 J. R. 112.

9. And after his death they go to his personal representatives. *Ibid.*

10. If the husband, without taking out letters of administration, obtain possession of his wife's personal property, he may retain it against his wife's next of kin. *Ibid.*

11. So, if the husband gives a receipt for the distributive share of his wife, out of her father's estate, as received for his son, a minor, he is not concluded by the receipt, which does

not operate as a transfer of the property, and the son cannot maintain an action against his father, in his lifetime, or against his executor after his death. *Ibid.*

12. If administration be granted to a third person, the administrator of the wife is trustee to the husband, and, after his death, for the husband's representative. Per *Spencer, J. Ibid.*

13. If the husband execute a lease of his wife's land, and afterwards the husband and wife execute a lease of the same land to another person, which is acknowledged by the wife, according to the statute, she is thereby precluded from affirming the first lease, and the *lessee under the second lease cannot be prejudiced by her acts. *Jackson, ex dem. Campbell, v. Holloway, 7 J. R. 81.*

14. *It seems*, that where the wife is not a party to a lease, it is void, as to her; and an acceptance of rent, or any act of the wife; after the death of her husband, will not confirm it. *Ibid.*

15. Where a husband, seised in right of his wife, and his wife, by deed duly executed and acknowledged, convey land to a third person, who reconveys it to the husband, the husband thereby acquires a right to the land as his own. *Jackson, ex dem. Stevens, v. Stevens, 16 J. R. 110.*

16. A deed executed by a *feme covert*, is not binding upon her, until duly acknowledged; and her subsequent acknowledgment does not relate back to the time of execution. *Ibid. S. P. Jackson, ex dem. Corson, v. Cairns, 20 J. R. 301.*

17. As, where husband and wife execute a deed of his wife's land, but she does not then acknowledge it, and the husband and wife, afterwards, execute another deed of the same land, which is duly acknowledged by the wife at the time, and she, afterwards, acknowledges the first deed, the title to the land is vested in the grantee of the second deed. *Ibid. [And see Jackson, ex dem. Corson, v. Cairns, 20 J. R. 301.]*

18. Where land is conveyed to husband and wife, they take neither as joint tenants, nor as tenants in common; but being one person in law, they are both seised of an entirety; neither of them can dispose of any part, without the assent of the other; and on the death of either, the whole goes to the survivor. The statute, (Sess. 9. c. 12. s. 6.) does not apply to such a case. *Ibid.*

19. Where the wife has a perfect title to land, and a deed of the same land is afterwards executed by a third person to her and her husband, and accepted by them, this does not preclude her from setting up her original title, nor is she bound by any limitation or trust in the deed. *Jackson, ex dem. White, v. Cary, 16 J. R. 302.*

20. Where the husband was seised of lands, in right of his wife, and the wife died in 1795, and the husband afterwards continued in possession of the land, claiming it as his own, and making permanent improvements thereon, and in 1800, executed a mortgage of

the land as his own; *held*, that the husband, after the death of his wife, was a tenant at sufferance, and his continuance in possession was not adverse or hostile to the true owners or heirs of his wife. *Jackson, ex dem. Corson, v. Cairns, 20 J. R. 301.*

[As to the character in which a married woman is regarded in equity, and her power over her separate estate. *See tit. CHANCERY, and Jaques v. Methodist Episcopal Church, on appeal, 17 J. R. 548.*]

And see CURTESY.

III. Husband's liability for the wife.

21. *It seems*, that where a husband permits his wife to act in any particular business, he is bound by her acts and admissions, which may be given in evidence against him. *Fenner v. Lewis, 10 J. R. 38.*

*22. A husband is liable for a for- [*12] feiture under a penal statute incurred by his wife. *Hasbrouck v. Weaver, 10 J. R. 247.*

23. If a wife elopes from her husband, though not in an adulterous manner, the husband is not liable for any of her contracts, though the person who gives credit to her for necessities had no notice of the elopement. *McCutchen v. McGahay, 11 J. R. 281. S. P. McGahay v. Williams, 12 J. R. 293.*

24. But if she offers to return, and the husband refuses to receive her, his liability upon her contracts for necessities is revived from that time, notwithstanding a general notice not to trust her. *Ibid. S. P. McGahay v. Williams, 12 J. R. 293.*

25. And, if application is made to the husband by a third person, on behalf of the wife, to receive her, and he, without questioning the authority of the person applying, puts his refusal on other grounds, it will be equivalent to a personal application by the wife herself. *McGahay v. Williams, 12 J. R. 293.*

26. Cohabitation is evidence of the husband's assent to contracts made by his wife for necessities, and it can be repelled only by express notice of previous dissent, or notice not to trust her. Per *Platt, J. Ibid.*

27. If a husband turns away his wife, he gives her a credit wherever she goes, and must pay for necessities furnished her. Per *Platt, J. Ibid. S. P. McGahay v. Williams, 12 J. R. 293.*

28. All persons supplying the necessities of a married woman, separated from her husband, are bound to make inquiries as to the cause and circumstances of the separation, or they give credit at their peril. Per *Platt, J. Ibid.*

29. Where a husband and wife separate, without any provision being made for the maintenance of the wife, the husband is liable for necessities furnished to her, suitable to her condition in life. *Lockwood v. Thomas, 12 J. R. 248.*

30. Whether the circumstance that the wife has a separate estate of her own, will exonerate the husband from providing for her main-

tenance, and how far it will have that effect? *Quere. Ibid.*

And see post, V.

IV. Actions by and against husband and wife.

31. If a husband and wife join in an action, it must be shown how the wife has an interest. *Staley v. Barhite*, 2 C. R. 221.

32. The husband of a *feme covert*, guardian in *socage*, must join in actions by her. *Byrne v. Van Hoesen*, 5 C. R. 66.

33. The husband cannot be sued alone for the debt of his wife, contracted before their marriage. *Angel v. Felton*, 8 J. R. 149.

34. A bond to the husband and wife, conditioned for their maintenance, during their joint and several lives, is a valid bond, on which a suit may be brought by the husband and wife jointly. *Executors of Schoonmaker v. El-mendorf*, 10 J. R. 49.

*35. If, after a judgment in favor of husband and wife on such bond, the husband die, and afterwards the wife die, the executors of the wife may bring a *scire facias* on the judgment. *Ibid.*

36. Where a husband and wife execute a conveyance, in which they both covenant to the grantee, the wife cannot be joined with the husband, in an action for a breach of the covenant; her acknowledgment having no further effect, than to convey her interest in the land, and not binding her by the covenants contained in the deed. *Whitbeck v. Cook*, 15 J. R. 483.

37. As a *feme covert* cannot bind herself personally by a covenant or contract, a deed executed by husband and wife, with covenant of warranty, does not estop the wife, in an action of ejectment, brought against her after the death of her husband, from setting up a subsequent interest in the same land. *Jackson, ex dem. Clowes, v. Vanderheyden*, 17 J. R. 167.

38. As the wife cannot be sued upon a mere personal contract, made during coverture, a declaration in assumpsit against husband and wife, alleging a request, and promise by the husband and wife during coverture, is bad. *Edwards v. Davis*, 16 J. R. 281. *S. P. Jackson, ex dem. Clowes, v. Vanderheyden*, 17 J. R. 167.

39. If a count on a promise by husband and wife is joined with a count on a promise by the wife, *dum sola*, and judgment is rendered generally for the plaintiff, it is error. *Ibid.*

40. If a *feme sole* plaintiff marries, after a report of referees in her favor, the husband must be made a party by *scire facias* to the judgment. *Johnson v. Parmely*, 17 J. R. 271.

41. Where a married man sailed in a vessel from New-York, on a voyage to South America, and neither he, nor the vessel, had ever been heard of afterwards; held, that this was sufficient presumptive evidence of his death, on a plea of coverture, in an action against the wife as *feme sole*, brought twelve years after the departure of her husband on such voyage. *King v. Paddock*, 18 J. R. 141.

V. Separation, and separate maintenance.

42. If a husband and wife part by consent, and the husband secures to her a separate maintenance, suitable to his condition in life, and pays it according to agreement, he is not liable for articles furnished to his wife, not even for necessities; and the general reputation of the separation will be sufficient. *Baker v. Barney*, 8 J. R. 72. *Fenner v. Lewis*, 10 J. R. 38. *See ante*, III.

43. But, where the agreement, on the part of the husband, to pay a certain sum to his wife, or a separate maintenance, is not reduced to writing, and there is no evidence of any payment having been made by him to her, he will be liable for goods furnished to his wife during the separation. *Baker v. Barney*, 8 J. R. 72.

44. Husband and wife, by articles of agreement, covenanted to live separate, and C. executed the agreement as trustee and surety for the wife, and covenanted to pay to the husband a certain sum of money, on his delivering to the wife, for her [*14] separate use, a coach and horses, &c. In an action, brought by the husband against C., to recover the money; held, that evidence of the declarations and confessions of the wife, as to the delivery of the coach and horses, was admissible. *Fenner v. Lewis*, 10 J. R. 38.

VI. Divorce.

45. If the wife of a citizen of this state leave her husband for the express purpose of going into another state, and there obtaining a divorce, which she does, and a divorce is decreed on grounds which would not authorize it by our law, and likewise alimony adjudged to her, such conduct being in evasion of the law, she cannot support an action upon the decree. *Jackson v. Jackson*, 1 J. R. 424.

46. A divorce of persons domiciled in this state, decreed in another state, is invalid here. *Pauling v. Willson*, 13 J. R. 192.

47. But if the parties, although domiciled here, were married in the state in which the divorce was decreed, and appeared and litigated the question of divorce there whether it may not, under the circumstances be valid? *Quere. Ibid.*

48. But, admitting such a decree to be valid, if it made no provision with regard to the children of the marriage, and there was no agreement between the parties, as to their maintenance, the mother cannot (the guardianship of the children having been decreed to her) support an action against the father for their maintenance; both parents being equally bound to maintain their children, she can, at most, claim from him contribution only. *Ibid.*

49. A divorce obtained in Vermont by a husband from his wife, who resided in another state, and had no notice of the pendency of the proceedings, is void, and will not legalize a subsequent marriage by the husband in this state. *Borden v. Fitch*, 15 J. R. 121.

See further, tit. CHANCERY, XXXI. Husband and Wife. DOWER.

INDEPENDENT STATE.

1. The parts of the island of *St. Domingo*, respectively under the government of *Petion* and *Christophe*, are not independent states within the meaning of the act of Congress, of the 5th June, 1794. (3 Cong. sess. 1. c. 50. s. 3.) and, therefore, it is not illegal to fit out a vessel for the purpose of assisting the one against the other. *Hoyt v. Gelston*, 13 J. R. 141. S. C. in error, 13 J. R. 561.

2. It is not for Courts of law to determine whether a revolted colony has become an independent state, but for the government alone; and until the government has solemnly recognized its existence as a nation, Courts are bound to consider the ancient state of things as remaining. *Ibid.*

See tit. CHANCERY, XIII. *Constitution and Government of the United States.*

INDIANS.

1. Indians residing in this state cannot, either in their national or individual capacity, *alienate* their lands, without the consent of the legislature. *Jackson*, ex dem. *Gilbert*, v. *Wood*, 7 J. R. 290.

2. All contracts for the purchase or sale, or occupation of land, made with any of the tribes of Indians, within this state, without the previous consent of the legislature, are, by the constitution and laws of the state, illegal and absolutely void. *St. Regis Indians v. Drum*, 19 J. R. 127. (See *Goodell v. Jackson*, ex dem. *Smith*, 20 J. R. 693.)

3. Therefore, the *St. Regis Indians*, though authorized by an act of the legislature "at their annual meetings, to make such rules, orders and regulations respecting their lands, as they shall judge necessary," &c., cannot maintain an action of assumpsit for the use and occupation of their lands, against a white man who occupied it, under a *parol* agreement, as a tenant from year to year, at an annual rent, pursuant to the rules made by them at an annual meeting, as to the improvement of their lands. *Ibid.*

4. A lot of land was granted to an *Oneida Indian*, in fee, as a bounty for his services during the revolutionary war: after his death, the land was sold and conveyed, by his sons, who were his heirs, and the sale and conveyance were held void. *Jackson*, ex dem. *Gilbert*, v. *Wood*, 7 J. R. 290.

5. The possession of lands by *Indians* does not affect the validity of patents granted by the state for their lands to others, without their consent. *Jackson*, ex dem. *Klock*, v. *Hudson*, 3 J. R. 375.

6. An outstanding title, in certain *Indians* of the *Mohawk* tribe, was held to be extinguished, as the title had never been claimed or asserted, and the tribe or nation had become extinct. *Ibid.*

7. The *Brothertown Indians* are subject to the

civil and criminal jurisdiction of this state. *Case of Peters, an Indian*, 2 J. C. 344.

8. A person cannot lawfully enter upon the lands of the *Stockbridge Indians*, and cut and carry away timber growing thereon, even with their consent. *Chandler v. Edson*, 9 J. R. 362.

9. Where a person, by a written license from the peacemakers of the tribe, entered and cut down trees, of which he made shingles; held, that he was a trespasser, notwithstanding such license, and acquired no property in the timber or shingles. *Ibid.*

10. The act, (Sess. 36. c. 92.) relative to the Indians within this state, does not merely protect Indians of the *Oneida* nation from suits on contracts, while residing on the lands reserved to that nation, but extends [*16] to suits against such *Indians*, wherever their residence may be; and an Indian sued upon a contract, may plead the act in bar, and is not restricted to pleading it in abatement. *Dana v. Dana*, 14 J. R. 181.

11. The *Brothertown, Oneida and Stockbridge Indians* can sue and be defended only by their attorney commissioned for that purpose, pursuant to the act, (Sess. 36. c. 92. s. 27.) *Jackson*, ex dem. *Van Dyke*, v. *Reynolds*, 14 J. R. 335.

12. Such suits may be brought in the name of their attorney; and they cannot, even with his assent, be prosecuted in the name of another attorney. *Ibid.*

13. The 37th article of the constitution of the state, making void purchases of lands of the *Indians* within this state, applies to purchases of such lands only as they possess in their national capacity, or as communities; and not to land, acquired by an *Indian*, as an individual, distinct from his tribe; and the prohibition is not extended by the statute of the 18th of March, 1788. *Jackson*, ex dem. *Twa-hangarahkan*, v. *Sharp*, 14 J. R. 472. [But see *contra*, *Goodell v. Jackson*, ex dem. *Smith*, 20 J. R. 693—720, in error.]

14. Therefore, when an *Indian* being seized of land that had been granted to him by patent for his military services during the revolutionary war, conveyed the same, on the 22d December, 1791; held, that the conveyance was valid, being anterior to the act of the 4th of April, 1801, (Sess. 14. c. 147.) which was more extensive in its operation than the act of 1788. *Ibid.* S. P. *Jackson*, ex dem. *Gillet*, v. *Brown*, 15 J. R. 264. [But see *Goodell v. Jackson*, 20 J. R. 693.]

15. The approbation of the surveyor-general to the deed of an *Indian* patentee, or his heirs, pursuant to the 55th section of the act, (Sess. 36. c. 92. 2 N. R. L. 172.) to a deed that is void and inoperative, does not preclude the surveyor-general from afterwards giving his assent to a valid and operative deed from the same *Indian* grantor for the same land. *Jackson*, ex dem. *Gillet*, v. *Brown*, 15 J. R. 264.

16. The surveyor-general, in the endorsement of his approbation on the deed, need not state his reasons for giving it. The words, "I approve of the within deed," are sufficient. *Ibid.*

17. The Court refused to grant an attachment for costs on a judgment of nonsuit against an *Oneida Indian*, lessor of the plaintiff, in an action of ejectment; but granted a rule on the attorney who brought the suit, not being the agent or attorney appointed by the state to manage the affairs of the *Indians*, to show cause why an attachment should not issue against him for the costs. *Jackson, ex dem. Dackstader, v. King*, 18 J. R. 506.

18. The *Indian* tribes within this state are subject to the jurisdiction and laws of the state. *Jackson, ex dem. Smith, v. Goodell*, 20 J. R. 188. S. P. in the S. C. in error, 20 J. R. 693.

19. A patent for land to J. S. an *Oneida Indian*, and to his heirs and assigns forever, is to him and his *Indian* heirs, whatever their civil condition or character may be, whether aliens or citizens. S. C. in error, 20 J. R. 693.

20. Such a patent is to be taken as issued by due authority, and as equivalent to a legislative grant to J. S. and his *Indian* heirs. *Ibid.*

*21. The *Indians* within this state [*17] are not citizens, but distinct tribes or nations, living under the protection of the government. *Ibid. Contra, S. C. 20 J. R. 188.*

22. A deed executed in 1797, by the son and heir of J. S., (an *Indian* patentee of land,) to a citizen, in the usual form, without the consent of the legislature, is illegal and void. *Ibid.*

INDICTMENT.

I. *Indictment, and its incidents*; (a) *Form of the indictment*; (b) *Plea*; (c) *Trial*; (d) *Removal of an indictment*.

II. *Verdict and judgment*.

III. *Expenses of prosecution*.

I. *Indictment, and its incidents*; (a) *Form of the indictment*; (b) *Plea*; (c) *Trial*; (d) *Removal of an indictment*.

(a) *Form of the indictment*.

1. An indictment taken at the sessions must, in the caption, state that the grand jury were, then and there, sworn and charged: the omission of the words then and there will be fatal on motion, in arrest of judgment. *The People v. Guernsey*, 3 J. C. 265.

2. In an indictment for forging a bill of exchange, or bank bill, it is not necessary to insert the letters or marks in the margin, as they make no part of the bill. *The People v. Franklin*, 3 J. C. 299.

3. On an indictment for forging a check, drawn in the name of a copartnership firm, on a banking company, it is not necessary to set out the names of all the persons who compose the copartnership, or the banking company. *The People v. Curving*, 1 J. R. 320.

4. It is sufficient for the indictment to designate any one person intended to be defrauded; and an acquittal on it will be a bar to another prosecution for the same forgery, though laid with intent to injure some other person. *Ibid.*

5. An indictment for a second offence, in cases in which the punishment is increased, must set forth the first offence. *The People v. Youngs*, 1 C. R. 37.

6. A suggestion on the record, in the nature of a counterplea, averring a former conviction, will be insufficient. *Ibid.*

7. An indictment against an attorney, for extorting more than his legal fees, must specify how much he received on his own account, and how much for the officers and members of the Court. *The People v. Rust*, 1 C. R. 131.

8. The want of a venue, in an indictment for a conspiracy, to the averment of the false pretence, is fatal. *The People v. Barrett & Ward*, 1 J. R. 66.

*9. Indictment for a nuisance, in [*18] keeping gunpowder in a certain house near the dwelling-houses of divers good citizens, and near a certain public street, without alleging it to have been negligently kept, is bad. *The People v. Sands*, 1 J. R. 78.

10. In an indictment for an assault, with felonious intent, it is sufficient to state the assault and battery with the usual precision, and aver the intent with which it was made. *The People v. Pettit*, 3 J. R. 511.

11. So, an indictment stating that the prisoner with force and arms, to wit, with, &c., made an assault upon E. G., with intent to commit murder upon him, and did then and there cut, beat, strike, wound, and ill treat, the said E., to his damage, &c. and against the peace, &c., is sufficient. *Ibid.*

12. If a person be indicted for burning the dwelling-house of another, it is sufficient if it be, in fact, the dwelling-house of such person; his tenure or interest therein is immaterial. *The People v. Van Blaricum*, 2 J. R. 105.

(b) *Plea*.

13. The first section of the act regulating certain proceedings in criminal cases, (Sess. 24. c. 60. 1 N. R. L. 494.) does not extend to collateral issues. On such, if the prisoner stand mute, the Court will enter a plea for him. *The People v. Youngs*, 1 C. R. 37.

14. *Auterfois acquit*, is not a good plea, if the former indictment was so far defective that no good judgment could have been given upon it. *The People v. Barrett & Ward*, 1 J. R. 66.

15. The arresting of judgment, after conviction, on an indictment for a felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. *The People v. Casborus*, 13 J. R. 351.

(c) *Trial*.

16. A person indicted for forging an order for the payment of money, is not entitled to a peremptory challenge; it being an offence under the statute, punishable only with imprisonment for a term of years. *The People v. Howell*, 4 J. R. 296.

17. In all cases, where a right of peremptory challenge does not exist, two or more persons may be indicted, or tried jointly or separately, in the discretion of the Court. *Ibid.*

18. Whether two persons indicted for a capital offence, and entitled to a peremptory challenge, can be tried together against their consent? *Quare. Ibid.* [See tit. NEW TRIAL, V.]

(d) *Removal of an indictment.*

19. On the removal of an indictment from the sessions, and the cause being sent down to the circuit for trial, it takes the course of a civil action; and, within the first four days of the term ensuing the *conviction, a motion in arrest of judgment may be made, or the parties may make a case for the opinion of the Court. *The People v. Croswell*, 1 C. R. 149.

II. *Verdict and judgment.*

20. On an indictment for a conspiracy, a verdict that *there was an agreement between A. and the defendant, to obtain money from B., but with intent to return it again*, is bad, and the Court cannot give judgment upon it. *The People v. Olcott*, 2 J. C. 301.

21. If one count of an indictment be good, although the others may be defective, it will be sufficient to support a general verdict of guilty. *The People v. Curling*, 1 J. R. 320.

22. Where, on a conviction for a misdemeanor, no circumstances attending the offence are shown to regulate the discretion of the Court in fixing the punishment, they will impose merely a nominal fine. *The People v. Cochran*, 2 J. C. 73.

23. Where a prisoner, convicted at the sessions, is brought into the Supreme Court for judgment, that Court will give no other judgment than might have been pronounced by the Court below. *The People v. Youngs*, 1 C. R. 37.

24. On a prisoner being brought up for sentence, the Court will not pronounce judgment, unless the record of conviction be brought before them. *M'Neill's Case*, 1 C. R. 72.

25. And, the conviction being for a conspiracy, the defendant was admitted to bail. *Ibid.*

III. *Expenses of prosecution.*

26. The expenses of the prosecutor and witnesses are not allowed them of course, but it must be shown that they are poor. *Ex parte Manning*, 1 C. R. 59.

27. Poor persons, appearing on subpoena to give evidence against the defendant, are equally entitled to be paid as if they had appeared on recognizance. *The People v. Dowelle*, C. C. 35.

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*INFANT.

I. *How far the acts of an infant are binding.*

II. *Privileges of infancy, and liability of an infant.*

III. *Actions by and against infants.*

I. *How far the acts of an infant are binding.*

1. Such deeds of an infant as do not take effect by delivery of his hand, are void; and

such as take effect by delivery of his hand are voidable. *Conroe v. Birdsall*, 1 J. C. 127. Per *Lansing*, Ch. J.

2. Therefore, the bond of an infant is voidable only. *Ibid.*

3. If, at the time of making the bond, he fraudulently allege that he is of full age, he may, notwithstanding, avoid it. *Ibid.*

4. The note of an infant carrying on trade cannot be enforced against him by a payee, who was ignorant of his infancy. *Van Winkle v. Ketcham*, 3 C. R. 323.

5. A negotiable note given by an infant, even for necessities, is void. *Spasey v. Administrator of Vanderheyden*, 10 J. R. 33.

6. A manumission of a slave by an infant, though done with the approbation and consent of his guardian, is voidable. *Executors of Rogers v. Berry*, 10 J. R. 132.

7. An infant under the age of 18, not being liable to be enrolled in the militia, is not bound by an agreement with him, entered into with the consent of his father, to go into actual service, as a substitute for another person. *Grace v. Wilber*, 10 J. R. 453. See MILITIA.

8. D., an infant, in 1784, conveyed a lot of land to M., and arrived at full age in 1785; and, afterwards, in 1791, without having made any entry on the land, or done any act to avoid the deed to M., executed another deed to B. for the same lot. Whether the second deed avoided the first deed? *Quare. Jackson, ex dem. Dunbar, v. Todd*, 6 J. R. 257.

9. Though the deed of the infant D. was voidable, yet T., a purchaser under B., could not avail himself of the second deed to B., to avoid the first deed to M. *Ibid.* [And see ONONDAGA COMMISSIONERS.]

10. An entry is not in all cases requisite, by a grantor, to avoid a deed executed by him during his infancy. *Jackson, ex dem. Wallace, v. Carpenter*, 11 J. R. 539.

11. Where an infant, in 1784, conveyed lands in the military tract, and afterwards, in 1794, having arrived to full age, conveyed the same lands to another person, and such conveyance was registered; held, that the lands being waste and uncultivated, he was not concluded by the lapse of time, and that an entry was not necessary to avoid the former deed, which (not being a *feoffment*) might be avoided by a deed of the same nature, and equal notoriety. *Ibid.* 14 J. R. 124.

*12. Where an infant bargains [*21] and sells land to A., and after coming of age, bargains and sells the same land to B., this is a revocation of the former grant, admitting that the first deed was voidable only and not void. *Jackson, ex dem. Brayton, v. Burchin*, 14 J. R. 124.

13. A person who has conveyed land, when an infant, may avoid his grant by an act of equal solemnity and notoriety; as if it was a *feoffment* with livery of seisin, by entering on the land, and making known his dissent; or if it was a bargain and sale, by a subsequent deed of bargain and sale. *Ibid.*

14. Notice to a subsequent grantee, before the execution of the conveyance, of a prior grant made by the grantor when an infant,

does not render the subsequent deed fraudulent and void; and if the prior grantor never was in possession, it is not an act of maintenance. *Ibid.*

15. Where an infant conveys land, a bare admission of the fact, after he comes of age, is not an affirmation of the act. *Ibid.*

II. Privilege of infancy, and liability of an infant.

16. Infancy is a personal privilege, of which the party alone can avail himself. *Van Bramer v. Cooper*, 2 J. R. 279. *S. P. Hartness v. Thompson*, 5 J. R. 160.

17. In an action against two defendants, where one is taken and brought into Court, and the other returned not found, the defendant in Court cannot, under the general issue, give in evidence, or plead the infancy of his co-defendant. *Van Bramer v. Cooper*, 2 J. R. 279.

18. An infant who lives with, and is maintained by his father, is not liable even for necessities. *Wailing v. Toll*, 9 J. R. 141.

19. An infant may be disseised, and is then bound to bring his action within ten years after coming of age. Per *Kent and Benson, Js. Jackson, ex dem. Rensselaer, v. Whillock*, 1 J. C. 213.

III. Actions by and against infants.

20. An infant can only appear by guardian, the power of appointing whom, *ad litem*, is incident to a Justice's Court, as well as to every other Court. *Mockey v. Grey*, 2 J. R. 192.

21. The defendant, in a Justice's Court, pleaded infancy, and the justice, from examination, was of opinion, that he was not an infant, and did not appoint a guardian, and the jury found, that the defendant was not an infant. On the return to a *certiorari*; held, that the infancy of the defendant could not be assigned for error, it being against the record and the fact, as found by the jury. *Ingersoll v. Wilson*, 3 J. R. 437.

22. Where one co-defendant pleads his infancy, the plaintiff may enter a *noti prosequi*, as to him, and proceed to judgment against the other defendants. *Hartness v. Thompson*, 5 J. R. 160.

23. The jury may find a verdict for the infant defendant, and a verdict for the plaintiff against the other defendants. *Ibid.*

*24. If an infant defendant appear [*22] by attorney, and not by guardian, it is error in fact. *Arnold v. Sandford*, 14 J. R. 417.

See *tit. CHANCERY, XXXII. Infant.*

INFORMATION.

1. An information will not be granted against a sheriff for false swearing, in an affidavit annexed to a plea of recaption, on fresh pursuit, where an action is pending against him for the escape. *The People v. Dole*, 1 C. R. 181.

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2. The affidavits to support the motion must falsify the allegations contained in the sheriff's affidavit. *Ibid.*

3. The rule for an information having been made absolute, no cause being shown on the day appointed, was enlarged, of course, on the defendant's showing that himself, his counsel, and papers, had been detained by adverse winds until after the rising of the Court on that day. *The People v. Freer*, 1 C. R. 394.

INJUNCTION FROM CHANCERY.

1. Though an injunction from Chancery operates only on the party, his attorney and agent; yet the Supreme Court will take notice of an existing operative injunction, for the purpose of promoting the ends of justice, and preserving harmony between the two Courts. *Hoyt v. Gelston*, 13 J. R. 139.

2. Where an appeal is entered immediately from an order of the Court of Chancery dissolving an injunction, the injunction is not revived by such appeal, so as to operate a stay of the proceedings at law. *Ibid.*

See *tit. CHANCERY, XXXIII. Injunction.*

INNS AND INNKEEPERS.

Act for regulating inns and taverns, (Sess. 24. c. 164. 1 N. R. L. 176.)

1. The supervisor may associate more than two justices with him *as commissioners of excise, and the act of a [*23] majority present is valid. *Orvis v. Thompson*, 1 J. R. 500.

2. If three of the commissioners, or a majority present, sign the license, it is sufficient, though the supervisor refuse; it is not indispensable that it should be signed by him. *Ibid.*

3. A license granted by two of the commissioners of excise, without the presence and consent of the supervisor, and when they are not assembled for the purpose of granting licenses, is illegal and void; and such a license, though regular on the face of it, is no justification of the tavern-keeper, who is liable for the penalty. *Palmer v. Doney*, 2 J. C. 346.

4. But a tavern-keeper, who has a legal and competent license, is not liable for the penalty for retailing liquors after his license has expired, and before the time of the next meeting of the commissioners of excise, for the purpose of granting licenses. *Ibid.*

5. In an action *qui tam*, on the 7th section of the act, for retailing liquors, &c. without a license, the plaintiff may unite in his declaration any number of offences, but though he proves several and distinct offences, he can recover only one penalty. *Washburn v. M'Inroy*, 7 J. R. 134. *S. P. Tiffany v. Driggs*, 13 J. R. 253.

6. And a conviction and recovery, in such case, for a single offence, is a bar to all pro-

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cution for offences of like nature committed before such recovery. *Tiffany v. Driggs*, 13 J. R. 253.

7. It is unnecessary for the plaintiff to prove the day of committing the offence; and it will be sufficient for the justice, in making up the record of conviction, to insert the day laid in the declaration, although no particular day was proved. *Ibid.*

8. In an action on the 7th section of the statute, where the offence charged in the declaration is the selling of strong spirituous liquors, without a license, contrary to the first clause in that section, the plaintiff cannot proceed for the offence specified in the subsequent clause, to wit, the selling liquors to be drunk in the house of the seller, without having entered into a recognizance. *Bigelow v. Johnson*, 13 J. R. 428.

9. A license to keep a tavern is a personal trust, that cannot be assigned to another. *Alger v. Weston*, 14 J. R. 231.

10. And, in an action for a penalty under the 7th section of the act, the defendant cannot justify under a license given to another person. *Ibid.*

11. A declaration for a penalty for selling liquors contrary to the act, ought to state the town where, time when, kind and quantity of liquor. *Blasdel v. Hewitt*, 3 C. R. 137.

12. It need not negative the proviso in the 7th section of the act. *Teel v. Fonda*, 4 J. R. 304. *Contra*, *Blasdel v. Hewitt*, 3 C. R. 137. which case is so stated, that it is impossible to say on what ground it was decided by the Court. Per *Kent*, Ch. J. *Bennet v. Hurd*, 3 J. R. 438.

13. In an action for retailing liquors without a license, the defendant *cannot [*24] justify under a parol license from the supervisor to whom he paid the sum required. *Lawrence v. Gracy*, 11 J. R. 179.

14. Under a plea of a former conviction for the same offence, the defendant must give in evidence, to support his plea, a conviction drawn up in the form prescribed by the act for the recovery of debts to the value of 25 dollars, as any variance or defect in the form will render the evidence of such conviction inadmissible. *Beadlestone v. Sprague*, 6 J. R. 101.

15. If a plaintiff declares expressly for tavern expenses, it is incumbent on him to bring the defendant within the exceptions of the act; but if he declares generally, without specifying the particulars, it seems, that the illegality of the demand must be shown by the defendant. *Ehel v. Smith*, 3 C. R. 187.

16. Innkeepers are chargeable for the goods of their guests lost or stolen at their inns; and to render them liable, it is not necessary that the goods should have been delivered into their special keeping, nor to prove negligence. *Chute v. Wiggins*, 14 J. R. 175.

17. As, where a sleigh loaded with wheat, &c. was put by the guest into an out-house appurtenant to the inn, where loads of that description were usually received, and the grain was stolen during the night, the innkeeper was held responsible for the loss. *Ibid.*

INSOLVENT.

- I. *Of the assignment, what passes by it, the effect of it, and how avoided.*
- II. *Effect of an insolvent's discharge.*
- III. *How the insolvent may avail himself of his discharge.*
- IV. *What will avoid the discharge.*
- V. *Payment of debts and charges of proceedings.*

I. *Of the assignment, what passes by it, the effect of it, and how avoided.*

1. Where an order has been made for the assignment of an insolvent's estate, under the 9th section of the act, (Sess. 36. c. 98.) the judge or officer granting the order cannot afterwards vacate it, unless there has been a surprise on the opposing creditors, or they have been misled by the opposite party. *Matter of Bradstreet*, 13 J. R. 385.

2. Where the counsel for the opposing creditor was, while going to the office of the judge, to oppose the insolvent's discharge, met by one of the attorneys of the petitioning creditors and insolvent, and detained by him in conversation and the perusal of the papers relating to the opposition, and, in the mean time, the other attorney had appeared with the petitioning creditors before the judge, and obtained an order for *the assignment; held, that under these circumstances, [*25] the judge granting the order ought to vacate it. *Ibid.*

3. The judge or officer before whom the proceedings under the act (Sess. 36. c. 98.) are had, should be satisfied that two thirds of the creditors had requested that an assignment of the insolvent's estate should be made; although if it should appear, after the assignment has been made, that two thirds of the creditors had not assented, the assignment is, notwithstanding, valid.

4. If the creditors do not attend in due time to oppose, their assent is presumed, and that they have waived all opposition. *Ibid.*

5. The assignment having been made by the insolvent himself, under the 9th section of the act, he is to be discharged, on conforming to the directions of the act in respect to the petitioning creditors; he must, therefore, make out, under oath, an account of his creditors, and a just and true inventory of his estate, and deliver over his estate to his assignee; but he is not bound to advertise anew. *Ibid.*

6. A first judge of the Court of Common Pleas has no jurisdiction under the 9th section of the act, (Sess. 36. c. 98.) *Matter of Murray*, 14 J. R. 221.

7. A petitioning creditor's affidavit, stating that the insolvent was indebted to him on a note of hand given on the settlement of accounts, is insufficient; the affidavit should set forth the nature of the account on which the settlement took place, or the general ground of indebtedness. *Matter of Cook*, 15 J. R. 183.

8. Under the assignment, no other estate vests in the assignee than that of which the

insolvent had the legal and equitable title. *Kip v. Bank of New-York*, 10 J. R. 63.

9. Property held in trust, does not pass by the assignment. *Ibid.*

10. And if the property held in trust remains in specie, or in goods or notes, or other choses in action, the *cestui que trust* is entitled to the property, and not the general creditors of the insolvent. *Ibid.* (And see *Kennedy v. Strong*, 10 J. R. 289.)

11. And though the trust property is converted into money, yet if it is kept separate and distinct, so that it can be traced and distinguished from the general mass of the insolvent's estate, it will go to the *cestui que trust*. *Ibid.*

12. So, where two joint trustees sold the property held in trust, and one of them deposited the money in the bank in his own name, where it remained; and, being insolvent, afterwards, assigned all his estate under the act; his general creditors were not entitled, under the assignment, to the money so deposited. *Ibid.*

13. The assignees take the property, subject to any equitable lien in a third person. *Waddington v. Vredenberg*, 2 J. C. 227.

14. Where A. and B. were sued jointly for the debt of A., and B. paid the amount of the judgment, and agreed with the plaintiff that he might have the benefit of the judgment, to recover the amount out of the property of A. in the name of the plaintiff, and issued an execution, by which the lands of A. were bound: the Supreme Court would not relieve the assignees of A. against the execution, by an *audita querela*. *Ibid.*

*15. A bona fide assignment will not [*26] be invalidated, by the goods of the insolvent remaining in his possession, at the request and for the accommodation of his assignees. *Vredenberg v. White*, 1 J. C. 156.

16. An assignment by an insolvent of a debt due to him, to one creditor, in preference to the others, is valid; and the debtor, in a suit against him, cannot, therefore, avail himself of the fact by way of plea. *Caines v. Brisbane*, in error, 13 J. R. 9.

17. Where three assignees have been appointed under the insolvent act of the 3d of April, 1811, (since repealed,) one of whom refuses to act, and no other is appointed in his stead, the two who enter upon the execution of the trust, may maintain actions for debts due to the insolvent, in their own names, without joining the third. *Van Valkenburgh v. Elmendorf*, 13 J. R. 314.

II. Effect of an insolvent's discharge.

18. A discharge under the insolvent act of this state, is a bar to all suits brought in this state upon antecedent contracts, wherever made. *Penniman v. Meigs*, 9 J. R. 325.

19. A discharge under the act does not make the original contract void, but only suspends the remedy; and the previous consideration is sufficient to support a new promise. *Shippey v. Henderson*, 14 J. R. 178.

20. The insolvent's discharge extends to such debts only as are specific, and to which the creditor can make oath as being justly due, or to become due, at some specified time; and unless the creditor at the time of the assignment is able to produce and verify such a debt, he will not be entitled to receive from the assignees his dividend of the insolvent's effects, nor will he be barred from his future action against the insolvent. Per *Kent, J. Frost v. Carter*, 1 J. C. 73. *S. P. Mechanics' Bank v. Capron*, 15 J. R. 467.

21. The costs arising on a judgment, obtained against the insolvent before his discharge, are a debt capable of liquidation, and is barred by the discharge; (*Thomas v. Striker*, 3 J. C. 90. *S. C.* 5 J. R. 136. n.) although the costs were not taxed, nor the roll signed. *Warne v. Constant*, 5 J. R. 135. *Contra, Cone v. Whitaker*, 2 J. C. 280.

22. A bond conditioned to perfect the title of lands previously granted by the obligor to the obligee, and which has become forfeited, is a debt provable under the act, and is barred by a discharge. *Clinton v. Hart*, 1 J. R. 375.

23. A discharge extends to debts due from the insolvent jointly with others. *Tooker v. Bennett*, 3 C. R. 4. *S. P. Willson v. Gomperts*, 11 J. R. 193.

24. But it will not operate as a discharge of the partner of the insolvent from a partnership debt, but he will, notwithstanding, be liable. *Ibid.*

25. If an endorser of a promissory note pay it, after the maker has been discharged, he may recover the amount from the maker, whose *discharge will be no [*27] bar to the action. *Frost v. Carter*, 1 J. C. 73. *S. C.* 2 C. C. E. 311.

26. The endorser of a promissory note, who after his endorsement, and before the note becomes payable, obtains his discharge, is not protected by it from payment of the note; the endorsement not creating a certain debt, but merely a liability contingent on non-payment by the maker, and which liability could not be fixed before such discharge. *Mechanics' and Farmers' Bank v. Capron*, 15 J. R. 467.

27. Nor does it vary the case, that the note was given by the endorser as collateral security for a debt due to the holder and barred by discharge. *Ibid.*

28. Where a party having commenced a suit, afterwards obtains a discharge under the act, and then a judgment as in case of nonsuit is rendered against him, for not going to trial, his discharge is no bar to an action to recover the costs on such judgment. *Stebbins v. Willson*, 14 J. R. 403.

29. A judgment was obtained against the bail, before the discharge of their principal under the insolvent act, and after his discharge a *ca. sa.* was issued against them, and they paid the debt, and afterwards brought an action against their principal: the debt not being certain until after the discharge, it is not a bar. *Buel v. Gordon*, 6 J. R. 126.

30. A discharge is no bar to an action on an express covenant to pay rent, brought to re-

cover rent accruing subsequent to the insolvent's discharge. *Lansing v. Prendergast*, 9 J. R. 127.

31. The insolvent act of 1811, (Sess. 34. c. 132.) did not extend to actions for libels or torts. *Strong v. White*, 9 J. R. 161.

32. And a discharge under that act is no bar to an action of trover. *Kennedy v. Strong*, 10 J. R. 289. S. P. S. C. 14 J. R. 128.

33. Nor is it a good plea, in bar to an action against a factor or trustee, for goods delivered to him, to be sold for account of the owner or consignor. *Ibid.* Because, such property does not pass by the assignment of the insolvent's estate. *Kip v. Bank of New-York*, 10 J. R. 63.

34. Where at the time of entering into the contract, there is a law of the state declaring that if an insolvent debtor, on petition of two thirds of his creditors, shall assign to them all his property, he shall be discharged from his debts, the law does not impair the obligation of the contract within the meaning of the constitution of the United States, and is therefore valid. *Mather v. Bush*, 16 J. R. 233. [But see 4 *Wheat. Rep.* 122. 192. 209.]

35. An execution, therefore, issued against the property of such debtor acquired subsequently to his discharge under such act, on a judgment obtained previous to his discharge, will be set aside on motion. *Ibid.* [And see *Hicks v. Hotchkiss*, 7 J. C. R. 297.]

36. But if the insolvent act is passed after the contract, it is unconstitutional and void. *Roosevelt v. Cebra*, 17 J. R. 108.

37. A discharge under the act, (Sess. 36. c. 98.) obtained the 6th of May, 1817, is a good bar to an action of covenant brought by the loan officers of Albany, on a covenant contained in a mortgage, to recover the balance due on such mortgage, executed under the act of the 14th of March, 1792, after a sale of the mortgaged premises, pursuant to the act, the proceeds of which were insufficient [*28] to satisfy *the principal and interest due on the mortgage, and which, by the terms of the mortgage, were payable when demanded; at any time after the first Tuesday of May, 1815, it being a debt when the insolvent presented his petition on the 17th of February, 1817. *New Loan Officers of Albany v. Capron*, 17 J. R. 44.

38. An insolvent debtor, against whom a judgment was rendered in December, 1816, on a note given in October, 1812, was discharged in June, 1817, under the act of April, 1813, which required two thirds of the creditors to petition for the insolvent's discharge. The act of April, 1801, which required three fourths of the creditors to petition, was, by the repeal of the act of the 3d of April, 1811, revived and in force, in October, 1812, when the original contract was made; held, that the difference between the two acts, (though part of the same system in regard to insolvent debtors,) was so material, that the insolvent could not be considered as discharged under the act of 1801, but under the act of 1813, passed subsequent to the time of making the contract, and being therefore, in this respect, unconstitutional, the

discharge was void. *Matter of Wendell*, 19 J. R. 153.

39. Where the insolvent act was in force when the contract was made, the discharge under it exonerates both the person and estate of the insolvent. *Roosevelt v. Kellogg*, 20 J. R. 208. See ante, 34, 35, 36.

40. An act amendatory to the act of April, 1813, passed subsequent to the judge's order for publication, but prior to the debtor's assignment, does not affect the proceedings; as such act applies only to cases in which the application of the debtor for relief is made after the act was passed. *Ibid.*

41. A discharge under the act, of a defendant who had signed a bond as surety for a deputy sheriff, is not a good plea in bar, as the damages sustained in consequence of the breaches of the condition of the bond were not then ascertained. *Andrus v. Waring*, 20 J. R. 153.

42. If the certificate of discharge does not except foreign creditors, it does not affect its validity as against creditors here. *Roosevelt v. Kellogg*, 20 J. R. 208.

How the discharge of the principal, as an insolvent, affects his bail. See BAIL.

III. How the insolvent may avail himself of his discharge.

43. A discharge must be pleaded or given in evidence, if obtained in time. *Valkenburgh v. Dederick*, 1 J. C. 133.

44. If a party lays by until after judgment is obtained against him, and he is surrendered by his bail, the Supreme Court will not relieve him. *Ibid.*

45. But where a person, having given a bond and warrant of attorney, became insolvent, and obtained his discharge, and afterwards judgment was entered up on the bond, the Supreme Court ordered the judgment to be set aside. *Billings v. Skutt*, 1 J. C. 103.

*46. If an insolvent omit to plead his discharge, the Supreme Court [*29] will not relieve him on motion. *Cross v. Hobson*, 2 C. R. 102.

47. Where a defendant, after pleading the general issue, obtained his discharge under the insolvent law, and his attorney, by mistake, served a notice of giving it in evidence at the trial, the Supreme Court, on payment of costs, gave the defendant leave to withdraw his notice and plead the special matter, the plaintiff to be at liberty to discontinue, without costs. *Shaw v. Wilmerden*, 2 C. R. 380.

48. A discharge is such a defence on the merits, as that the defendant may avail himself of it in setting aside proceedings against him. *Schenck v. Woolsey*, 3 C. R. 100.

49. On a sci. fa. to revive a judgment of twenty years' standing, where an inquest had been taken, because the defendant's counsel was not prepared to adduce his discharge, long since obtained under an insolvent law, and the defendant himself, from remoteness of distance and bodily infirmity, could not attend; the Supreme Court, on being satisfied

that the discharge had been obtained, set aside the inquest, on payment of costs, though the defendant was shown to be of sufficient ability to pay; for a Court of law cannot notice the moral obligation to pay debts from which a debtor had been discharged by law. *Ibid.*

50. Although a continuance has intervened, the defendant will be permitted, on payment of costs, to plead his discharge, *nunc pro tunc*. *Morgan v. Dyer*, 9 J. R. 255.

51. Where the defendant, after verdict, obtained leave to plead his discharge *puis darrein continuance*, on payment of costs, but neglected to comply with the condition of the rule, and judgment was perfected against him; *held*, that he could not afterwards avail himself of his discharge; and the Supreme Court would not, therefore, on the motion of his bail, order an *exoneretur* on the bail-piece. *Mechanics' Bank v. Hazard*, 9 J. R. 392. *And see Post v. Riley*, 18 J. R. 54.

52. So, where a defendant obtains his discharge, after a declaration has been filed against him in a suit, he ought to plead his discharge at or before the next term, or, at least, before a default has been entered for want of a plea; and if he neglects to do so, he will not be allowed, after a judgment has been perfected against him, to plead his discharge *nunc pro tunc*. *Desobry v. Morange*, 18 J. R. 336.

53. Where the defendant obtained his discharge on the 8th of November, and filed his plea *puis darrein continuance*, at the first day of the sittings after term, on the 8th of December, and the plaintiff refused to receive it, but noticed his cause again for trial at the April sittings, the Supreme Court, on motion, granted a rule to stay all further proceedings on payment of the costs of the December sittings, until the plaintiff replied to the plea; or that the plaintiff might discontinue without paying costs. *Merchants' Bank v. Moore*, 2 J. R. 294.

54. If the party obtains his discharge on the same day that a judgment is rendered against him, he may, on being taken on a *ca. sa.*, be discharged by the Court in which judgment was given. *Baker v. Judges of Ulster*, 4 J. R. 191.

55. If the discharge was not obtained in time to be pleaded, the defendant may be relieved, on motion, without being put to an *audita querela*. *Ibid.*

*56. A discharge granted under [*30] the act of the 3d of April, 1811, (which was repealed in 1812,) is not admissible in evidence under the general issue, in an action commenced against the insolvent in 1813; the rule of pleading the discharge prescribed by the act of 1801, (which was revived by the repeal of the act of 1811,) applies only to discharges under that act; and the act of 1811 required the defendant to give notice of his discharge with the plea. *Sessions v. Phinney*, 11 J. R. 162.

Where a person has been discharged, under the "act for the relief of debtors with respect to the imprisonment of their persons;" (Sess. 36. ch. 81.) and, afterwards, under the "act for

the benefit of insolvent debtors and their creditors," passed April 3, 1811; and the plaintiff, notwithstanding the discharge of the defendant under the last mentioned act, issued a *fi. fa.* on the judgment, under the provisions of the first mentioned act, the Court refused to set aside the execution, leaving the defendant to his *audita querela*, but not allowing it to operate as a *supersedeas* to the execution, or to stay the proceedings upon it, pending the *audita querela*. *Hunt v. Brooks*, 18 J. R. 5.

See AUDITA QUERELA.

57. Where a defendant pleaded the general issue, with notice, and gave in evidence his discharge as an insolvent debtor, under the act of the 3d of April, 1811, by a commissioner, and the discharge recited, among other things, that the defendant was an inhabitant of Jefferson county for the space of three months, at least, immediately preceding the presenting his petition, or, in which said county, he was imprisoned or impleaded, &c.; *held*, that the discharge was sufficient evidence in itself, either of the imprisonment of the insolvent, or of his inhabitancy, (one of which facts must be deemed true,) and his being prosecuted on civil process, agreeably to the act, so as to give the commissioner jurisdiction, without any proof *aliunde* of these facts. *Jenks v. Stebbins*, 11 J. R. 224.

58. The notice subjoined to the general issue of a discharge under the insolvent act of 1811, need not state the proceedings previous to the discharge, that the defendant was imprisoned or impleaded, and a resident, &c.; but those facts, though not stated in the notice, may be proved by the proceedings on file. *Hines v. Ballard*, 11 J. R. 491.

59. It is sufficient if the notice states that the defendant had been discharged, the commissioner's name, and the date of the discharge. *Ibid.*

60. Where the plaintiff appeared before the judge to oppose the insolvent's discharge, under the act of April 3d, 1811; and after examining the defendant and hearing his explanations, withdrew, without making any further opposition, and the defendant obtained his discharge: the Supreme Court, on motion, ordered a perpetual stay of execution on the part of the plaintiff. *Field v. Howland*, 17 J. R. 85.

61. It seems, that if the defendant had applied to the Court immediately after his discharge, they would have ordered a *discontinuance* of the suit, under the circumstances of the case. *Ibid.*

62. Though a discharge under the insolvent act, so far as it attempts to discharge the party from a contract made previous to the passing of the act, is unconstitutional and void; yet the defendant may avail himself of the discharge to protect his person from imprisonment. *Post v. Riley*, 18 J. R. 54. *See ante*, 34, 35, 36.

63. But the insolvent, for that purpose, must plead the discharge specially; and if he neglects to do so, and suffers judgment to pass against him, his bail cannot be relieved on motion, on the ground of the discharge of the principal. *Ibid.* *See ante*, 43, 44, 51.

[*31] *IV. *What will avoid the discharge.*

64. A discharge is conclusive, and can only be avoided for fraud. *Cole v. Stafford*, 1 C. R. 249.

65. The Supreme Court will not inquire into the regularity of the proceedings before the judge or Court below. *Ibid.*

66. It is conclusive as to the facts set forth, and cannot be avoided, except for the particular causes, or frauds specified in the statute. *Lester v. Thompson*, 1 J. R. 300.

67. The validity of an insolvent's discharge will not be tried on affidavit, but the plaintiff must resort to his action. *Noble v. Johnson*, 9 J. R. 259.

68. Where an insolvent did not insert in his inventory of debts due to him, a claim which he had on the *United States*, for services during the war, and for which claim he received a compensation after his discharge; it was held fraudulent, and the discharge void. *Duncan v. Dubois*, 3 J. C. 125.

69. If the specification of the cause and consideration of the debts due and owing the insolvent, set forth in his inventory according to the statute, (Sess. 40. c. 53.) fairly apprise the creditors of the general ground of indebtedness, so as to give them a clue to inquiry, it is sufficient. *Taylor v. Williams*, 20 J. R. 21.

70. If the certificate of assignment states that the insolvent had assigned "all his estate, both in law and equity, in possession, remainder and reversion," it is sufficient. *Roosevelt v. Kellogg*, 20 J. R. 208.

71. Where an insolvent, under the act of the 3d of April, 1811, presented his petition to the first judge of the county, who appointed a day for the creditors to appear, and show cause, &c.; and, before the day, a commissioner was appointed for the county, and the insolvent on the day presented his petition, &c. to the commissioner, who completed the proceedings so begun before the first judge, and granted a discharge to the insolvent; held, that the discharge was void, for want of jurisdiction in the commissioner, the act having made no provision in such case, and he had no authority, unless the proceedings were commenced *de novo*. *Muzzy v. Whitney*, 10 J. R. 236.

72. Where a debtor, prior to the passing of the insolvent act of 1811, had fraudulently disposed of, and conveyed away his property; this was held, not to be a fraud against that statute, so as to invalidate his discharge under it, there being no evidence of his having conveyed away his estate in expectation of that act being passed, and with intent to avail himself of it; and whether, if that fact had been shown, it would have affected his discharge? *Quere. Davis v. Reynolds*, 10 J. R. 442.

73. If the certificate of discharge does not except foreign creditors, it does not affect the validity of the discharge, as against creditors here. *Roosevelt v. Kellogg*, 20 J. R. 208.

[*32] *V. *Payment of debts and charges of proceedings.*

74. The costs of suit mentioned in the 21st section of the act, giving relief in cases of in-

solveny, (Sess. 24. c. 131.) do not mean costs arising on suits before instituted by the insolvent; such costs are not entitled to a preference over other debts. *Dry v. Lovett*, 7 J. R. 374.

75. The provision in the insolvent act, that the charges of proceedings under the act are first to be paid by the assignees, extends only to those services made necessary by the act, and which accrue to third persons, who are bound to perform the services, as the state printer or commissioner. *Dayton v. Nichols*, 10 J. R. 469.

76. A person who advances money for the insolvent, at his request, to pay the fees of the printer and commissioner, is not entitled to this peculiar preference; but must come in for the money lent as a general creditor. *Ibid.*

77. The 22d section of the act, (Sess. 36. c. 98.) directing all the costs of suit to be first paid by the assignees, applies only to costs of suits brought by or against the assignees; not to suits brought by creditors before the assignment. *Horton v. Hicks*, 12 J. R. 341.

INSPECTION.

Inspection of beef and flour.

1. Under the act (Sess. 24. c. 138. 2 N. R. L. 327.) for repacking and inspecting beef, an offer to brand a cask, and a refusal by the inspector-general to have it branded, are not equivalent to a branding, he having no authority to order or refuse the branding of a cask. *Seaman v. Patten*, 2 C. R. 312.

2. The act for the inspection of flour and meal, (Sess. 24. c. 130. 2 N. R. L. 320.) extends only to flour and meal intended for exportation; and it is only in case of their being intended for exportation that the penalties of the act attach. *Ferris v. Coles*, 3 C. R. 207.

3. If flour once inspected, after having been put on board a vessel, should receive an injury, and in consequence, be relanded, it may be reshipped on board the same vessel, and for the same voyage, without another inspection. *Griswold v. New-York Insurance Company*, 1 J. R. 205.

4. The act for the inspection of flour, (Sess. 36. c. 27.) does not apply to flour purchased out of the state, (where it had been inspected and branded,) to be consumed in another state, and brought to New-York, and here shipped with a view to be forwarded to its place of destination. *Hancock v. Sturges*, 13 J. R. 331.

*INSURANCE. [*33]

- I. *Subject matter*; (a) *What trade or goods are legal, so as to be the subject of insurance*; (b) *Profits, freight, and commissions.*
- II. *Insurable interest*; (a) *What is an insurable interest*; (b) *Wager policy.*

- III. *Ship*; (a) *Seaworthiness, and competency of ship to perform the voyage*; (b) *Changing the ship*.
- IV. *Risks or perils insured against*; (a) *What risks are within the policy*; (b) *What risks are excluded by the memorandum*; (c) *Duration of risks*.
- V. *Policy*; (a) *Party effecting the policy, and description of the person of the insured*; (b) *General construction of the policy, and when valued or open*; (c) *Description of the subject*; (d) *Description of the voyage*; (e) *Parol evidence to explain a policy*.
- VI. *Warranty*; (a) *Warranty express or implied, and nature and effect of it*; (b) *Compliance with warranty*; *Warranty of neutrality*; (c) *Warranty against illicit and contraband trade*; (d) *Other warranties*.
- VII. *Representation*.
- VIII. *Concealment*; (a) *What is a material concealment, and the effect of it*; (b) *What need not be disclosed*.
- IX. *Deviation*; (a) *What is a deviation, and when actual or intended*; (b) *What will justify a deviation*.
- X. *Loss*; (a) *By perils of the sea*; (b) *By capture*; (c) *By arrest and detention*; (d) *By barratry*; (e) *By average contributions*; (f) *By death of animals*.
- XI. *Abandonment*; (a) *Upon capture or arrest*; (b) *Where there is a loss of the voyage*; (c) *Where there is a loss or deterioration of the subject*; (d) *Other causes of abandonment*; (e) *How far an abandonment is necessary*; (f) *When, and how an abandonment is to be made*; (g) *What will be a waiver of a previous abandonment*; (h) *Effect of an abandonment*; (i) *Ordering and disposal of the effects abandoned*.
- XII. *Preliminary proofs*.
- XIII. *Adjustment of losses*.
- XIV. *Return of premium*.
- XV. *Prior insurance*.
- XVI. *Re-assurance*.
- XVII. *Action on the policy*.
- XVIII. *Insurance against fire*.
- I. *Subject matter*; (a) *What trade or goods are legal, so as to be the subject of insurance*; (b) *Profits, freight and commissions*.
- (a) *What trade or goods are legal so as to be the subject of insurance*.
1. All goods, the traffic in which [*34] is not prohibited by the law of this country, are lawful goods, within the meaning of the policy. *Seton v. Low*, 1 J. C. 1. *S. P. Gardiner v. Smith*, *id.* 141. *S. P. Skidmore v. Desdoity*, 2 J. C. 77.
2. Although they may be contraband of war. *Seton v. Low*, 1 J. C. 1. *S. P. Skidmore v. Desdoity*, 2 J. C. 77. *S. P. Juhel v. Rhineland*, 2 J. C. 120. *S. C.* in error, 2 J. C. 487.
3. Or the traffic in them prohibited by treaty with a foreign nation. *Seton v. Low*, 1 J. C. 1.
4. Or owned by the subject of a belligerent nation. *Skidmore v. Desdoity*, 2 J. C. 77.
5. Where, during the existence of an act of congress, prohibiting intercourse with France and her dependencies, a vessel was compelled to put into a French port, in distress, and part of her cargo was taken out by the government, and the residue only permitted to be bartered for the produce of the place, of which the cargo insured consisted; held, that this was not an illegal trade. *Jenks v. Hallett*, 1 C. R. 60. *S. C.* in error, 1 C. C. E. 43.
- See post, VI.
- (b) *Profits, freight, and commissions*.
6. Profits are insurable, *eo nomine*. *Abbott v. Sebor*, 3 J. C. 39. *S. P. Tom v. Smith*, 3 C. R. 245.
7. Every policy on profits is, necessarily, a valued policy. *Mumford v. Hallett*, 1 J. R. 433.
8. A loss on a policy on profits will be a total or partial loss, according as the loss on the subject matter of the profits is total or partial. *Abbott v. Sebor*, 3 J. C. 39.
9. It seems, that the rule by which to ascertain whether there is a total or partial loss of the profits is, to determine whether more or less than one half in value of the subject has been lost. *Ibid.*
10. Goods are insured in one policy, and the profits in a separate policy, and the insured recovers for an average loss on the goods; he can only recover an average loss, in the like proportion, on the profits. *Loomis v. Shaw*, 2 J. C. 86.
11. If the charterer of a vessel insure the freight, without any further designation, he can recover nothing in case of loss, as he has no insurable interest; for the policy being on freight generally, cannot be considered to be on freight earned. *Cheriot v. Barker*, 2 J. R. 346.
12. No other interest is covered by an insurance on freight, than freight, strictly so called, that is, an interest accruing to the insured for the use of a vessel of which he is owner, unless the insured has disclosed the peculiar nature of his interest. *Riley v. Delafield*, 7 J. R. 522.
13. If where A. sells a vessel to B., it is agreed, that A., the vendor, should have the benefit of the freight to arise from a voyage for which A. had previously chartered the vessel; the interest of A. is not freight, and cannot be insured, *eo nomine*, as freight; unless accompanied with a disclosure of the particular nature of his interest. *Ibid.*
- *14. A supercargo was to receive as his compensation, a gross sum out [*35] of the proceeds of the return cargo, or a part of the cargo to that amount, on arrival at the place where the voyage was to terminate; on the vessel's return voyage, she was compelled to put into a port of necessity, where the voyage was broken up, and the vessel and cargo sold. The supercargo cannot demand his compensation of his employers; but as it is an insurable

interest, and if an insurance has been effected, there being a total loss, he may recover the whole from the underwriter. *Robinson v. New-York Insurance Company*, 2 C. R. 357. S. C. in error, 1 J. R. 616.

Wager policy on profits or freight. *See post*, II. 24. 25.

Inception and duration of risk on a policy on freight. *See post*, IV.

Abandonment of profits. *See post*, XI.
— of freight. *See further, post*, XI.

II. Insurable interest; (a) *What is an insurable interest*; (b) *Wager policy*.

(a) *What is an insurable interest*.

15. The insured is not required to state the particular interest, whether distinct or undivided, which he has in the subject; it is sufficient if he has an insurable interest to the amount in question. *Laurence v. Van Horne*, 1 C. R. 276.

16. The owner of a vessel hypothecated, has an insurable interest in her, and may insure generally, without describing his interest. *Williams v. Smith*, 2 C. R. 13. S. P. *Kenny v. Clarkson*, 1 J. R. 385.

17. But the owner of a vessel under a bottomry, for more than her value, has not an insurable interest. *Smith v. Williams*, 2 C. C. E. 110.

18. If a person purchases a vessel, and takes the possession and control of her, but not being able to pay all the purchase money, it is agreed that she shall remain in the name of the original owners, who, when the whole is paid, are to give a bill of sale, the vendee has an insurable interest, which is covered by an insurance on the vessel generally. *Kenny v. Clarkson*, 1 J. R. 385.

19. A bottomry interest is not covered by an insurance on the vessel, unless expressly mentioned in the policy. *Robertson v. United Insurance Company*, 2 J. C. 250. S. P. *Kenny v. Clarkson*, 1 J. R. 385.

20. A vessel was insured from *New-York* to *St. Bartholomews*, and at and from thence back to *New-York*, with liberty to touch and trade at *Martinique*. The vessel discharged her outward cargo at *Martinique*, and had taken in part of her return cargo, when a loss happened; held, that if the cargo she had taken in at *Martinique* was intended for the *United States*, it was a breach of the non-

[*36] intercourse law of *the *United States*, passed the 1st of *March*, 1809, and which was then in operation, by which the vessel would be forfeited, and the property be immediately vested in the *United States*, so that the owners could have no insurable interest. *Fontaine v. Phoenix Insurance Company*, 11 J. R. 293.

21. And that by *return cargo* was meant a cargo for the home port, which fact, however, as it subjected the vessel to forfeiture, must be conclusively shown. *Ibid*.

22. M. purchased the whole of a cargo, in which L. was to be interested one third, and which was charged to him by M., and the in-

voice and bill of lading made out in their joint names. Some time after, L. directed his correspondent to place the proceeds of the cargo to the credit of M.; held, that M. had not such a lien on one third belonging to L. as amounted to an insurable interest, nor could M., who had insured the whole, and had averred an interest in the whole cargo, recover for more than two thirds. *Murray v. Columbian Insurance Company*, 11 J. R. 302.

(b) *Wager policy*.

23. A wager policy is valid at common law. *Juhel v. Church*, 2 J. C. 333. *Abbott v. Sebor*, 3 J. C. 39. *Clendinning v. Church*, 3 C. R. 141.

24. Insurance on profits: "no other proof of interest to be required but the policy; if the goods did not arrive, insured to recover for a total loss; warranted free from average, and without benefit of salvage;" this is a wager of policy. *Juhel v. Church*, 2 J. C. 333.

25. Insurance on profits or freight, where the insured has an interest in the subject which is to produce them, is not a wager policy. *Abbott v. Sebor*, 3 J. C. 39.

26. The words, "policy to be proof of interest," or the want of an averment of interest, are not evidence of a wager policy. *Clendinning v. Church*, 3 C. R. 141.

Loss on a wager policy. *See post*, IV. 55, 56.

III. *Ship*; (a) *Seaworthiness and competency of the ship to perform the voyage*; (b) *Changing the ship*.

(a) *Seaworthiness and competency of the ship to perform the voyage*.

27. That the vessel shall be seaworthy is an implied warranty in every contract of insurance. *Silva v. Low*, 1 J. C. 184. S. P. *Barnwall v. Church*, 1 C. R. 217. *Talbot v. Marine Insurance Company*, 2 J. R. 130. *Talbot v. Commercial Insurance Company*, id. 124.

28. A vessel must not only be seaworthy, but must be duly equipped and manned, with a competent crew engaged for the voyage insured. *Silva v. Low*, 1 J. C. 184.

29. An intention formed before the inception of the voyage, to stop at an intermediate port to procure seamen, is evidence either that "the crew was not competent, or [*37] was not engaged for the voyage insured. *Ibid*.

30. One seaman, besides the master, is not a sufficient crew for a vessel of 35 or 40 tons, on a coasting voyage. *Dow v. Smith*, 1 C. R. 32.

31. A vessel, seaworthy at the time of her leaving port, sprung a-leak the day after her departure, and foundered, without any stress of weather, or apparent cause; the Court held it a loss by the perils of the sea, on a demurrer to evidence. *Patrick v. Hallett*, 1 J. R. 241. (And see S. C. 3 J. C. 76.)

32. But if a vessel sails with a fair wind, and moderate weather, and in the evening of the same day suddenly springs a-leak, in consequence of which she founders, without any apparent cause or extraordinary accident to which the leak can be ascribed, it will be presumed

that she was not seaworthy. *Talcot v. Commercial Insurance Company*, 2 J. R. 124. *Talcot v. Marine Insurance Company*, id. 130.

33. It seems, that a vessel may be competent to perform the voyage, although she has not all proper papers or documents on board, as that is only requisite when the national character of the vessel is warranted or represented to the assurer. *Elting v. Scott*, 2 J. R. 157.

34. Where a vessel insured from *New-York* to *Bordeaux*, after being out about 30 days, was without fire-wood, oil or candles, so that, for want of the necessary light, she was obliged to slacken sail at night, and was retarded in her voyage; *held*, that she was not seaworthy. *Fontaine v. Phoenix Insurance Company*, 10 J. R. 58.

35. Where one vessel, during a storm, lent a cable and small anchor to another vessel, and was afterwards driven ashore, and lost, the jury having found for the insured, the Supreme Court would not disturb the verdict on the ground of unseaworthiness. *Patrick v. Commercial Insurance Company*, 11 J. R. 9.

36. Where no visible cause can be assigned for the loss of a vessel, it will be intended to have arisen from unseaworthiness. *Patrick v. Hallett*, 3 J. C. 76.

37. The want of seaworthiness is not restricted, in its effects, to an insurance on the vessel, but extends to the other subjects of insurance. *Warren v. United Insurance Company*, 2 J. C. 231.

38. A survey of the vessel previous to her sailing, by which she is pronounced competent to perform the voyage, makes no difference in the rule. *Ibid*.

39. Admiralty surveys as to seaworthiness, are *ex parte* evidence, and inadmissible. *Abbott v. Sebor*, 3 J. C. 39. *S. P. Saltus v. Commercial Insurance Company*, 10 J. R. 487.

40. Such survey is not evidence on the part of the plaintiff, unless called for by the defendant. *Saltus v. Commercial Insurance Company*, 10 J. R. 487.

41. The policy contained the following clause; *If the vessel, upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, the insurers shall not be bound to pay their subscription; if the survey and condemnation do not proceed* *on the [*39] single ground that the vessel was unsound or rotten, but on that fact connected with other defects and circumstances, they are not conclusive. *Haff v. Marine Insurance Company*, 8 J. R. 163.

42. And where the policy contains such a clause, it is sufficient, in such case, if the survey state particular facts, from which the conclusion of her being unseaworthy is drawn, and, for that cause alone, she is declared unseaworthy. It is not necessary that the survey should follow the exact words of the policy. *Brandegee v. The National Insurance Company*, 20 J. R. 328. See XVII.

43. The declaration on such a policy stated, that "by storms, winds, tempestuous weather, and by the perils and dangers of the seas, the

vessel became leaky, and was greatly broken and damaged, and upon her arrival at S., upon a survey duly had upon her, she was found injured in her timbers and planks, and inasmuch as she could not receive her necessary repairs there, nor safely proceed to sea to procure repairs elsewhere, she was condemned and sold, &c., whereby she became wholly lost," &c. The defendant in bar pleaded, admitting the arrival of the vessel at S., and that a survey was made, &c., but setting it forth more fully, by which it was found that a greater part of her timbers and planks, from the stern posts to the stern of the ship, on both sides, *were entirely rotten*, &c.; *held*, that as the plea admitted the cause of action, and set up new matter in its avoidance, which the plaintiff was not bound to prove, and which involved a question of law, on which the defendant was entitled to the judgment of the Court, the plea was good on demurrer. *Ibid*.

44. Whether a vessel was seaworthy or not, is a question of fact for the jury. *Patrick v. Hallett*, 1 J. R. 241.

45. In actions on two policies of insurance on the same vessel, where there had been two trials in each cause, and two verdicts for the plaintiff, on the subject of seaworthiness, the Court refused to grant a third trial. *Talcot v. Commercial Insurance Company*, 2 J. R. 467.

(b) Changing the ship.

46. It is the duty of the master, when the ship becomes disabled during the voyage, to procure another vessel if it is in his power; and the insurer is not answerable for the consequence of his voluntary neglect to do so, unless such neglect is caused by an act of barratry. And it is a general rule, that the plaintiff, in an action on the policy, in order to entitle himself to recover on the ground of the loss of the voyage, must show that another vessel could not be obtained. *Schieffelin v. New-York Insurance Company*, 9 J. R. 21.

47. The master is not bound to seek another vessel to carry on the cargo, out of the port of distress, or out of a port immediately contiguous thereto. *Saltus v. Ocean Insurance Company*, 12 J. R. 107.

48. It seems, that if the cargo is of such a nature that it is impracticable to reship and transport it to its place of destination, without an expense equal to its value, or nearly so, or without manifest detriment to the owners, it may be sold at the port of distress, and need not be sent on in another vessel. *Ibid*.

49. And if part only of the goods is sent to the port of destination *in another vessel, the insurer on freight is not [*39] entitled to a deduction from the loss or allowance for the freight earned on that part, unless he shows that the goods were actually delivered to the insured at the port of destination, or that the insured had notice of their arrival and situation. *Ibid*.

IV. Risks or perils insured against; (a) What risks are within the policy; (b) What risks are excluded by the memorandum; (c) Duration of risk.

(a) *What risks are within the policy.*

50. Insurance against all risks protects the insured against every loss happening during the voyage, except such as may arise from his fraudulent acts. *Goiz v. Knox*, 1 J. C. 337.

51. Where a vessel is insured, excepting *French risks*, a capture by a *French* privateer is within the exception, and discharges a policy, so that the insurer will not be liable for any loss which may subsequently happen. *Roget v. Thurston*, 2 J. C. 248.

52. Where there is no warranty or representation of neutrality, the insurer takes upon himself war risks. *Barnewall v. Church*, 1 C. R. 217.

53. Damage to the subject insured, occasioned by delay arising from pestilence in port, is a loss within the policy. *Williams v. Smith*, 2 C. R. 1.

54. The interdiction of commerce with the port of destination, is a peril within the policy, and the vessel is not bound to proceed to the nearest port to deliver her cargo, or the affreighter to receive his goods there. *Schmidt v. United Insurance Company*, 1 J. R. 249.

55. On a wager policy, the loss, to entitle the plaintiff to recover, should be absolutely and totally final. *Cleddining v. Church*, 3 C. R. 141.

56. So, that a capture, if there has been a subsequent recovery, is not a loss within such policy. *Ibid.*

And see post, X. XI.

(b) *What risks are excluded by the memorandum.*

57. A memorandum, that *corn, &c. shall be free from average, unless general*, protects the insurer from every claim for a total loss, when there has not been an actual physical destruction of the subject insured. *Le Roy and others v. Gouverneur*, 1 J. C. 226. *S. P. Maggrath v. Church*, 1 C. R. 196. *Neilson v. Columbian Insurance Company*, 3 C. R. 108.

58. The policy contained a memorandum, that salt, &c. "and all articles that are perishable in their own nature, are warranted by the assured free from average, unless general; and sugar, &c., skins, hides, and tobacco, are warranted free from average under 7 per cent., unless general;" the articles mentioned in the second clause of the memorandum are not to be considered within the general

[*40] words in the first *clause, so that the insured may recover a partial loss on them, if exceeding 7 per cent. *Bakewell v. United Insurance Company*, 2 J. C. 246.

59. Where the policy enumerated *dried fish* in the memorandum, among the articles free from average, unless general, as also, "all other articles perishable in their own nature," pickled fish are not included, and the plaintiff may recover for an average loss on them. *Baker v. Ludlow*, 2 J. C. 289.

60. Parol evidence is admissible to show, that, by the general usage among merchants and underwriters in *New-York*, the word *roots*, first inserted in the *New-York* policies in 1787, is confined to such roots as are perishable in

their own nature; and that *sarsaparilla* is not a root perishable in its nature, or included under that term in the memorandum in the policy. *Coit v. Commercial Insurance Company*, 7 J. R. 385.

61. Insurance on cargo; the policy contained the following written clause: "the assureds by this policy take no other risk than general average, and such total loss as may arise by the absolute destruction of the property:" the vessel having stranded, part of the goods were afterwards lost or stolen. The invoice cost of the articles insured was 1195 dollars, and the amount of articles stolen or lost was 332 dollars; held, that the policy was upon so much of the cargo as an integral subject, and that the insured could not recover for each article totally lost, there being neither a general average nor a total destruction of the subject insured. *Guelrain v. Columbian Insurance Company*, 7 J. R. 527.

(c) *Duration of risks.*

62. Where goods are insured *at and from* a place, the risk attaches from the time the goods are laden on board the vessel. *Patrick v. Ludlow*, 3 J. C. 10. *S. P.* Where insurance was on freight. *Smith v. Steinbach*, 2 C. C. E. 158.

63. Where a vessel has been long in port, previous to an insurance, the risk does not commence till some act be done towards equipping her for the voyage. *Kemble v. Boune*, 1 C. R. 75.

64. Or from the day on which she is stated in the policy to have been in safety in the port from which she was to sail. *Ibid.*

65. And when stated to have been there on a certain day, it must mean that she was there in safety, and that no preceding accident was to be made good by the insurer. *Ibid.*

66. Insurance on cargo on the return voyage of the vessel, beginning from, and immediately following the loading thereof on board, &c.; on the vessel's arrival at her outward port of destination, she was not permitted to remain there, but was compelled to put to sea, and proceed with her original cargo to another port; held, that the risk never attached. *Graves v. Marine Insurance Company*, 2 C. R. 339. *S. P. Richards v. Marine Insurance Company*, 3 J. R. 307.

67. Whether a vessel, by dropping down a river on the route of the voyage insured, has commenced the voyage or not, will depend on the **quo animo* or *bona fide* [*41] intent of the party. *Dennis v. Ludlow*, 2 C. R. 111.

68. Insurance until 24 hours after the goods are landed, means 24 hours after all the goods are landed. *Gardiner v. Smith*, 1 J. C. 141.

69. Where the insurance is from A. to B, with liberty to touch at one or two ports, on, &c., the adventure to continue until the goods are safely landed at one or two ports, on, &c. breaking bulk at B. does not determine the risk. *Gilfert v. Hallet*, 2 J. C. 296.

70. By a valued policy on freight *at and from* one port to another, and *at and from* thence back to the original port, for which a premium is paid double to that which would be demand-

ed for the outward voyage, the freight to the full amount of the valuation is covered on each voyage; and the insured, on a capture on the return voyage, is entitled to recover the full amount of his policy, without making any deduction for the freight received on the outward risk. *Davy v. Hallet*, 3 C. R. 16.

71. A vessel was chartered for an entire sum for a voyage from A. to B., and at and from thence to C., and insurance was effected on the freight, being the sum at which the vessel was chartered; on the arrival of the vessel at B., she was detained by an embargo, and the insured abandoned in consequence; *held*, that the risk had attached on the whole freight at the time of abandonment. *Livingston v. Columbian Insurance Company*, 3 J. R. 49.

72. Insurance on freight valued at the sum insured, carried or not carried; a part only of the cargo was on board, when the vessel was driven on shore and lost in a gale of wind; *held*, that the insured was entitled to recover for a total loss. *De Longuemere v. Phoenix Insurance Company*, 10 J. R. 127.

73. Where the whole of the cargo was ready to be shipped, and a part actually shipped on board when the storm arose by which the ship was lost, the insured is entitled to recover for a total loss on the freight, according to the valuation in the policy. *De Longuemere v. New-York Fire Insurance Company*, 10 J. R. 201.

74. Where insurance was effected on the cargo of a vessel which had sailed from *New-York*, from *Cagliari* to *St. Petersburg*, &c., upon all kinds of goods laden, or to be laden on board, &c., beginning the adventure from, and immediately following, the lading thereof on board; *held*, that the policy attached only on such goods as the vessel took on board at *Cagliari*, and not on such part of her cargo as she had brought there, with the intention of proceeding with it to her ultimate port of destination, although it was taken out of the vessel and put on deck, and afterwards restowed in perfect order. *Murray v. Columbian Insurance Company*, 11 J. R. 302.

75. Where a vessel is, by the municipal regulations of the country, obliged to stop without the harbor to which she is bound, in order to be examined, she is still protected by the policy, and the risk continues until she has been moored twenty-four hours within the harbor. *Dickey v. United Insurance Company*, 11 J. R. 358.

*Where the voyage on which the [*42] vessel sails, and that described in the policy, are different, so that the risk never attaches. See post, V.

When the risk attaches where there is a warranty in the policy to sail by a certain day. See post, VI.

V. Policy; (a) Party effecting the policy and description of the person of the insured; (b) General construction of the policy, and when valued or open; (c) Description of the subject; (d) Description of the voyage; (e) Parol evidence to explain a policy.

(a) Party effecting the policy, and description of the person of the insured.

76. Where the policy states the insurance to be for account of A. B., it is equivalent to a representation that A. B. is owner. *Kemble v. Rhineland*, 3 J. C. 130.

77. The underwriter, and not the broker who effects the insurance, is debtor to the insured for a loss; and the latter will not be affected by any agreement between the insurer and the broker as to the mode of payment, without his assent. *Bethune v. Neilson*, 2 C. R. 139.

78. If one of two joint owners cause insurance to be effected for himself, and every other person to whom the property may appertain in part or in whole, it is an insurance on their joint account, and not for the separate benefit of the party whose name appears in the policy; and the party effecting it is, in case of loss, entitled to receive and recover from the insurer a moiety only of the sum for which he is liable. *Lawrence v. Sebor*, 2 C. R. 203.

79. If the insurer knows that a policy, though in the name of a broker, is, in fact, effected on account of another, a set-off of a debt due from the broker cannot be made in a suit by him on that policy, though it be carried on in his own name. *Gordon v. Church*, 2 C. R. 299.

(b) General construction of the policy, and when valued or open.

80. If any of the terms used in the policy have, by the known usage of trade, or by use and practice as between assurers and assured, acquired an appropriate sense, they are to be construed according to that sense. *Coit v. Commercial Insurance Company*, 7 J. R. 385.

81. The policy contained the following words: "the said goods and merchandises are valued at 18 francs, valued at four dollars and 44 cents;" this is an open policy, these words merely ascertaining at what rate the value of the cargo paid for in francs was to be reduced into our money. *Ogden v. Columbian Insurance Company*, 10 J. R. 273.

82. Where insurance is made on a vessel on one fourth, valued at 5,500 dollars, the valuation applies to the interest insured, and not to the whole ship. [*43] *Post and others v. Phoenix Insurance Company*, 10 J. R. 79.

83. Where the policy contains a clause, that the insurers take no risk in port, but sea risk, the term port is not to be confined to the port of departure or discharge, but is used in contradistinction to the *high seas*, and refers to any port into which the vessel may of necessity enter during the voyage insured. *Patrick v. Commercial Insurance Company*, 11 J. R. 9.

84. Where a policy of insurance was effected during the late war with *Great Britain*, on goods from *Norfolk* to *Lisbon*, and the policy contained a warranty that the vessel should have a genuine *British license* on board; and the vessel sailed on her voyage, having such a license on board at the time of her loss; *held*, that as the taking such a license was unlawful, and subjected the vessel to forfeiture,

the policy was void. *Colquhoun v. The New-York Firemen Insurance Company*, 15 J. R. 352.

85. If, after the commencement of the voyage insured, a war breaks out between the country to which the property insured belongs, and a foreign country, the policy is not therefore vacated; and the insured was liable for a loss arising out of the state of war. *Saltus v. United Insurance Company*, 15 J. R. 523.

(c) *Description of the subject.*

86. Profits, freight, and bottomry interest must be insured *eo nomine*. See *ante*, I. II.

87. Goods laden on deck are not covered by a policy on goods or cargo, unless expressly mentioned. *Lenox v. United Insurance Company*, 3 J. C. 178.

(d) *Description of the voyage.*

88. Insurance on cargo to *St. Andero*: at the time of effecting the insurance, the insured represented that the voyage was to *St. Andero*, but that the vessel would have a clearance for *Hamburg*: the cargo was shipped for *Hamburg*, and while prosecuting the voyage thither, the master, to avoid perils of the sea, was induced to put into *St. Andero*, and on his way thither was captured; held, that the vessel sailed on a voyage for *Hamburg*, and not for *St. Andero*, and that the policy had not attached. *Forbes v. Church*, 3 J. C. 159.

89. Insurance at and from A. to B., but a different voyage is in the contemplation of the insured: the vessel being lost before leaving A., whether the insurer was liable? *Quere*. *Steinbach v. Columbian Insurance Company*, 2 C. R. 129.

90. Where the insurance is to some port in the *West Indies*, and a market, the vessel may, *bona fide*, go from island to island to dispose of her cargo, and the risk is not determined until the whole is disposed of. *Maxwell v. Robinson*, 1 J. R. 333.

91. A vessel insured to A. clears out for B., and after a loss, the master states in his protest that the vessel was bound to B.; if it be proved that she actually proceeded on her voyage to A., the insertion *of B. in [*44] the papers, when explained, will not make it a different voyage. *Talcot v. Marine Insurance Company*, 2 J. R. 130.

92. If the insurance be from A. to B. and at and from B. to C., the vessel may proceed immediately from A. to C.; or if she has been obliged to put into a port of necessity, she may proceed to C. without first stopping at B.; for where the assurance is to several places, if the insured intend to go but to one of them, that one is at his election, but if to more than one, the order described in the policy must be observed. *Kane v. Columbian Insurance Company*, 2 J. R. 264.

93. A vessel on her homeward voyage was insured "from A. to B., with liberty to touch at C., beginning the adventure at and from A.," the vessel never went to A., but went to B., and from thence commenced her voyage home; the voyage not being the same as that described in the policy, the risk never attached. *Murray v. Columbian Insurance Company*, 4 J. R. 443.

94. But where goods were insured at and from any port or ports in the *West Indies*, and at and from thence to *New-York*, beginning the adventure on the said goods from the loading thereof on board in the *West Indies*, and the vessel having disposed of a small part of her outward cargo at one port in the *West Indies*, proceeded to another, in order to dispose of the residue, and on her way thither was captured; held, that the risk attached from the time of her leaving the first port in the *West Indies*, on the cargo which she then had on board, which was the same that she carried out; such appearing to have been the intention of the parties, as the broker who made the insurance had mentioned to the underwriters, at the time of their subscribing the policy, that the property which was to be insured was the same that was carried out. *Vredenberg v. Gracie*, 4 J. R. 444. n.

95. The term *port* is to be taken in reference to the subject matter to which it is applied, and although it generally means a harbor or shelter to vessels from storms, yet when applied to places on a coast where there are no harbors, it may mean only a road or anchorage place, for the purpose of unloading and loading cargoes. *De Longuemere v. New-York Fire Insurance Company*, 10 J. R. 120. *De Longuemere v. Firemen Insurance*, 10 J. R. 126.

(e) *Parol evidence to explain a policy.*

96. *Parol* evidence is not admissible to vary or contradict a policy, except in the special instance of explanations resulting from the usage of trade. *New-York Insurance Company v. Thomas*, 3 J. C. 1.

97. Where part of the policy is printed and part written, and there is no contradiction between the two parts, and no ambiguity, *parol* evidence is inadmissible to explain the intention of the parties. *Mumford v. Hallett*, 1 J. R. 433.

98. A policy of insurance contained the following clause: "The vessel sails under a sea-letter, without a register: property warranted *American*." Held, that *parol* evidence was admissible to explain what document was meant by a sea-letter. *Sleght v. Hartshorne*, 2 J. *R. 531. in error. (Contra, S. [*45] *C. Sleght v. Rhinelander*, in the Supreme Court, 1 J. R. 192.)

99. Where a policy is clear, certain, and unambiguous as to the voyage insured, propositions asking the rate of insurance for another voyage cannot be resorted to as representations to show that the voyage insured was meant to be restricted to that described in the proposition; but they may be left to the jury as evidence of fraud. *Vandervoort v. Smith*, 2 C. R. 155.

See *ante*, IV. (b) 57—61, as to risks excluded by the memorandum in the policy; and where *parol* evidence is admissible, as to the meaning of words in trade.

VI. *Warranty*; (a) *Warranty express or implied, and nature and effect of it*; (b) *Compliance with warranties*; *Warranty of neutrality*;

(c) *Warranty against illicit and contraband trade*; (d) *other warranties*.

(a) *Warranty express or implied, and nature and effect of it.*

100. A description in the policy of the vessel as an *American ship*, is an implied warranty that she is *American property*. *Goix v. Lou*, 1 J. C. 341. *S. P. Murray v. United Insurance Company*, 2 J. C. 168. *S. P. Haskin v. New-York Insurance Company*, 2 J. C. 173. n. *S. P. Vandenheusel v. United Insurance Company*, 2 J. C. 127. *S. C. id.* 451. *S. P. Barker v. Phoenix Insurance Company*, 8 J. R. 307.

101. A representation that the vessel insured is *American*, is equivalent to a warranty, although no warranty be contained in the policy. *Vandenheusel v. Church*, 2 J. C. 173. n.

(b) *Compliance with warranties; Warranty of neutrality.*

102. Where the subject of a belligerent state emigrates to this country, *flagrante bello*, and becomes naturalized, such naturalization will support a warranty of neutral property. *Duguet v. Rhinlander*, in error, 2 J. C. 476. *S. C. 1 C. C. E. xxv. Contra, S. C.*, in Supreme Court, 1 J. C. 360. and *Jackson v. New-York Insurance Company*, 2 J. C. 191.

103. The character of the property is to be determined by the domicile of the owner. *Arnold v. United Insurance Company*, 1 J. C. 363. Affirmed in the Court of Errors, in 1801. *S. P. Jenks v. Hallet*, 1 C. R. 60.

104. Therefore, the property of a citizen, or even of a consul of a neutral state resident in a belligerent country, is not neutral, within the warranty. *Arnold v. United Insurance Company*, 1 J. C. 363. *S. P. Elbers v. The United Insurance Company*, 16 J. R. 128.

105. And if he have partners residing in a neutral country, their joint property will not be neutral, within the policy. *Ibid.*

106. Where A. and B. were *Swedish* subjects, and partners in trade at *St. Bartholomew*: In 1811, B. came to the *United States*; and in July, 1813, still continuing here, a

[*46] policy of insurance was effected *on account of A. and B., on goods from *New-Haven* to *St. Bartholomew*, warranted *Swedish* property; held, that from the long previous residence of B. in this country, it was to be presumed that he intended to reside here permanently, which presumption it was incumbent on the insured to repel; and not having done so, B. was to be regarded as domiciled in the *United States*, and the warranty therefore was not complied with. *Elbers v. United Insurance Company*, 16 J. R. 128.

107. The subject of a belligerent state, domiciliated here, is neutral, within the warranty. *Johnston v. Ludlow*, 2 J. C. 481. *S. C. 1 C. C. E. xxix.*

108. If the *cestui que trust* of the profits of a vessel be the subject of a belligerent, the warranty is not complied with. *Murray v. United Insurance Company*, 2 J. C. 168.

109. Sailing merely with an intention to evade a blockade, is not a breach of the warranty. *Vos*

v. United Insurance Company, in error, 2 J. C. 469. *S. C. 1 C. C. E. vii. Contra, S. C.* in Supreme Court, 2 J. C. 180. And see *Liottard v. Graves*, 3 C. R. 226.

110. A blockade must exist *de facto*, to render it unlawful for a neutral to enter. *Williams v. Smith*, 2 C. R. 1.

111. The neutral is not bound to see whether a blockade is finally raised, or whether the blockading squadron still retains an *animus revertendi*. *Ibid.*

112. If the neutral enters after receiving notice of a blockade, there being no actual blockade, it is not a breach of neutrality. *Ibid.*

113. But an accidental removal of a blockading fleet, by winds or storms, does not suspend the blockade; and if the neutral, with notice of the cause of its absence, attempt to enter, it is a breach of the blockade. Per *Kent*, Ch. J. *Radcliff v. United Insurance Company*, 7 J. R. 38.

114. Notice, either actual or constructive, of the existence of a blockade, is requisite, before a neutral can be deemed in *delicto*, by having attempted to violate it. *Ibid.*

115. Where the sentence of condemnation is directly on the ground of a breach of a blockade *de facto*, it is *prima facie* evidence of the fact of such blockade; and it is not enough that the jury have doubts as to the existence of the blockade at the time of the capture, to authorize them to find a verdict for the plaintiff. *Radcliff v. United Insurance Company*, 9 J. R. 277.

116. Even if a neutral could not lawfully carry on a trade between the mother country of a belligerent and its colonies, which was not allowed to such neutral in time of peace, yet the penalty of forfeiture can attach only during the existence of such unlawful trade, which cannot effect or vitiate a subsequent lawful voyage. *Kemble v. Rhinlander*, 3 J. C. 130.

117. A passport granted by any particular government as a protection against its cruisers, does not affect the national character of the vessel bearing it. *Jenks v. Hallet*, 1 C. R. 60. *S. C. affirmed* in error, 1 C. C. E. 43.

118. A warranty of neutrality imports, not merely that the property *is [*47] neutral, but that it shall be accompanied during the voyage with all the accustomed documents to insure it respect, as such, within the law of nations. *Blagge v. New-York Insurance Company*, 1 C. R. 549. *S. P. Coolidge v. New-York Firemen Insurance Company*, 14 J. R. 308.

119. And if accompanied with papers which compromise its neutral character, as if there be on board two different sets of papers, one neutral and one belligerent, it will be a breach of the warranty. *Ibid.*

120. If the homeward cargo be stated to have been purchased with the proceeds of the outward cargo, and it appears that the former cost more than the latter sold for, the assured must show that the excess was also the product of neutral funds. *Ibid.*

121. A transfer, by the insured, of part of the subject insured after it has been captured,

to the subject of a belligerent, is a breach of the warranty of neutrality. *Goold v. United Insurance Company*, 2 C. R. 73.

122. If a merchant in this country agrees to deliver goods to a merchant residing in France, at a stipulated price, on the performance of certain conditions by the latter, the consignor taking upon himself all risk attending the transportation; the property remains in the consignor until delivery, and the warranty of neutrality is complied with. *Ludlow v. Boune*, 1 J. R. 1.

123. A cargo consisting of flour, &c., was insured from New-York to Havana, and at and from thence to Lagaira and Porto Cabello, or either of them, warranted American property. The cargo was purchased in New-York, of the plaintiff, an American citizen, by L., a Danish citizen of St. Thomas, then here, under a contract made here, by which the plaintiff engaged to deliver the cargo to L. at Havana, Lagaira or Porto Cabello, at five per cent. advance on the invoice or costs, and the freight and premium of insurance, which were to be paid by the plaintiff. The plaintiff consigned the cargo to Spanish merchants at Havana, designated by L., with instructions to dispose of the cargo for the plaintiff's account, &c., or to send it to another market, that is, to a windward port. The bill of lading expressed that the cargo was shipped for the account and risk of the plaintiff, to be delivered at Havana, to H. and C. or their assigns, paying no freight, it being the property of the owner of the vessel, (the plaintiff.) On the arrival of the vessel at Havana, the consignees interlined the bill of lading with the words "or market," and directed the master to proceed with the cargo to Lagaira, and while proceeding for that place, the vessel was captured by a Venezuelan privateer, carried into a port in the island of Margarita, and the cargo was there libelled and condemned as prize, &c.; held, in an action on the policy, that the cargo was, and remained the property of the plaintiff, until its delivery at one of the places mentioned; that there was no delivery or acceptance of it at Havana; and that the consignees, in directing the master to proceed to L., acted as the agents of the plaintiff, who continued owner of the cargo until its capture; and therefore the warranty was complied with. *De Wolf v. The New-York Firemen Insurance Company*, 20 J. R. 214.

124. Such a contract of sale, as [*48] above stated, being legal, by the municipal law of New-York, as well as by the law of nations, could not affect the neutral character of the property. *Ibid*.

125. Where a policy contains no warranty of neutrality, or of the character of the vessel, the assurers take upon themselves all risks, belligerent as well as neutral. *Barnewell v. Church*, 1 C. R. 217. *Elting v. Scott*, 2 J. R. 157.

126. And the assured is not bound to show that the vessel had on board a sea-letter, or other papers determining her national character. *Ibid*.

127. Proof that the vessel was owned by an American citizen, and had all the papers for an American vessel, except a register, having sail-

ed with a sea-letter only, is sufficient evidence of a compliance with the warranty of American property. *Barker v. Phoenix Insurance Company*, 8 J. R. 307.

128. The sentence of a foreign Court of Admiralty is not conclusive evidence as to the character of the property, and of a breach of the warranty of neutrality. *Vandeneuvel v. United Insurance Company*, in error, reversing the judgment of the Supreme Court, 2 J. C. 451. S. C. 2 C. C. E. 217. *S. P. Johnston v. Ludlow*, 2 J. C. 481. *S. P. Laing v. United Insurance Company*, in error, *id.* 487. *S. P. Goix v. Low*, in error, *id.* 480. *S. P. Kemble v. Rhinelander*, 3 J. C. 130. *Contra*, same cases in Supreme Court, viz. *Goix v. Low*, 1 J. C. 341. *Vandeneuvel v. United Insurance Company*, 2 J. C. 127. *Laing v. United Insurance Company*, 2 J. C. 174. *S. P. Ludlow v. Dale*, 1 J. C. 16. S. C. 2 C. C. E. 348. *S. P. Harkin v. New-York Insurance Company*, and *Vandeneuvel v. Church*, 2 J. C. 173. n.

129. The sentence of a Court of Admiralty is only *prima facie* evidence of any fact, and will have no effect, if sufficient appears in the sentence to rebut the presumption of the existence of such fact. *Johnston v. Ludlow*, 2 J. C. 481. S. C. 1 C. C. E. xxix. *S. P. Laing v. United Insurance Company*, 2 J. C. 487.

130. Seizure, on suspicion of a breach of neutrality, is not conclusive as to the fact of a breach. *Smith v. Steinbach*, 2 C. C. E. 158.

131. A copy of the register of a vessel, certified to be a true copy by the collector, is not, on proof of the hand-writing of the collector, sufficient evidence to show the interest of the insured, or a compliance with the warranty of American property; but, as the collector has only authority to grant a copy to accompany the vessel, and not to give copies generally, a copy offered in evidence at the trial of a cause, must be authenticated in the usual way, that is, by the oath of a witness who has compared it with the original. *Coolidge v. New-York Firemen Insurance Company*, 14 J. R. 308.

(c) Warranty against illicit and contraband trade.

132. To constitute a breach of the warranty "against seizure or detention, on account of illicit or prohibited trade," &c., there must be an illicit or prohibited trade, in fact, existing; it is not sufficient *that [*49] there has been a condemnation under pretext of such a trade. *Johnston v. Ludlow*, 2 J. C. 481. S. C. 1 C. C. E. xxix.

133. If the insurer, at the time of subscribing a policy on goods, knows that other goods, which are contraband of war, have been shipped on board the same vessel, he will not be protected by the warranty against loss occasioned by trading in articles contraband of war. *Boune v. Shaw*, 1 C. R. 489.

134. In a policy on commissions, the warranty against contraband goods is not broken, though the insured be master of the vessel, and consignee of illicit articles shipped on board without the knowledge of the insurer. *De Peyster v. Gardner*, 1 C. R. 492.

135. When it is understood by the parties

that the voyage insured is illicit by the laws of the country to which the vessel is destined, the warranty against contraband goods is to be extended to such goods only as are contraband of war, and not such as are contraband by the laws of that country. *Vandervoort v. Smith*, 2 C. R. 155.

136. Under a warranty against seizure, on account of illicit trade, the underwriters are liable for a loss by illicit trade barratrously carried on by the master. *Suckley v. Delafeld*, 2 C. R. 222.

137. Insurance on sugar from *Antigua* to *N.*, warranted free from loss arising in consequence of seizure or detention for any illicit or prohibited trade. Vessels were allowed, by a special permission, to take sugar from *A.*, on certain conditions, which, in this case, were complied with before the loading commenced, during which an order was issued, revoking the permission, without any exceptions; the vessel was, notwithstanding, in consequence of an opinion of the president of *A.*, allowed to clear with her sugar; on the voyage home, she was captured by a *British* cruiser, carried in, and the sugar condemned for a breach of the laws of trade. The Court held, that the exportation of the sugar was illicit, and so a breach of the warranty. *Tucker v. Juhel*, 1 J. R. 20.

138. The warranty against prohibited trade protects the insurer from loss in consequence of the vessel's being denied an entry at her port of destination. *Suydam v. Marine Insurance Company*, 1 J. R. 181.

139. A warranty against "any loss by seizure or detention," &c., extends only to partial losses occasioned by a seizure or temporary detention, not followed by a condemnation. *Johnston v. Ludlow*, 2 J. C. 481. S. C. 1 C. C. E. xxix.

And see post, X. XI.

(d) Other warranties.

140. If a vessel bound to the port of a belligerent, have on board a document showing her cargo to be of the origin of a colony of that belligerent, and being a document in the usual course of trade, without which the cargo would not be admitted to an entry, it is not a breach of a warranty in the policy, that the property insured was not exported by the importers. *Le Roy v. United Insurance Company*, 7 J. R. 343.

141. By the following warranty in the policy, "the insurers take *no risk [*50] of a blockaded port, but if turned away, the assured to be at liberty to proceed to a port not blockaded," the insurer is protected from every loss happening in consequence of a blockade, whether such blockade were strictly legal or not. *Radcliff v. United Insurance Company*, 7 J. R. 38. S. C. 9 J. R. 277.

142. A vessel was insured from *New-York* to *Nantz*, warranted "free from seizure or detention in port;" during the voyage the ship was visited by two *British* cruisers, who endorsed her register, forbidding her to enter any port of *France*, &c. Having met with a gale

of wind, and being near *Belle-Isle*, she went there for a pilot, and was chased by a *British* cruiser under the lee of the island; and having taken in a pilot, she lay to about an hour, about a league from shore, and distant about 30 miles from *Nantz*, the fog being so thick that the ship could not safely proceed; and while in this situation, about a league and a half from the principal fort, and nearly in reach of cannon shot, the ship was taken possession of by a *French* armed boat, and carried in under the guns of the fort, and there claimed as prize; and was afterwards condemned under the *Milan* decree of the 17th of *December*, 1808, for having been visited by a *British* cruiser; held, that this was not a seizure or detention in a port, within the meaning of the policy, and that the insurer was liable for a total loss; neither was the stopping at *Belle-Isle* a deviation. *Watson v. Marine Insurance Company*, 7 J. R. 57.

143. Insurance at and from *A.* to *B.*; warranted to have sailed before a certain day; (or if the vessel be in port at the time of making the insurance, warranted to sail before a certain day;) the warranty applies to the voyage and not the risk in port, and the policy attaches on the subject in port; so, that whether the vessel sail before the day stipulated or not, a risk has been run, and the insurer is entitled to his premium; and he is liable, in the first place, for a loss in port, whether the vessel sail before the day stipulated or not; and in the next place, if the vessel sail before the day, for a loss on the voyage. *Hendricks v. Commercial Insurance Company*, 8 J. R. 1.

144. A vessel was insured against capture only, "warranted free from seizure in any river, port, or place, under the jurisdiction of *Napoleon*, or under the jurisdiction of any power under his control, or in alliance with him." The vessel intending to put into *Amsterdam*, and having arrived within the jurisdiction of *Holland*, which was then in alliance with or under the control of *Napoleon*, was captured, and carried into *Amsterdam*, and afterwards condemned by the Court of Prizes at *Paris*, for a violation of the *Berlin* and *Milan* decrees; held, that the term seizure, in the warranty, was not to be restricted to a seizure for a breach of any municipal regulation; but was to be considered, in this instance, as synonymous with capture, and the capture or seizure having been made in a place excepted in the warranty, the insurers were discharged. *Black v. Marine Insurance Company*, 11 J. R. 287.

145. A vessel bound to *Havana*, with negroes on board, was insured, and the policy contained a warranty, free from loss, if not permitted to an entry in consequence of having negroes on board; according to a regulation of the place, the vessel was obliged to stop before entering the inner harbor, until permission could be obtained to *land the slaves; [*51] and whilst the proper means were taking to obtain permission, she was lost; held, that the meaning of the warranty was to guard against the consequence of not being permitted to an entry at the custom-house, and which, not having been refused, the event provided against

by the warranty had not occurred, and the insured were entitled to recover. *Dickey v. United Insurance Company*, 11 J. R. 358.

146. Goods on board of an American ship were insured from *Norfolk to Cadiz*: "warranted free from British and American capture and detention; but the usual sea risks to continue both during capture and after liberation." The vessel having on board a British license, was stopped at the mouth of the *Chesapeake*, by a British blockading squadron, and ordered back to *N.* under pain of capture and condemnation. The vessel accordingly returned, and afterwards gave up the voyage; held, that it was a loss by detention of the British, within the meaning of the warranty. *Wilson v. The United Insurance Company*, 14 J. R. 227.

VII. Representation.

147. A representation is a statement of such facts or circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the assessor, to enable him to form a just estimate of the risk. Per *Thompson, J. Vandervoort v. Smith*, 2 C. R. 155.

148. A representation to the insurer, that a vessel had been out about nine weeks, when in fact, she had been out ten weeks and four days, is not a material misrepresentation, provided the latter period be within the usual time of the voyage; and what is within the usual time for a vessel to perform a voyage is a question of fact for the jury. *Mackay v. Rhinelander*, 1 J. C. 408. (And see *Williams v. Delafield*, 2 C. R. 329.)

149. A representation that the vessel insured is American, is equivalent to a warranty. *Vandenheuvel v. Church*, 2 J. C. 173. n.

150. A representation that the vessel has a bill of sale on board is not complied with, unless it be produced, or be capable of being produced when occasion requires; and it is a material document, and necessary to be on board. *Murray v. Alsop*, 3 J. C. 47.

151. A representation that a man has been a naturalized citizen since a particular year, does not mean that he was so in that year. *Coulon v. Bowne*, 1 C. R. 288.

152. A representation, in time of peace, that the vessel will sail in ballast, is substantially complied with, though she sail with a trunk of merchandise, and a few barrels of gunpowder laden on board. *Suckley v. Delafield*, 2 C. R. 222.

153. The insured made the following representation: "I have information of her sailing, and she has been out, this day, 26 days;" the information is applicable as well to the sailing as to the time she had been out; and although it appears that she had been 27 days out, the difference is immaterial. *Williams v. Delafield*, 2 C. R. 329.

*154. A representation to one underwriter is not evidence of a representation to a subsequent underwriter on a different policy, though on the same vessel, and against the same risks. *Elting v. Scott*, 2 J. R. 157.

VIII. Concealment; (a) *What is a material concealment, and the effect of it*; (b) *What need not be disclosed*.

(a) *What is a material concealment, and the effect of it*.

155. Every fact in the knowledge of the assured, which enhances the ordinary risk, and which would, if disclosed, enhance the premium, ought to be communicated to the underwriters. Per *Kent, J. Seton v. Low*, 1 J. C. 1.

156. Fraud may be established by circumstances. *Livingston v. Delafield*, 3 C. R. 49.

157. A jury is not bound to conclude that the insured knew of a loss at the time of effecting the insurance, because two of the vessel's crew had arrived in the harbor the night before, and intelligence of the loss had been received in the place where he resided on the day when the policy was subscribed. *Ibid*.

158. If a person who is a subject of, and residing in, a belligerent country, be beneficially interested, as *c'estui que trust*, in property warranted neutral, his interest should be disclosed to the insurer. *Murray v. United Insurance Company*, 2 J. C. 168.

159. The insured, at the time of effecting the insurance, had notice that there was a violent storm at the port of departure 11 hours after the vessel left it, but only communicated to the insurer, generally, that there had been blowing weather and severe storms on the coast since the vessel sailed; this was such a concealment as vitiated the policy. *Ely v. Hallett*, 2 C. R. 57.

160. If an insured send orders by several conveyances to insure, and afterwards arrive in the neighborhood of the place to which his letters were directed, knowing that a loss had in the mean time happened, and on board a vessel in which he knew one of his letters to be, he is bound to give his agent information of the loss by the same mail which he knew would carry the letter ordering insurance; and an insurance, effected under such circumstances, will be void. *Watson v. Delafield*, 2 C. R. 224. S. C. 1 J. R. 150. S. C. affirmed in error, 2 J. R. 526.

161. A vessel was insured from A. to B.; before effecting the insurance, another vessel had arrived at B., from A., which place she left subsequently to the sailing of the vessel insured; it is not thence to be intended that the insured knew of a storm, which the vessel that arrived had encountered, and concealed the fact; and his communicating to the insurer that he had information of her sailing, is a sufficient intimation that a vessel which sailed with or after the one insured, had arrived. *Williams v. Delafield*, 2 C. R. 329.

162. In effecting the insurance, the broker stated to the insurer that the vessel was expected to sail the latter end of *September*, or the beginning of *October*. [*53] On the morning of the day on which the insurance was effected, a vessel arrived bringing information that the vessel insured had sailed about the 3d of *October*, which news was not communicated to the insurers. The

Court refused to grant a new trial, on the ground of its being a concealment of a material fact, after the verdict of a second jury in favor of the plaintiff. *Livingston v. Delafield*, 1 J. R. 522.

163. A vessel, of which the master was part owner, was cast away and lost about 90 miles from the port of destination, where the other part owners resided, who, after the loss, and before notice of it, had insurance made: there being no actual fraud in the case, it depended on the question of constructive fraud, on the ground that the captain had not used due diligence in communicating intelligence of the loss; held, that the master, not having directed insurance, or being apprized of any intention to insure, was bound to exercise ordinary diligence only. *Andrews v. Marine Insurance Company*, 9 J. R. 32.

(b) *What need not be disclosed.*

164. The insured is not bound to disclose to the insurer any circumstances relating to risks, which the latter does not assume, and which are excluded by warranty, either express or implied. *Walden v. New-York Firemen Insurance Company*, 12 J. R. 128. S. C. in error, 12 J. R. 513; or as to which there is a warranty. *De Wolf v. New-York Firemen Insurance Company*, 20 J. R. 214.

165. So the insured, *unsolicited*, is not bound to disclose circumstances relative to the seaworthiness of the ship, or facts showing carelessness or want of economy in the master, provided they do not tend to impeach his honesty. 12 J. R. 128. 513.

166. The insured must employ a captain of competent nautical skill and general good character; but facts or information as to his carelessness, extravagance or want of economy, are not material to the risk of barratry, and need not to be disclosed. *Ibid*.

167. What facts, in the knowledge of the assured, are material and necessary to be communicated to the insurers, at the time of effecting the insurance, is matter for a jury exclusively to determine; and the judge, in his charge to the jury, though he may express his opinion as to the materiality of the facts, for their assistance or by way of advice, in cases of doubt or difficulty, ought not to give them a positive direction or opinion, as to the materiality of the facts concealed, so as to prevent the jury from exercising their own judgment and deciding for themselves. *Walden v. New-York Fire Insurance Company*, 12 J. R. 513. Per Kent, Ch. J.

168. The insured is not bound to disclose to the insurer that the goods insured are contraband of war, as such goods are lawful within the meaning of the policy. *Seton v. Low*, 1 J. C. 1. S. P. *Skidmore v. Deadolt*, 2 J. C. 77. S. P. *Juhel v. Rhineland*, *id.* 120. S. C. affirmed in error, *Rhineland v. Juhel*, *id.* 487.

169. That the insured is the subject of a belligerent state, and had emigrated to this country, *flagrante bello*, and become naturalized, need not to be disclosed. *Duguet v. Rhineland*, in error, 2 J. C. 476. S. C. 1 C. C. E. xxv.

*170. It is not necessary to disclose how long a vessel had been in the port from which she is insured, unless her having been there previous to the insurance had enhanced the risk. *Kemble v. Bowne*, 1 C. R. 75.

171. It is not necessary to disclose that the vessel is a prize ship, except in the case of a warranty, or representation, negating her being a ship of that description. *Ibid*.

172. Where there is no warranty or representation, the sailing with a false clearance is immaterial, and need not be disclosed. *Barnewall v. Church*, 1 G. R. 217.

173. The master of a vessel insured to *Martinique*, without specifying the port, was instructed by his owner to keep well to the eastward, and to endeavor to make a particular port in M., and if he should be turned away by a cruiser, then to go to L., and take the first opportunity to get to M. These instructions were not made known to the insurer; but the Court held the concealment immaterial. *Talcot v. Marine Insurance Company*, 2 J. R. 130.

174. If the policy contains no warranty, concealment of the residence of the insured in a belligerent country, or of the interest of such person in the property, is immaterial. *Elting v. Scott*, 2 J. R. 157.

175. If the vessel have on board a document, usual and customary in the course of the trade in which she is engaged, although it may expose her to capture and condemnation, it need not be disclosed. *Le Roy v. United Insurance Company*, 7 J. R. 343.

176. It is always a question how far the want of disclosure of a paper, intentionally false, is material to the risk. *Ibid*.

177. The insurer is presumed to be acquainted with the situation and topography of the places to which the vessel is destined. *De Longuemere v. New-York Fire Insurance Company*, 10 J. R. 120.

178. So, if there be no havens or harbors on the coast to which the vessel is insured, that fact will be presumed to be within the knowledge of the insurers, and need not be disclosed. *Ibid*.

179. Where an assignment of the policy does not vary the risk, the insurer need not have notice. *Earl v. Shaw*, 1 J. C. 313.

IX. *Deviation*; (a) *What is a deviation, and when actual or intended*; (b) *What will justify a deviation.*

(a) *What is a deviation, and when actual or intended.*

180. If the voyage be commenced with the avowed intent on the part of the insured to go out of the direct course, and stop at another port before proceeding to the port of destination, the voyage is, notwithstanding, the same as the one insured, the *termini* being in both cases the same; and should a loss happen previously to the vessel's arriving at the dividing point, there being only an intention to deviate, the insurer will still continue liable.

Silva v. Low, 1 J. C. 184. *S. P. Henshaw v. Marine Insurance Company*, 2 C. R. 274.

181. Goods were insured "at and [*55] from *New-York* to *Gothenburg*, *and at and from thence to one port in the *Baltic* or *North Sea*, not south of the river of *Jade*." The vessel arrived at *G.* and sailed from thence for *St. Petersburg*, but meeting with accidents, was compelled from necessity to put into *Carlsham* for repairs, and sailed from thence on the 10th *November* for *St. Petersburg*, but the next day was compelled by stress of weather to put back to *C.*, and was there detained by adverse winds, until the season was too late to navigate the *Gulf of Finland*. The supercargo afterwards determined to send her to *Stockholm*, and while proceeding to that port, and before she came to the dividing point of the routes to *Stockholm* and *St. Petersburg*, she was captured by a *French* privateer and carried into *Dantzic*, and was afterwards condemned by the Court of *Prizes* at *Paris*; held, that there was not an actual deviation, but an intention only to deviate; and that the vessel being lost before she arrived at the dividing point, the insurers were liable. *New-York Firemen Insurance Company v. Laurence*, in error, 14 J. R. 46.

182. An alteration of the voyage after the risk has commenced, is only a deviation. *Lawrence v. Ocean Insurance Company*, 11 J. R. 241.

183. Goods were insured "from *New-York* to *Gottenburgh*, and at and from thence to one port in the *Baltic* or *North Sea*, not south of the river *Eyder*; the risk to continue until the goods should be safely landed at *Gottenburgh*, and one other port." The vessel arrived at *Gottenburgh*, and sailed from thence, bound for and intending to proceed to *St. Petersburg*, but was compelled, by necessity, to put into *Carlsham*, where the destination of the vessel was changed to *Stockholm*, and she proceeded from thence to *Stockholm*; and whilst in the direct route, either to *St. Petersburg* or *Stockholm*, and before she came to the dividing point, was captured; held, that the assured having elected at *Gottenburgh* to proceed to *St. Petersburg*, she was concluded by that election; that the policy was to be considered the same as if *St. Petersburg* had been inserted, and that the assured could not revoke his election, and adopt another port of destination. *Ibid*.

184. But that the change of destination at *Carlsham*, not being an alteration of the voyage, but merely an intended deviation, and the loss having happened before the vessel arrived at the dividing point, the insurers were liable. *Ibid*.

185. If a vessel is insured from *N.* to *G.* and one other port, she may stay at *G.* a reasonable time after her arrival, to make the necessary inquiries as to a market, &c., without its being considered a deviation, and what is a reasonable delay in such a case is a proper question for the jury to decide. *Ibid*.

186. Where the termini of the voyage described in the policy, and of the intended voyage, remain the same, any design to deviate, whether formed before or after the commence-

ment of the voyage, will not vitiate the policy. *Ibid*. Per *Thompson*, Ch. J.

187. The effect of an alteration of the voyage upon the policy is, that it is considered as never having attached. *Ibid*. Per *Thompson*, Ch. J.

188. It is not material that the voyage should be pursued immediately *on effecting the insurance, provided there is [*56] no unusual or unnecessary delay, or nothing has occurred to alter the risk before the vessel sailed. *Earl v. Shaw*, 1 J. C. 313.

189. So, where a vessel staid in port six months after the date of the policy, it was held not to be a deviation, it not being fraudulent or varying the risk. *Ibid*.

190. Where the voyage is, in the contemplation of the parties, a trading voyage, a long stay at one port, for the purpose of selling the cargo, such stay being necessary for that purpose, does not amount to a deviation. *Gilfert v. Hallet*, 2 J. C. 296.

191. Nor, in such a case, will a stay of three days before and off a harbor, while seeking for a market, if such delay were necessary for that purpose, amount to a deviation. *Ibid*.

192. If a vessel be captured and taken out of her course, by reason of her having contradictory papers on board, it is a deviation. Per *Kent*, J. *Goiz v. Low*, 1 J. C. 341. 346.

193. Insurance from *New-York* to *Bordeaux*; "the insured not to abandon if refused admittance or turned away, but may proceed to another near open port." the vessel was boarded off the coast of *France* by a *British* vessel, informed of the blockade, and warned, that if he attempted to enter any port under the influence of *France*, he would be liable to capture and condemnation; and he was told that he must either go to *England* or *Malta*, or return to *America*: not having sufficient water to return to *America*, he proceeded towards *England*, but springing a leak, and meeting with violent and adverse winds, he was compelled by necessity, for the preservation of the ship, &c., to go into *L'Orient*, where the vessel and cargo were seized under the *Berlin* decree; held, that notwithstanding the existence of the *Berlin* decree, the ports of *France* were not to be considered as shut, as it regarded the ship insured; that the terms near open port, must be understood in a geographical sense; that neither of the *English* ports was to be considered as a near open port to *Bordeaux*, and that the attempt of the master to reach a port in *England* was a deviation which put an end to the policy. *Tenet v. Phoenix Insurance Company*, 7 J. R. 363.

194. A vessel was insured from *New-York* to *Teneriffe*, and, for an additional premium, permission was given to proceed from *Teneriffe* to the *Ile of May* and *Bonavista*, and at and from thence to *New-York*. The vessel arrived at *Teneriffe*, but was refused permission to enter or land any part of the cargo until after performing a quarantine of 40 days, which the master not choosing to do, went to *Madeira*, the nearest port where he could enter and land his cargo, and there sold and delivered the cargo, and then proceeded to the *Ile of May*; held, that the going from *Teneriffe* to *Madeira*, was a deviation. *Rob*

ertson v. Columbian Insurance Company, 8 J. R. 491.

195. A vessel was insured at and from *Port Plata*, *St. Domingo*, to *New-York*, and in going from *Port Plata* to *Susua*, which is in the district bearing the name of *Port Plata*, and about 18 miles east of the port, to take in a cargo of mahogany, she was driven into the road or bay of *Isabella*, in the same district, and there lost. She had a permit from the custom-house at

Port Plata, to go to *Susua* to obtain [*57] *her cargo, and would have been obliged to return to *Port Plata*, to

pay the duties and get a clearance, such being the usual course of trade there. The custom-house and port of entry are confined to the particular place called *Port Plata*; and the district, for the purposes of revenue, which bears that name, extends nearly a hundred miles along the coast of *St. Domingo*. *Port Plata* is a safe harbor, but *Susua* and *Isabella* are open roads, and dangerous while particular winds prevail; held, that *Port Plata* proper, and the district of *Port Plata*, were different objects, and the perils distinct; and that the going from *Port Plata* to *Susua* was a deviation; and that nothing but a clear, well settled, and well understood usage of trade, would be sufficient to include both objects under the simple name of *Port Plata*. *Vos v. Robinson*, 9 J. R. 192.

(b) *What will justify a deviation.*

196. Going out of the usual course of the voyage, in order to avoid danger of capture, and putting into a port to seek for convoy, if done *bona fide*, and on reasonable grounds, is not a deviation. *Patrick v. Ludlow*, 3 J. C. 10.

197. If a vessel, on being pursued by a cruiser, put into an intermediate port to avoid the danger of capture, it is not a deviation. *Post v. Phoenix Insurance Company*, 10 J. R. 79.

198. On a vessel's arriving, within sight of *Madeira*, her port of destination, the master, seeing a ship, which he suspected to be a privateer, went to the *Cape de Verd Islands*, where not being able to repair the vessel, the voyage was broken up, and the insured abandoned, but the vessel afterwards got some repairs and went to *Lisbon*; held, that this was a deviation, as her leaving the original place of destination was not warranted by necessity; and if it had been, the insured was not justified in breaking up the voyage. *Neilson v. Columbian Insurance Company*, 1 J. R. 301.

199. If, on being refused an entrance at the place of destination, the master, under a reasonable expectation of finally being able to obtain it, wait there for some time, it will not be a deviation. *Suydam v. Marine Insurance Company*, 2 J. R. 138.

200. Putting into a port whilst obliged to wait for a favorable wind, in order to avoid a probable danger of capture, is justifiable. *Ibid.*

201. Insurance on a cargo at and from *Carlisham* to *St. Petersburg*. The vessel sailed from *Carlisham* the 9th of *November*, 1813, and meeting with adverse winds, attempted to get into *Revel*, as a place of safety; but finding it

impracticable, she put into *Port Baltic*, on the 2d of *November*. Being informed that it would be impossible to reach *Cronstadt*, on account of the ice, and the wind and weather becoming favorable, she sailed from *Port Baltic* on the 23d of *November*, intending to go to *Revel*; but the wind soon after suddenly changed, and the weather became thick; and while endeavoring to get into the bay of *Revel*, the ship struck on a shoal, and was lost; held, that the captain having acted *bona fide*, and according to his *best judgment, his going into *Port Baltic*, and

afterwards attempting to get into *Revel*, was justifiable, and not a deviation. *Graham v. Commercial Insurance Company*, 11 J. R. 352.

202. If a vessel is obliged by necessity to put into a port, and part of her cargo is necessarily taken out, in order to repair the vessel, which being found to be damaged, is sold, without occasioning a delay to the vessel, it will not avoid the policy. *Kane v. Columbian Insurance Company*, 2 J. R. 264.

203. A vessel was insured from *New-York* to *Bordeaux*, and had *French* passengers on board, and the owners instructed the master to go to sea through the *Sound*, in order to avoid the chance of detention by *British* cruisers then off the *Hook*, and the master went through the *Sound*, instead of going through the *Narrows* to the *Hook*, which is the most usual and least dangerous route; held, that it was not a deviation. *Reade v. Commercial Insurance Company*, 3 J. R. 352.

204. A deviation from necessity will excuse the assured, in case of an insurance against a particular risk, as well as in the case of a general insurance. *Robinson v. Marine Insurance Company*, 2 J. R. 89.

205. As, where the insurance was from A. to B., and from thence to C., against sea risks only; when the vessel arrived off B. she was turned away by a ship of war, on account of the place being blockaded, and she then proceeded to C., on her way to which port a loss happened by perils of the sea: the deviation being occasioned by necessity, the insurer is liable for subsequent loss. *Ibid.* And see ante, VI. 142.

X. *Loss*; (a) *By perils of the sea*; (b) *By capture*; (c) *By arrest and detention*; (d) *By bar- ratry*; (e) *By average contributions*; (f) *By death of animals.*

(a) *By perils of the sea.*

206. There is no precise time after which a vessel that has not been heard of is to be presumed lost, but it must depend on the circumstances of the case. *Gordon v. Bowne*, 2 J. R. 150.

207. A vessel bound from *North-Carolina* to *New-York*, and not heard of for a year, will be presumed to be lost. *Ibid.*

208. In judging whether a missing vessel has been lost on the voyage insured, the usual and not the utmost period of the voyage is to be taken into calculation. *Brown v. Neilson*, 1 C. R. 525.

209. If two storms are given in evidence, in

an action on a policy for a limited time, the one storm within and the other without the time, it is for the jury to decide in which the loss happened. *Ibid.*

210. An insurance made after a knowledge of a second storm does not conclude the jury from finding the vessel was lost in a prior storm. *Ibid.*

211. Where a vessel during a voyage puts into a port of necessity, and is repaired, and afterwards proceeds on her voyage, and is totally lost, the insured is entitled to recover the partial loss arising from the repairs, and general average consequent thereon, in addition to the total loss. *Saltus v. Commercial Insurance Company*, 10 J. R. 487.

212. The policy contained a clause, that the insurers took no risk in port, but sea risk; the vessel, while in port, was driven on shore, and stranded, so that she could not be got off, unless at an expense exceeding half her value, and was afterwards taken possession of by an armed force, and burnt; held, that it was a loss by sea risk, and not by burning. *Patrick v. Commercial Insurance Company*, 11 J. R. 9.

213. But there being no evidence that the cargo had been injured by the stranding; held, that the loss of that was not occasioned by sea risk, but was to be attributed solely to the subsequent burning. *Patrick v. Commercial Insurance Company*, 11 J. R. 14.

214. Insurance on freight from *Riga* to *New-York*. The bulk of the cargo consisted of hemp, and the residue of manufactured goods and iron. The vessel sprung a-leak, and put into *Kinsale* in distress, where, on a survey, she was found incapable of prosecuting her voyage, unless repaired at an expense equal to her value: and the master, with the advice of the merchants and others at *Kinsale*, sold the hemp there, and shipped the residue of the cargo, in another vessel, to *New-York*, which, however, was not capable of taking more than one third of the hemp, as there was no machinery to pack and stow it in the *Russian* mode; held, that the insured was entitled to recover for a total loss of the freight, it not appearing that the goods re-shipped for *New-York* had reached there, or that any freight had been earned. *Saltus v. Ocean Insurance Company*, 12 J. R. 107.

215. A vessel was insured, and warranted "free from any loss by the *British* or *Americans*; but in case of capture by either, the usual sea risks to continue." The vessel was captured by the *British*, and while detained by the captors, was lost in consequence of their negligence; held, that if the loss had arisen from a sea risk, strictly speaking, the insurer would have been liable; but as the immediate and proximate cause of the loss was an act of the captors, and which, if done by the insured, would have exonerated the insurers, the latter were in this case protected by the warranty. *Coolidge v. New-York Firemen Insurance Company*, 14 J. R. 308.

(b) *By capture.*

216. A vessel was captured and deprived of

all her papers, which she never regained, and was afterwards recaptured and restored, on payment of salvage; held, that the insured were justified in breaking up the voyage, and that the ship, by the loss of her papers, not being in a legal capacity to perform her voyage, there was a total loss by capture. *Post v. Phoenix Insurance Company*, 10 J. R. 79.

217. A policy of insurance on goods from *Philadelphia* to *St. Sebastians*, containing the following clause: "warranted not to abandon if detained or captured, if the property is released in six months after notice to assurers; no risk in port taken but sea risk." The vessel, when about two leagues from land, and about four leagues from *St. Sebastians*, was boarded by an armed launch, and a prize master and eight men put on board, who took the vessel into *Port Passage*, where she was compelled to perform quarantine for eight days, when her hatches were sealed by the *French* consul, and the master and supercargo ordered to *St. Sebastians*; and some time after, a *French* pilot and crew were put on board, and the vessel sent to *Bayonne*, where the cargo was sequestered, and afterwards landed by order of the *French* government, and put in the public stores; held, that there was a total loss by capture, and not by seizure in port. *Duval v. Commercial Insurance Company*, 10 J. R. 278.

218. Where an *American* vessel sailed from *Gothenburgh*, bound to *St. Petersburg*, the next day after a *British* convoy, and came up with the convoy the next day after, and kept company with her through the *Belk*, but without receiving or exchanging any signals or receiving any assistance from the convoy, and without altering its course or retarding its voyage on account of the convoy, this was not considered as sailing under *British* convoy, so as to affect the right of the insured to recover for a total loss, in consequence of the capture by the *French*, though the ground of the condemnation was stated to be, her having sailed under *British* convoy. *Lawrence v. Ocean Insurance Company*, 11 J. R. 241.

219. After capture and recapture, the insured is liable only for the salvage and for losses within the policy, but not for expenses attending a sale of the property at auction, by direction of the consignee of the insured. *Muir v. United Insurance Company*, 1 C. R. 49.

220. The insurer is liable for the expenses of prosecuting an appeal against captors, where he has notice of the proceedings, and does not dissent. *Lawrence v. Van Horn*, 1 C. R. 276. Though the expenses surpass the amount of the underwriter's subscription. *Ibid.*

221. As to the propriety of those expenses, and what proportion of them shall be paid by the insurer, the jury must decide. *Ibid.*

222. The capture of a vessel under convoy, by the commander of the convoy, for the purpose of protecting her from belligerent capture, will not exonerate the insurer in case of loss. *Gouverneur v. United Insurance Company*, 1 C. R. 592.

223. Insurance on goods from *New-York*

to *Guadaloupe*: the vessel was captured by a British cruiser, carried into *Antigua*, and libelled; the master put in a claim, and the goods were detained for further proof, but were delivered to the master, on his giving security for their appraised value, and paying the costs. The master procured A., a merchant of *Antigua*, to give the security, and also to pay the costs and other expenses for the ship and cargo; and for the indemnity of A., the master drew bills of exchange on his owner in *New-York*, and pledged the ship and goods to A., to secure the amount, which included a commission of 5 per cent., charged by A., on the sums advanced by him, and a premium of insurance, paid by him, to insure the ship and cargo, so pledged, from *Antigua* to *New-York*. The cargo was delivered to the agent of A., in *New-York*; and the insured, to obtain the possession of his property, paid his proportion of the charges and expenses, includ-

[*61] ing the commissions and *premium of insurance; held, that the master having acted with good faith, and the charges being reasonable and necessary, the insured were entitled to recover the amount so paid against the insurers. *Fontaine v. Columbian Insurance Company*, 9 J. R. 29.

224. Where goods insured were captured during the voyage, and the vessel was released, but the goods detained for further proof, and were afterwards restored, on payment of the full freight, but the owner was obliged to hire another vessel to carry the goods to their place of destination; held, that the insured was liable to pay additional or increased freight, being an expense necessarily incurred in consequence of the capture. *Mumford v. Commercial Insurance Company*, 5 J. R. 262.

(c) *By arrest and detention.*

225. Detention in port, on suspicion of a breach of neutrality, is a loss within the policy. *Smith v. Steinbach*, 2 C. C. E. 158.

226. A cargo was insured from *New-York* to *Cherbourg* in *France*, and the policy contained a clause, "warranted free from seizure for or on account of any illicit or prohibited trade." The vessel met with an *English* cruiser, and was compelled to go into the outer road of *Plymouth*, where she was detained six hours, and then suffered to proceed; but no person belonging to the vessel went on shore during the time of her detention. The vessel and cargo arrived at *Cherbourg*, and were there seized under the *Berlin* decree, and confiscated, on the alleged ground that the captain, on his examination by one of the officers of the port, had made a false declaration, that he had not been in *England*; held, that this was not a loss arising from any illicit or prohibited trade, but under the general peril of arrests and detentions of princes, and that the insurers were liable. *Mumford v. Phoenix Insurance Company*, 7 J. R. 449.

227. Where a vessel, chartered at so much per month, is detained by an embargo, the charterer, who has had the cargo insured, cannot recover from the insurer the hire paid for the

vessel during her detention. *Penny v. New-York Insurance Company*, 3 C. R. 155.

228. Insurance on goods from *New-York* to *Antwerp*. During the voyage, the vessel was carried by a British privateer to *Portsmouth, England*, and after a short detention, released. On arriving at *Flushing* roads, an armed force was put on board the vessel and continued until her arrival at *Antwerp*, on the 21st of *July*, 1807. She was not suffered to land her cargo there, nor to depart with it; an armed force being kept on board by the officer of the customs. On application by the consignee, leave was obtained from the *French* government, through its ministers, to land the cargo under the direction of the officers of the customs, on condition of its being placed in depot, in the custom-house stores, until the decision of the emperor of *France* could be obtained. After remaining in this state of sequestration until 1810, the cargo was sold by order of the emperor of *France*, and the proceeds paid into his *caisse d'amortissement*; held, that there was a total loss of the cargo, by the arrest, restraint and detainment of the *French* *government. *Gracie v. New-York* [*62] *Insurance Company*, 13 J. R. 161.

229. Where a vessel in the prosecution of the voyage insured, puts into a port at which she is permitted by the policy to stop, and whilst there, the place is closely invested by the cruisers of the enemy of the country to which she belongs, so that, if she attempted to escape, she would be inevitably captured, this is a *restraint of princes and of men of war, &c.*, within the meaning of the risks enumerated in the policy; and the insured may break up the voyage, and abandon for a total loss, and such abandonment is not liable to the objection of its being made *quia timet*. *Saltus v. United Insurance Company*, in error, 15 J. R. 523.

Seizure or detention for illicit trade. See *ante*, VI. 132—139.

(d) *By barratry.*

230. A fraudulent act of the master, in his character of master, is barratry; it need not be made affirmatively to appear that he was benefited by it, and the law will intend that it was done to the injury of the owner. *Kendrick v. Delafield*, 2 C. R. 67.

231. Barratry may be committed by the master of a ship, in respect to the cargo, though the owner of the cargo is at the same time owner of the vessel, and though the master is, also, supercargo or consignee for the voyage. *Cook v. Commercial Insurance Company*, 11 J. R. 40.

232. Insurers are not liable for the fault or negligence or misconduct of the master or mariners, not amounting to barratry. *Grim v. The Phoenix Insurance Company*, 13 J. R. 451.

233. Acts of mere carelessness or negligence do not amount to barratry, which is an act done with a fraudulent intent, or *ex maleficio*. *Ibid*.

234. Where a vessel was insured, among other risks, against fire, and during the voyage

a seaman carelessly put a lighted candle in the binnacle, which took fire, and communicating to some powder on board, the vessel was blown up and wholly lost; *held*, that the insurers were not liable for the loss. *Ibid*.

235. If the master, without the consent or knowledge of his owner, lades on board the vessel such goods as will subject her to condemnation for illicit traffic, it is barratry. *Suckley v. Delafield*, 2 C. R. 222.

236. Under a warranty against seizure, on account of illicit trade, the underwriter is liable for a loss by illicit trade barratrously carried on by the master. *Ibid*.

237. Where the master is both master and owner of the vessel, the insurer will not be liable for loss by barratry; but the ownership of the master is a fact to be established by the insurer, and it is not incumbent on the insured to show that he is the owner. *Steinbach v. Ogden*, 3 C. R. 1.

238. If the master of a vessel fraudulently sells her, and purchases *her in himself, and afterwards, in his capacity of master, contracts with the insured, who is ignorant of his pretensions to the ownership of the vessel, for the carriage of certain goods, with which he runs away, and which he converts to his own use, the insurer is liable. *Ibid*.

239. If the master proceeds on a voyage different from the one insured, but for the benefit of his owner, whom he has apprized of his intention, and afterwards sells the vessel, and embezzles the proceeds, it is not barratry. *Thurston v. Columbian Insurance Company*, 3 C. R. 89.

240. If the owner of a vessel charters her for a voyage, retaining, however, the management of her, and hiring and paying the master and crew, and furnishing them with provisions; the hirer is not owner of the vessel, *pro hac vice*, but the original ownership still continues; consequently, if the master, at the request of the hirer, go out of the course of the voyage, it is barratry. *McIntyre v. Bowne*, 1 J. R. 229.

241. Where the owner of a vessel charters her to the master for a certain period of time, the master covenanting to victual and man her at his own cost, he is to be deemed owner *pro hac vice*, and no act of his will amount to barratry. *Hallet v. Columbian Insurance Company*, 8 J. R. 272.

242. And if he commits an act, which, were he invested with no other character than that of master, would be barratrous, the insurer will not be liable even to an innocent owner of goods laden on board the vessel. *Ibid*.

(e) *By average contributions.*

243. A jettison of goods laden on deck, although expressly mentioned in the policy, cannot be brought into general average. *Lenox v. United Insurance Company*, 3 J. C. 178. *S. P. Smith v. Wright*, 1 C. R. 43.

244. But it is otherwise as to the ship's boat. *Lenox v. United Insurance Company*, 3 J. C. 178.

245. A damage to particular goods necessa-

rily arising from some act done for the general safety of the ship and cargo, is a subject of general average. *Magrath v. Church*, 1 C. R. 196.

246. The wages and provisions of the crew, during the detention of a vessel captured and carried in for adjudication, may be brought into general average. *Leavenworth v. Delafield*, 1 C. R. 573.

247. And the insurer on freight must pay a proportion of the general average on the freight, equal to the proportion of the voyage which the vessel shall have performed previous to the capture, and the insurer on the vessel the residue. *Ibid*.

248. If a vessel be compelled by stress of weather to put into an intermediate port to refit, the wages and provisions of the crew, from the moment of bearing away until the period of sailing again in prosecution of the original voyage, are subjects of general average. **Walden v. Le Roy*, 2 C. R. [*64]

263. *S. P. Henshaw v. Marine Insurance Company*, *id*. 274.

249. The expenses attending the detention of a vessel by an embargo, are not a subject of general but of particular average. *Penny v. New-York Insurance Company*, 3 C. R. 155.

250. Where a vessel and cargo were captured, and proceedings in the Admiralty Court were had against the whole cargo, and part was condemned and the residue released; and, to prevent an appeal, and avoid further detention, the master agreed to pay a specific sum as a ransom, and sold a part of the cargo, being more than a moiety of the part insured, to defray the expenses and pay the ransom; *held*, that the sum paid for ransom and expenses was not general average, but must be borne by the cargo alone, and that the plaintiff was entitled to recover for a total loss. *Fandenheuwel v. United Insurance Company*, 1 J. R. 406.

251. Where the vessel insured has been captured and condemned, but the cargo liberated, the expenses in endeavoring to recover the vessel are to be apportioned as general average, and borne by the vessel, freight, and cargo; but the insured on the vessel can only recover the proportion chargeable to the vessel. *Jumel v. Marine Insurance Company*, 7 J. R. 412.

252. Where a vessel is compelled to put into an intermediate port to refit, the wages and provisions of the crew, expenses of unloading, repairing, reloading, storage, &c., from the time of the accident until the ship is again ready to sail, are general average; and if, by an embargo or detention of the subject insured, after the expenses have been incurred, there is a total loss, they must be paid by the insurer, in addition to the total loss. *Barker v. Phoenix Insurance Company*, 8 J. R. 307.

253. Where a vessel was stranded near her port of delivery, and it was agreed by the insurers and insured, that without prejudice to their respective rights, lighters and men should be sent to endeavor to save the property, and the cargo was thereby preserved, and delivered to the consignees and owners, but the ves-

sel was totally lost; *held*, that the expenses of salvage, including the cost of lighters, &c., were general average, and that the insurers on the cargo were bound to pay their proportion of such average. *Heyliger v. New-York Firemen Insurance Company*, 11 J. R. 85.

254. Where a vessel arrives at her outward port of destination, after having been injured in the voyage by tempests, and delivers her cargo, and earns freight, and is then detained for the purpose of receiving necessary repairs, the wages of the master and crew, and provisions on board, during such detention, are not general average, and the underwriters on the ship are not liable for them. *Dunham v. Commercial Insurance Company*, 11 J. R. 315.

255. Only such expenses can be brought into general average as were incurred before the vessel had arrived at her port of discharge, and were necessary for the prosecution of the voyage, and the preservation of the cargo and freight, as well as of the vessel. *Ibid.*

256. The same rule as to contribution applies as well between the *assurer [*65] and assured, as the owners of ship and cargo. Per *Van Ness, J. Strong v. Firemen Insurance Company*, 11 J. R. 323.

257. Insurance on freight; the vessel being obliged to put into a port of necessity, the cargo, on being taken out, in order to repair the vessel, was found to be greatly deteriorated, and not in a state to be reshipped, and was accordingly sold; the vessel was repaired so as to be able to prosecute her voyage; *held*, that the insured could not recover for a loss of freight, as the subject, though damaged, remained in specie. *Saltus v. Ocean Insurance Company*, 14 J. R. 138.

258. A cargo of flour and corn was insured. During the voyage, part of the cargo was thrown overboard, for the preservation of the ship and lading, in a storm, by which the residue of the cargo was greatly deteriorated, and the vessel having put into a port of necessity, was found to be unfit to be reshipped, and was sold; *held*, that the insured was entitled to an average contribution for the corn thrown overboard; but that the insurer was protected by the memorandum in the policy, for any loss on that part of the cargo remaining in specie, although reduced to less than half its value by sea damage. *Ibid.*

259. If a ship, in case of extremity, be voluntarily run ashore, and is afterwards recovered, and performs her voyage, the damages resulting from the stranding are to be borne as general average. *Bradhurst v. Columbian Insurance Company*, 9 J. R. 9.

260. But if by the act of running her ashore, the ship is destroyed and totally lost, but the cargo saved, this is not a case of general average, and the cargo is not bound to contribute. *Ibid.*

261. The wages of the crew during a detention by an embargo, are not chargeable to the ship; nor are they general average, but fall exclusively on the freight. *McBride v. Marine Insurance Company*, 7 J. R. 431.

262. In an adjustment of average, the freight

actually earned will make part of the contribution; but not what the vessel would have earned had she arrived at her port of destination. *Maggrath v. Church*, 1 C. R. 196.

263. The whole contribution is, in the first instance, recoverable from the insurer. *Ibid.*

264. But where the ship, freight and cargo belong to the same person, and the freight and cargo are not insured, in that case the insured on the vessel can only recover the proportion chargeable to the vessel. *Jumel v. Marine Insurance Company*, 7 J. R. 412.

265. The amount on which a general average in cases of capture is to be calculated is, the cargo, on its first cost or invoice price, and charges, at the port of departure; the vessel, on four fifths of its value at the same place; the freight at one half agreed to be paid. *Leavenworth v. Delafield*, 1 C. R. 573.

266. Where a vessel, by the perils of the sea, becomes so much injured as to render it necessary to sell her in a foreign port, the amount of her value, on which the general average is to be calculated, is the amount she actually and *bona fide* sold for, and not the four fifths of her original value, as in case of capture. *Bell v. Smith*, 2 J. R. 98.

* (f) By death of animals. [*66]

267. Insurance on horses, "against all risks, including the risk of death, from any cause whatever, until they shall be safely landed;" in consequence of a storm, a horse is injured, which occasions his death three days after he is landed at the port of destination; this is within the risks insured against, and the insured is entitled to recover the full value of the horse. *Cott v. Smith*, 3 J. C. 16.

Loss on a policy on profits. See *ante*, I. 8, 9, 10.

Loss on a policy on commissions. See *ante*, I. 14.

Risks within the policy. See *ante*, IV. 50—56.

Risks excluded by the memorandum. See *ante*, IV. 57—61.

XI. *Abandonment*; (a) *Upon capture or arrest*; (b) *Where there is a loss of the voyage*; (c) *Where there is a loss or deterioration of the subject*; (d) *Other causes of abandonment*; (e) *How far an abandonment is necessary*; (f) *When and how an abandonment is to be made*; (g) *What will be a waiver of a previous abandonment*; (h) *Effect of an abandonment*; (i) *Ordering and disposal of the effects abandoned*.

(a) *Upon capture or arrest*.

268. The assured has a right to abandon immediately on advice of a capture. *Gardere v. Columbian Insurance Company*, 7 J. R. 514.

269. A capture by a friend, or the carrying a neutral vessel into port for adjudication, as contradistinguished from a capture by an enemy, is a ground for abandonment. *Murray v. United Insurance Company*, 2 J. C. 263.

270. Such a capture is *prima facie* evidence of a total loss, and the insured may abandon

immediately on receiving intelligence of it. *Ibid.*

271. After capture and recapture of a vessel, where salvage and other consequent expenses do not amount to one half of her value, the insured cannot abandon. *Parage v. Dale*, 3 J. C. 156.

272. If the goods insured are captured, carried in and acquitted, but the insured cannot obtain them from the captors, he may abandon, and is not bound to have them conveyed to their place of destination. *Bordes v. Hallet*, 1 C. R. 444.

273. A vessel bound to a port under the dominion of France was boarded by a British vessel of war, and warned not to proceed, and the master put into *Gibraltar*, where he was informed of the French and Spanish decrees, and was refused a clearance to any but a British port; held, that this was not a restraint of princes, to warrant an abandonment, a clearance not being essential; neither did a threat of British capture amount to such a restraint. *Corp v. United Insurance Company*, 8 J. R. 277.

274. Insurance on goods; the vessel was captured by a French privateer, carried in, and proceeded against under the Berlin and Milan decrees; the master was advised, by counsel, by the American consul-general and agent of prizes, and by the American minister, that the property would certainly be condemned, and that he ought to attempt a compromise with the captors; and, accordingly, the master, who was also part owner of the ship, compromised both for ship and cargo. Although the parties to the policy had neither authorized, nor since adopted the act of the master; held, that as he was, *ex necessitate*, the mutual agent of both parties, to do what was right, his acts, done in good faith, and for the benefit of all concerned, could not prejudice the rights of either. *Clarkson v. Phoenix Insurance Company*, 9 J. R. 1.

275. The mode, nature, or value of the composition in such a case, is immaterial; the sole question is, whether it was done with prudence and good faith. *Ibid.*

276. And where the master is himself a part owner of the subject insured, his interest under the policy will be affected in no different manner from that of the other owners. *Waddell v. Columbian Insurance Company*, 10 J. R. 61.

277. Where intelligence is received, at the same time, both of the capture, recapture, and arrival of the vessel, the insured cannot abandon. *Muir v. United Insurance Company*, 1 C. R. 49.

278. In case of capture, a restoration previous to the time of abandonment, although unknown to the assured, takes away his right to abandon. *Church v. Bedient*, 1 C. C. E. 21. *S. P. Hallett v. Peyton*, *id.* 28. Contra, *Mumford v. Church*, 1 J. C. 147. *Slocum & Burling v. United Insurance Company*, 1 J. C. 151. *Murray v. United Insurance Company*, 2 J. C. 263. *Livingston v. Hastie*, 3 J. C. 293.

279. And whether the insured shall recover for a total or a partial loss, will depend on the

circumstances of the case. *Church v. Bedient*, and *Hallett v. Peyton*, 1 C. C. E. 21, 28. And see *ante*, X. 216, 217.

(b) *Where there is a loss of the voyage.*

280. If, during the voyage, great part of the cargo be taken out by pirates, and, by reason of adverse weather, the vessel is weakened, and the strength and competency of the crew, and the necessities of life exhausted, it will justify breaking up the voyage, and, consequently, authorize an abandonment of the cargo. *Gilfert v. Hallet*, 2 J. C. 296.

281. If the port of destination, as described in the policy, be blockaded, the insured may abandon. *Schmidt v. United Insurance Company*, 1 J. R. 249.

282. If, after the voyage has been commenced, the vessel is stopped, and detained in consequence of an embargo laid by the government of the United States, whether for a limited or indefinite period, the insured may abandon for a total loss. *M'Bride v. Marine Insurance Company*, 5 J. R. 299. *S. P. Walden v. Phoenix Insurance Company*, 5 J. R. 310. *S. P. Ogden v. New York Firemen Insurance Company*, 10 J. R. 177. S. C. in error, 12 J. R. 25.

*283. To render the commencement of the voyage illegal, so as to discharge the insurer, a knowledge of the embargo having been laid must be brought home to the masters or owners; a vague rumor, or knowledge by the pilot, of the embargo, previous to the sailing of the vessel, will not be sufficient to charge the insured with notice that such an act had been passed. *Walden v. Phoenix Insurance Company*, 5 J. R. 310.

284. Where, on the vessel's arriving within sight of *Madeira*, her port of destination, the master, seeing a ship which he suspected to be a privateer, went to the *Cape de Verd Islands*, where, not being able to repair the vessel, the voyage was broken up, and the insured abandoned; but the vessel afterwards got some repairs, and went to *Lisbon*; held, that, even admitting there was no deviation, there was no cause for breaking up the voyage; for the vessel might have returned to *Madeira* with little or no repairs. *Neilson v. Columbian Insurance Company*, 1 J. R. 301.

285. A vessel insured was compelled, in consequence of a storm, to put in for repairs, and her cargo was taken out, and the principal part of it necessarily sold, in order to prevent its destruction; but the vessel might have been repaired for less than half her value, so as to have been competent to prosecute her voyage; held, that the loss of the voyage did not entitle the insured to recover for a total loss on the ship. *Goold v. Shaw*, 1 J. C. 283. S. C. affirmed in error, 2 J. C. 442.

286. And whether, while the vessel is in safety, a breaking up of the voyage, in consequence of injury to the cargo, will entitle the insured to a total loss on the ship? *Quere. Ibid.*

287. Freight was insured from *Archangel* to *New-York*. During the voyage, the vessel was

compelled from necessity to put into the *Helder* for safety. On a survey of the vessel, she was found so much damaged, as to be incapable of being repaired, unless at an expense far exceeding half her value; and though another vessel might easily have been obtained at *Amsterdam*, at a moderate freight, to carry an ordinary cargo to *New-York*; yet the *hemp*, of which the cargo, in this case, chiefly consisted, being so much wet and damaged as to render it unfit, if not dangerous, to be rehipped in another vessel, even if any master would have been willing to carry it on in such a state; the voyage was, therefore, broken up, and the vessel and cargo sold at the *Helder*, for the benefit of all concerned, and the insured abandoned for a total loss; *held*, that the assured had a right to abandon and recover for a total loss, deducting freight, *pro rata itineris*, from A. to H. *Whitney v. The New-York Firemen Insurance Company*, 18 J. R. 208.

(c) *Where there is a loss or deterioration of the subject.*

288. Where the goods saved do not amount to half the value of the goods insured, the insured may abandon. *Gardiner v. Smith*, 1 J. C. 141.

289. A chariot was insured, to be carried on deck, among other perils, against jettison, and free from average; the box, estimated [*69] at two thirds of the price of the whole, was thrown overboard in a storm; the insured may abandon for a total loss, as, by the loss of the box, the subject no longer remained in specie. *Judah v. Randol*, 2 C. C. E. 324.

290. To justify an abandonment, in case of stranding, the goods must be deteriorated to half their value. *Ludlow v. Columbian Insurance Company*, 1 J. R. 335.

291. The vessel, on board of which the goods insured were laden, stranded at the mouth of a harbor. Not being able to get her off immediately, the master, with the advice of persons there, concluded to break up the voyage. Two days after, the goods were landed, and, ten days thereafter, sold at public auction. The consignees bought the goods, and the vessel being got off, proceeded with the goods to her original port of destination. They were not opened, but were sold by the package; and though one box appeared to be injured, there was no evidence of the extent of the damage; *held*, that the insured had no right to abandon for a total loss; and that the insured, in this case, was bound to send the goods to their place of destination, as the accident happened at the mouth of the harbor, and lighters might have been obtained to transport the goods. *Ibid*.

292. Stranding is not always, *ipso facto*, a loss that will justify an abandonment; but it is a question of evidence, whether it be attended with such circumstances as to produce a total loss, either because it is followed by shipwreck, or other destruction of the property, or because the vessel cannot be set afloat, or because she cannot be repaired at the place of the peril, or cannot be got off at an expense of half her value. *Patrick v. Commercial Insurance Company*, 11 J. R. 9.

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293. *It seems*, that if a vessel, after being stranded, should be deemed a wreck, or her situation desperate, it will justify an abandonment, though she should afterwards be got off by others, and repaired for a less sum than was estimated. *Fontaine v. Phoenix Insurance Company*, 11 J. R. 293.

294. *It seems*, that a survey, as to the state of a vessel, though not conclusive, yet, if honestly made, is very strong evidence. *Ibid*.

295. If certain articles be enumerated in a policy of insurance, and a moiety of them be lost, the assured may abandon, as for a total loss, though the loss is not equal to a moiety of the whole cargo. *Vandenheuvel v. United Insurance Company*, 1 J. R. 406.

296. Insurance on certain articles specified in the policy; part are lost by jettison, and part being damaged, are sold at a port which the vessel was obliged to put into, and the residue, being less than a moiety, finally arrive at the port of destination; the assured may abandon, notwithstanding that by deducting the sum, which the part sold produced, from the prime cost of all that part of the subject which never arrived, it would reduce it to less than a moiety of the prime cost of the whole. *Moses v. Columbian Insurance Company*, 6 J. R. 219.

297. If, during the voyage, the vessel be so much injured as not to be worth repairing, it is a total loss. *Snell v. United Insurance Company*, 3 J. C. 34.

[*70]
298. Where the vessel cannot be repaired for less than one half of her value, so as to complete her voyage with the original cargo, although she might be refitted so as to convey part of it, or a less bulky one, she may be abandoned. *Abbott v. Broome*, 1 C. R. 292.

299. *It seems*, that the value to be taken, in estimating whether the vessel can be repaired for one half, is not the valuation in the policy, but her value at the place where the accident happened. *Fontaine v. Phoenix Insurance Company*, 11 J. R. 293.

300. The insured, in case of a technical loss of ship, by sea damage, cannot abandon, unless she has been injured, at least, to the amount of one half of her value after deducting one third new for old. *Smith v. Bell*, 2 C. C. E. 153. *Contra*, *Dupuy v. United Insurance Company*, 3 J. C. 182.

301. If injuries to a vessel previous to her sailing on the voyage insured, are not such as to render her unseaworthy, no deduction is, on that account, to be made from the costs of repairs, in determining whether they exceed one half her value. *Depeyster v. Columbian Insurance Company*, 2 C. R. 85.

(d) *Other causes of abandonment.*

302. Insurance from *New-York* to *Bordeaux*. The policy contained the usual printed clause: "to be free from any loss which may arise in consequence of a seizure or detention for or on account of any prohibited or illicit trade;" and also the following written clause: "warranted not to abandon, if turned away, nor if captured, until condemned." On her voyage, the vessel was captured and carried into *England*,

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but afterwards released, and proceeded on her voyage to *Bordeaux*, where she was seized and detained, on account of her having come directly from *England*, and ordered to leave the territory of *France*; *held*, that the insured could not abandon and recover for a total loss, but was entitled only to recover for a partial loss for expenses and average, to be computed from the capture, until the arrival at *Bordeaux*, where the risk terminated. *Speyer v. New-York Insurance Company*, 3 J. R. 88.

303. Insurance on freight. The vessel receives a slight injury, and the cargo is taken out much deteriorated; the vessel being still in safety, the insured abandons, but the abandonment is not expressly accepted, and the vessel is repaired at a small expense: as the vessel was in safety at the time of abandonment, this was not a case for abandonment, and the insured ought to have insisted on carrying the cargo to the place of its destination, so as to entitle himself to full freight; neither is the insurer to be deemed to have accepted the abandonment on the freight, because he superintended the unloading of the cargo, which was necessary for the repairs of the ship, as he was liable for those repairs. *Griswold v. New-York Insurance Company*, 1 J. R. 205. S. C. 3 J. R. 321.

304. The insured cannot abandon *quia timet*, in cases in which the danger is remote or contingent. *Craig v. United Insurance Company*, 6 J. R. 226. S. P. *Corp v. United Insurance Company*, 8 J. R. 277.

305. A fear of capture on the voyage is not a ground for abandonment. **Craig* [*71] *v. United Insurance Company*, 6 J. R. 226. See *Salts v. United Insurance Company*, 15 J. R. 523.

306. A law of the country to which the vessel was bound, subjecting vessels which arrived there under certain circumstances, to confiscation, is not a just cause for breaking up the voyage, unless it appear, with moral certainty that the law applied to the present case, and that had the ship arrived it would have been enforced against her. *Ibid*.

307. It seems to be a cause for abandonment that the port of destination was shut, by being in possession of an enemy, or by interdiction of trade, or by blockade. *Ibid*.

308. Insurance on freight from *New-York* to *Bremen*, with liberty to touch at *Amsterdam*, &c. "warranted free from seizure in port." The ship, from necessity, put into *Tetzel*, where she was detained under the laws of the country; and while so detained, a violent storm arose, and for greater safety, and with the advice of the crew, the cables were cut and the ship run on shore, in consequence of which, she was so much injured as not to be worth repairing if got off, which was deemed impracticable. The cargo, having been discharged, was seized by order of government, and put into the king's stores; *held*, that to entitle the plaintiffs to freight, there must have been either a delivery of the cargo at *Bremen*, or a voluntary acceptance of it at the *Tetzel*, or *Amsterdam*, by the consignee or supercargo, or a refusal by him, upon an offer made to carry on the goods in another vessel; that if the master

or ship owner neglects to forward the goods by another vessel, when he has it in his power to do so, in consequence of which the freight is lost, the insurer is not liable. That it was incumbent on the insured to show, that the master was prevented by some other cause than the seizure of the goods, from carrying them to *Bremen*; otherwise, the omission to carry them was imputable to the seizure, as the apparent and proximate cause. *Bradhurst v. Columbian Insurance Company*, 9 J. R. 17.

309. And, where goods on board of the same vessel, and for the same voyage, were insured against the dangers of the sea only; and, in case of capture or detention, the risk to continue during and after such capture and detention; *held*, that there was no acceptance of the cargo at *Amsterdam* or the *Tetzel*, by the supercargo or agent of the shippers; and that the loss of the voyage was occasioned by the seizure, which prevented the cargo from being sent on to its port of destination in another vessel; the presumption being from the circumstances of the case, and no evidence to the contrary being shown by the plaintiff, that had it not been for the seizure, another vessel might have been procured to carry the cargo to *Bremen*. *Schiffelin v. New-York Insurance Company*, 9 J. R. 21.

(c) *How far an abandonment is necessary.*

310. The insured are not bound to abandon in case of an accident, but may wait the final event, and recover accordingly. *Earl v. Shaw*, 1 J. C. 313. S. P. *Regel v. Thurston*, 2 J. C. 248. S. P. *Steinbach v. [*72] Columbian Insurance Company*, 2 C. R. 129. S. P. *Smith v. Steinbach*, 2 C. C. E. 158.

311. It is sufficient, if the loss continue total to the time when the abandonment is made. *Ibid*.

312. An omission to abandon will not deprive the assured of his right to recover the actual loss he has sustained. *Seydman v. Marine Insurance Company*, 2 J. R. 138.

313. Where there is an absolute destruction of the subject matter, an abandonment is unnecessary in order to entitle the insured to a total loss. *Gordon v. Boone*, 2 J. R. 150.

314. If profits only be insured, an abandonment is necessary, when there has been no insurance on the cargo; and in such case it must be made early, that the insurer may elect either to pay only his loss, or to pay that and the price of the goods, at first cost, and charges; therefore, if the assured be by, and take his goods and sell them, he cannot afterwards call on the underwriter for any loss on the profits. *Tom v. Smith*, 3 C. R. 245.

315. The property insured was captured, and during the pendency of the proceedings, the captors agreed with the consignees to deliver them the cargo, on their giving a bond to the amount of the appraised value of the property: the property was appraised at a greater amount than the sum insured, and was carried to the port of destination, and sold by the consignees for an advance beyond the amount at which it was appraised: it was finally condemned, on appeal in the last resort; *held*,

that the insured was not bound to abandon, but might recover the amount paid on the bond, or as much as was covered by the policy, as a partial loss: the *spes recuperandi*, in such case, not being a subject for abandonment, as its value cannot be computed by a jury, and there being, after a condemnation by the highest tribunal, no *spes recuperandi*, of which a Court can take notice. *Gracie v. New-York Insurance Company*, 8 J. R. 237.

(f) *When and how an abandonment is to be made.*

316. After the voyage is completed, and knowledge by the insured of that fact, he cannot abandon. *Parage v. Dale*, 3 J. C. 156.

317. An abandonment should be unconditional, explicit, and on sufficient grounds, and the accident occasioning it should be described with certainty. *Suydam v. Marine Insurance Company*, 1 J. R. 181.

318. The insured is bound by the cause which he assigns, and if insufficient, he cannot avail himself of a subsequent accident, without making a new abandonment. *Ibid.*

319. If he assign a wrong cause for abandonment, although he cannot recover for a total loss, he may recover for the loss which he has actually sustained. *Suydam v. Marine Insurance Company*, 2 J. R. 138.

320. Whether an abandonment was accepted or not, is a question of fact for the jury to determine. *Bell v. Smith*, 2 J. R. 98.

321. Where the act incorporating an insurance company provides that no losses shall be settled or paid without the approbation of at least four of the directors, with the president, or assistants, or a plurality [*73] of them, the acceptance of an abandonment by the president and assistants alone will not be binding on the company. *Beatty v. Marine Insurance Company*, 2 J. R. 109.

322. The act of abandonment is valid and complete, so as to fix the technical total loss, without exhibiting, at the time of making it, the preliminary proofs. *Barker v. Phoenix Insurance Company*, 8 J. R. 307.

323. By the clause in the policy, "Warranted not to abandon, if detained or captured, until six months after notice," &c., the right to abandon is only suspended, and an abandonment at the expiration of the time being duly made, it relates back, and takes effect from the time of the loss. *Clarkson v. Phoenix Insurance Company*, 9 J. R. 1.

324. Where a policy contained a clause warranting not to abandon, in case of capture or detention, until six months after notice thereof to the insurers; and the vessel was condemned in less than a month after her capture; *held*, that the insured had a right to abandon immediately after condemnation; the warranty being confined to the cases of capture or detention only. *Ogden v. Columbian Insurance Company*, 10 J. R. 273.

325. Where different sorts of goods are specified, and separately valued in the same policy, the insured may abandon any one sort or article, in case of loss, and retain the rest, in the same manner as if the different articles

had been insured by different policies. *Deidericks v. Commercial Insurance Company*, 10 J. R. 234.

(g) *What will be a waiver of a previous abandonment.*

326. If the assured, after an abandonment of the vessel, purchases her for his own account and benefit, it is a waiver of the abandonment, and he is entitled to recover for a partial loss only. *Abbott v. Sebor*, 3 J. C. 39. *S. P. Saidler v. Church*, *cit. id.* *S. P.* And although the assured gave due notice of the time and place of sale to the insurer. *Ogden v. Fire Insurance Company*, 10 J. R. 177. *S. C.* in error, 12 J. R. 25.

327. If the property abandoned afterwards arrives in safety, and is tendered to the insurer, who refuses to accept it, a sale by the insured, for the benefit of the insurer, is not a waiver. *Livingston v. Hastie*, 3 J. C. 293.

328. A vessel put into a port in distress, where she was condemned as not worth repairing, was sold under the order of a Court of Admiralty, for the benefit of all concerned, and was purchased by the supercargo, on account of the assured; before notice of the purchase the assured abandoned, but the insurer refused to accept the abandonment; the vessel was afterwards brought to her port of destination, and sold at auction to a stranger, without any offer being made to deliver the vessel to the underwriter, or his being consulted as to the propriety of the sale: this was not a waiver; the assured not having appropriated the vessel to his own use, or attempted to derive any benefit from the purchase. *Abbott v. Broome*, 1 C. R. 292.

329. If, after abandonment to the insurers on vessel and freight respectively, the insured compromises with the insurer on vessel, receives *part of the amount [*74] of the loss, and becomes substituted in all the insurer's rights to the property, it is not a waiver of the abandonment of the freight. *Davy v. Hallett*, 3 C. R. 16.

330. After an abandonment, which is not accepted by the insurer, the insured remains the *quasi agent* or trustee of the insurer, and must do what he thinks most for the interest of the concerned; and if he acts with fidelity, and sells the vessel and property insured at public auction, in the usual manner, without a view to his own benefit, it is no waiver of the abandonment, nor will it prejudice his claim against the insurer for a total loss. *Walden v. Phoenix Insurance Company*, 5 J. R. 310.

331. After a waiver of an abandonment, the insured can only recover an average loss. *Abbott v. Sebor*, 3 J. C. 39.

(h) *Effect of an abandonment.*

332. In the *interim* between a loss, which gives a right to abandon, and the time when the insured elects to make an abandonment, the insured is bound to take all proper measures to recover and preserve the property insured, and if guilty of fraud or misconduct, the insurer will be discharged. *Rogel v. Thurston*, 2 J. C. 248.

333. In case of capture, if the insured abandons, and receives the amount of the loss, and after condemnation, the property is purchased by him or his agent, the purchase will enure to the benefit of the insurer, if such be his election; and if the property thus purchased be vested in other articles by the agent of the assured, which are transmitted by him to his principal, who sells them, *trover* lies by the insurer; for by his affirmance of the acts of the agent he obtains an absolute property in the goods, and the subsequent sale by the assured amounts to a conversion. *United Insurance Company v. Robinson*, 2 C. R. 280. S. C. affirmed in error, 1 J. R. 592.

334. The acceptance of an abandonment relates back to the time when the accident occasioning the loss happened, and constitutes the insurer owner of the property from that period. *United Insurance Company v. Scott*, 1 J. R. 106.

335. Underwriters on the same policy, by accepting an abandonment, and appointing a common agent to take care of the property, do not, thereby constitute themselves partners. *Ibid.*

336. A vessel insured was captured and condemned, and an offer to abandon made, which the insurer refused; after condemnation, the master made a compromise with the captors, and received back the vessel; *held*, that the total loss having been fixed by the abandonment, it was not in the power of the master, by any act of his, to change the total into a partial loss, without the subsequent assent of the assured; and that the purchase of the vessel by the master was for the benefit of the insurer, if he chose to take it, and, if he did not, still, that his refusal did not affect the abandonment. *Jumel v. Marine Insurance Company*, 7 J. R. 412.

337. And that, besides the total loss, the assured were entitled to recover for all the expenses incurred in endeavoring to [*75] recover the *property prior to the composition between the master and captors; which expenses were to be apportioned as general average, and borne by the vessel, freight, and cargo: but the insured on the vessel could only recover the proportion chargeable to the vessel. *Ibid.*

338. But, the master having raised money, by *bottomry*, for the repurchase of the vessel, which the assurers had refused to accept, they were held not to be answerable for the marine interest secured to be paid by the bottomry bond, nor for any charges or loss consequent to the purchase. *Ibid.*

339. To render the insurer liable for marine interest, it ought evidently and clearly to appear, that there were no other means of raising money than by a bottomry bond. *Reade v. Commercial Insurance Company*, 3 J. R. 352. S. P. *Jumel v. Marine Insurance Company*, 7 J. R. 412.

340. By an abandonment, the master becomes the agent of the insurers, and the plaintiff is not bound by his subsequent acts, unless they have adopted them. *Jumel v. Marine Insurance Company*, 7 J. R. 412.

341. And the master is answerable to the assurers alone, whose agent he becomes by the abandonment, for his misconduct, or loss. *Gardere v. Columbian Insurance Company*, 7 J. R. 514.

342. If an abandonment be made of a vessel, which is afterwards taken and sold under a bottomry bond, the insurer will be liable only for the difference between her value at the time of abandonment, and the sum at which she is valued in the policy. *Williams v. Smith*, 2 C. R. 13.

343. The plaintiffs were insurers on the cargo and freight, and the defendant on the ship; after capture, abandonment, and restoration of the ship and cargo, the net proceeds of the cargo were applied by the master and consignees to defray the expense of the necessary repairs of the ship, and also for arming her; *held*, that the insurers on the ship were liable for a proportion of the net proceeds of the cargo, applied to the necessary expenses of repairing the ship, but not for arming or increasing her complement of men; and the sum they were to pay, was to bear the same proportion to the whole sum so applied, as the sum so subscribed by them to the policy bears to the whole amount underwritten on the ship. *United Insurance Company v. Scott*, 1 J. R. 106.

344. The interdiction of commerce with the port of destination, by means of a blockade, is a peril within the policy, and the vessel is not bound to proceed to the nearest port to deliver her cargo, nor is the affreighter bound to receive his goods there; but if the vessel goes to another port for the purposes of delivering her cargo, it will, after abandonment, be considered as having been done for the benefit of the insurer. *Schmidt v. United Insurance Company*, 1 J. R. 249.

345. And the acceptance of the cargo at another port, by the consignee, under the circumstances of the case, and from necessity, is an act done for the benefit of all concerned, and does not prevent the insured from recovering for a total loss on the abandonment. *Ibid.*

346. Where freight is insured, and the vessel meets with an injury during the voyage, the insured cannot recover from the insurer, unless *he has entitled him- [*76]

self to receive freight from the shipper, by offering to carry on the goods. *Herbst v. Hallett*, 3 J. C. 93. S. P. *Griswold v. New-York Insurance Company*, 1 J. R. 205. S. C. 3 J. R. 321. S. P. *Bradhurst v. Columbian Insurance Company*, 9 J. R. 17.

347. Where vessel and freight are separately insured, an abandonment of the vessel to the insurer on the vessel, does not preclude the insured from recovering on the policy on freight. *Davy v. Hallett*, 3 C. R. 18. S. P. *Livingston v. Columbian Insurance Company*, 3 J. R. 49.

348. It is the better opinion, that the abandonment of the ship deprives the insurer on freight of his salvage, or the hope of any indemnity. Per *Kent*, Ch. J. *Livingston v. Columbian Insurance Company*, 3 J. R. 49.

349. On a valued policy, on freight, if, at the time of a total loss, there is an increase

right to freight, the insured is entitled to recover the whole amount of the valuation, which is to be adhered to, if the case be fair and honest between the parties. *Davy v. Hallett*, 3 C. R. 16.

350. If the insured abandons to the insurers on vessel and freight respectively, he may recover from the latter for the loss on the freight, deducting, *pro rata*, if any freight has been previously earned. *Ibid.*

351. On a total loss on a policy on freight, the insured is entitled to the whole amount of the freight, without any deductions for expenses, which the vessel would necessarily have been put to in case of her safe arrival. *Stevens v. Columbian Insurance Company*, 3 C. R. 43.

352. Where cargo and profits are separately insured, an abandonment of the cargo to the insurer on cargo, does not preclude the insured from recovering a total loss on the policy on profits. *Mumford v. Hallett*, 1 J. R. 433.

353. After an abandonment of the vessel, and acceptance, the insurer is entitled to whatever freight may be earned subsequent to the abandonment. *United Insurance Company v. Lenox*, 1 J. C. 377. S. C. affirmed in error, 2 J. C. 443. The freight prior to the loss, goes to the ship owner, or to his representative, the insurer on freight. *Marine Insurance Company v. United Insurance Company*, 9 J. R. 186.

354. And he is chargeable with the subsequent wages of the crew, as owner, but not as insurer. *McBride v. Marine Insurance Company*, 7 J. R. 431.

355. If the insurer does not accept the abandonment, he can be liable only for a total loss, and the necessary expenses incurred in laboring for the safety and recovery of the subject insured; in which may be included the expenses of wharfage, and selling the ship. *Ibid.*

356. The insurer on the cargo has nothing to do with the freight, and the acceptance of the net proceeds of the cargo, by the insurers, after the abandonment, forms no ground for a claim of freight against them. *Marine Insurance Company v. United Insurance Company*, 9 J. R. 186.

357. If the vessel is compelled, by disasters, to put into an intermediate port, and the voyage is necessarily broken up, and the owner of the goods receives them there, a *pro rata* freight is earned, and the insured on freight can only recover from the insurer a portion of *the amount subscribed, equal to the proportion of the voyage which remained to be performed. *Williams v. Smith*, 2 C. R. 13.

358. So, if the master of the vessel be also owner of the cargo, and he takes upon himself the disposal of the goods, he will be considered as acting in his capacity of owner, and thereby exonerating the insurer on freight from indemnifying him for such proportion of the voyage as may have been performed. *Ibid.*

(i) *Ordering and disposal of the effects abandoned.*

359. After an abandonment, the consignee of the goods insured becomes the agent of the

insurer; and his acts, if done in good faith, are at the risk, and for the benefit of the insurer. *Gardiner v. Smith*, 1 J. C. 141.

360. The insured may recover above the sum insured, for the expenses of labor and travel for the defence and recovery of the property insured; and where expenses are incurred for the recovery of the ship, the insured may recover the whole amount against the insurer on the ship, though the freight and cargo should be incidentally benefited, and ought to contribute in proportion; leaving the insurer on the ship to recover, if he can, of the owners or insurers of freight and cargo, for their contributory shares. *Watson v. Marine Insurance Company*, 7 J. R. 57. See 7 J. R. 412.

361. Where the vessel was captured and condemned, the insured was held entitled to recover beyond the amount of the total loss, for the expenses of the captain, in endeavoring to obtain the release and restoration of the ship, which included wages of the captain, from the time he left the ship until his arrival home, including his passage money, together with commissions and interest; but the insurer on the ship is not liable for any expense specifically and exclusively for the benefit of the cargo, nor for any sum, *per diem*, agreed by the owner to be allowed the captain while in port. *Ibid.*

362. If, after capture and abandonment, the insured appoints an agent for the management of the property, who compromises with the captors, the insurer is still liable for a total loss, without making any deduction for what has been recovered, as long as it remains in the hands of the agent, or other third person, to whom the insurer must look. *Miller v. De Peyster*, 2 C. R. 301.

363. Under the permission granted by the policy, to labor, &c., the insurer is liable for expenses incurred in attempting to recover the property, in addition to the payment of a total loss. *Jumel v. Marine Insurance Company*, 7 J. R. 412. S. P. 7 J. R. 57.

364. Where a policy contained a warranty of neutral property, and a clause making it lawful and necessary for the assured, his factors, &c. to sue for, labor and travel, in and about the defence, safeguard, and recovery of the property, &c.; held, that in case of capture, the assured, or their agents, were not bound to put in a claim or appeal; and though the property was condemned, because no claim was interposed, yet the assured were entitled to recover; for the assured has a right to abandon immediately on advice of the capture; and after an abandonment rightfully made, the master becomes the agent or servant *of the insurers, and is answerable [*78] to them for his misconduct or neglect. *Gardere v. Columbian Insurance Company*, 7 J. R. 514.

XII. *Preliminary proofs.*

365. The clause in the New-York policies, that the loss is to be paid in 30 days after proof of interest and loss, is merely to furnish reasonable information to the insurer, and is liberally construed to require only the best evi

dence of the fact in the possession of the party at the time. *Barker v. Phoenix Insurance Company*, 8 J. R. 307. *S. P. Lawrence v. Ocean Insurance Company*, 11 J. R. 241.

366. Proof, in a strictly legal and technical sense, or the oath of the party or witnesses, is not requisite. *Lenox v. United Insurance Company*, 3 J. C. 224.

367. Where a loss is to be paid in thirty days after proof thereof, the protest of the master, stating the loss, and the bill of lading and invoice, are sufficient preliminary proofs. *Ibid.*

368. And under a policy so worded, it is unnecessary to produce any proof of interest; the protest alone is sufficient. *Talcot v. Marine Insurance Company*, 2 J. R. 130.

369. If it be agreed in the policy, that "if the vessel, upon a regular survey, should be declared unseaworthy, or incapable of prosecuting her voyage, by reason of her being unsound or rotten," the insurer should be exonerated; and during the voyage, the vessel is surveyed and condemned; the survey is a necessary part of the preliminary proof, and must be exhibited, or some account given of its non-production, before the insured can bring an action. *Haff v. Marine Insurance Company*, 4 J. R. 132.

370. The protest, invoice, and original bills of parcels of the goods mentioned in the invoice; a survey of the goods by which it appeared that they were damaged by sea water, and an authenticated account of the sale of the goods, at auction, were considered sufficient proof of interest and loss. *Johnston v. Columbian Insurance Company*, 7 J. R. 315.

371. It is not necessary that the preliminary proofs should be exhibited at the time of making the abandonment. *Barker v. Phoenix Insurance Company*, 8 J. R. 307.

372. If at the time of exhibiting the preliminary proofs, the insurer does not object to their sufficiency, but refuses to pay the loss on some other specific ground, it is an admission of their sufficiency. *Vos v. Robinson*, 9 J. R. 192.

373. A copy of a letter from the master of a ship to the correspondents of his owner, informing them of the loss, transmitted by the correspondents to the owner, was held sufficient proof of the fact of loss; that being the best evidence which the party possessed. *Lawrence v. Ocean Insurance Company*, 11 J. R. 241.

[*79] *XIII. Adjustment of losses.

374. An adjustment signed by the insurer, does not conclude him, if he can show that it was made on the misrepresentation of the insured; and whether the misrepresentation proceeded from mistake or design, is immaterial. *Faugier v. Hallett*, 2 J. C. 233.

375. An adjustment made in a foreign country, according to the laws of that country, is not conclusive upon parties who have entered into the contract here, who are governed only by the law of this state. *Lenox v. United Insurance Company*, 3 J. C. 178.

376. Where a general average is fairly set-

tled in a foreign port, and the insured is obliged to pay his proportion of it there, he may recover the amount so paid by him, from the insurer, though such general average may have been settled differently abroad from what it would have been in the home port. *Strong v. Firemen Insurance Company*, 11 J. R. 323.

377. The rule of adjustment, in case of general average, is, to estimate the goods lost, as well as those saved, at the price they would have fetched at the port of discharge, on the ship's arrival there, freight being deducted. *Ibid.*

378. It is the duty of the master to cause an adjustment to be made upon his arrival at the port of destination; and he has a lien upon the cargo to enforce the payment of the contribution. Per *Van Ness, J.* *Ibid.*

379. An adjustment cannot be opened, except on the ground of fraud or mistake, from facts not known; but, where all the facts have been disclosed, it is conclusive. *Dow v. Smith*, 1 C. R. 32.

380. An adjustment made by the agent of the insurer, does not bind him so far but that he may show it to be erroneous. *Bordes v. Hallett*, 1 C. R. 444.

381. If the goods insured be valued at so much per pound in the policy, their weight must be calculated according to the standard of the place where the contract was made. *Gracie v. Bowne*, 2 C. R. 30.

382. The valuation in a policy is conclusive on the insurers, if there is no fraud or imposition. *Kane v. Commercial Insurance Company*, 8 J. R. 229.

383. The premium may be resorted to as a guide to discover the amount intended to be insured. *Post and others v. Phoenix Insurance Company*, 10 J. R. 79.

384. In an open policy on cargo, the invoice price of the goods is the value which, upon a total loss, the insured is entitled to recover. *Gahn v. Broome*, 1 J. C. 120.

385. And that without any deduction for the drawback allowed on exportation. *Ibid.* *S. P. Minturn v. Columbian Insurance Company*, 10 J. R. 75.

386. By the terms, "invoice price of the goods," is to be understood the prime cost. *Le Roy v. United Insurance Company*, 7 J. R. 343.

*387. It seems, that in estimating a [*80] total loss on an open policy of insurance, the value of the goods at the outset or commencement of the risk, with the usual charges, is what the insurer ought to pay; and that the prime cost is, generally, the safest and best rule of ascertaining such value, especially where the goods are purchased for exportation. *Ibid.*

388. A total loss, and also an average loss, are not both recoverable under the same policy. *Schmidt v. United Insurance Company*, 1 J. R. 249.

389. The insured, in making up an account of loss on an open policy, cannot charge commissions on the purchase of goods by himself. *Anonymous*, 1 J. R. 312.

390. A vessel was insured from New-York

to *Bordeaux*, and consigned, with a part of the cargo belonging to the owner, to a person at B., on whom the owner had drawn bills to the full amount of the goods and freight; and the master applied to the consignee for money to make the necessary repairs, to enable the vessel to return to *New-York*, and the consignee advanced the money, and took a bottomry bond for the amount; *held*, that, as it did not appear that there were no other means of raising money, the insurers were not bound to pay the bottomry bond, but were liable only for the repairs. *Reade v. Commercial Insurance Company*, 3 J. R. 352.

391. In calculating a loss on an open policy, the premium of insurance is to be added. *Ogden v. Columbian Insurance Company*, 10 J. R. 273.

392. If the insurer refuses to accept an abandonment, and the insured sells the property, the money produced by the sale must, in the case of a total loss, be deducted from the amount for which the insurer is liable. *Church v. Bedient*, and *Hallett v. Peyton*, 1 C. C. E. 21. 28.

393. In estimating the amount of loss, in case of repairs, the insurer is entitled to a deduction of one third, new for old, without any distinction as to the age of the vessel, or whether she was new, and on her first voyage or not. *Dunham v. Commercial Insurance Company*, 11 J. R. 315.

394. The rule by which to calculate a partial loss on goods, arising from sea damage, is the difference between the gross proceeds of the sound and damaged; that is, a proportion of the prime cost of the damaged goods, corresponding to the proportion of the diminution of the gross proceeds thereof. *Lawrence v. New-York Insurance Company*, 3 J. C. 217.

395. The fluctuation of the market, freight, or duties and port charges, are not to be included. *Ibid*.

396. In an open policy on vessel, to ascertain her value, charges are only to be allowed for such articles as add to her permanent value, or as are necessary, to prepare her for the voyage insured, as provisions, &c., together with a month's pay advanced to captain and crew. *Kemble v. Browne*, 1 C. R. 75.

397. The two per cent. deducted in cases of total loss, is considered as a part of the premium, and is not therefore to be added to the valuation. *Ibid*.

*398. Where the insurer is liable [*81] beyond the amount of a total loss, for expenses which have been paid by the insured, the latter will be allowed interest from the time of making the advance. *Vandenhewel v. United Insurance Company*, 1 J. R. 408.

399. The jury have a discretion to allow interest on the amount of a partial loss, if, under all circumstances, they think it proper. *Anonymous*, 1 J. R. 315.

400. A partial loss arising from a compulsory sale of the cargo, in a foreign port, is to be estimated by deducting the net proceeds of the sale from the invoice amount or cost of the

goods. *Suydam v. Marine Insurance Company*, 2 J. R. 138.

Further, as to adjustment of average, *see ante*, X. 263—267.

XIV. Return of premium.

401. Where the policy never attaches, as if the vessel never sails on the voyage insured, or if it becomes void by a failure of the warranty, there being no actual fraud, the insured is entitled to a return of the premium. *Dela-vigne v. United Insurance Company*, 1 J. C. 310. *Duguet v. Rhinelander*, 1 J. C. 360. *Murray v. United Insurance Company*, 2 J. C. 168. *Jackson v. New-York Insurance Company*, 2 J. C. 191. *Robertson v. United Insurance Company*, 2 J. C. 250. *Forbes v. Church*, 3 J. C. 159. *Graves v. Marine Insurance Company*, 2 C. R. 339. *Murray v. Columbian Insurance Company*, 4 J. R. 443. *Richards v. Marine Insurance Company*, 3 J. R. 307. *Elbers v. United Insurance Company*, 16 J. R. 128.

402. If property be insured to a larger amount than the real value, the overplus premium is recoverable by the assured. *Holmes v. United Insurance Company*, 2 J. C. 329.

403. After the risk has been run on a wager policy, the insured is not entitled to a return of premium. *Juhel v. Church*, 2 J. C. 333.

404. Goods were insured from *Philadelphia* to *Hamburg*, by a policy dated the 29th of *May*, 1798; the insurer to return 15 per cent., part of the premium, in case an insurance had been effected in *Europe*. The policy likewise contained the following clause: "provided that if the assured shall have made any other assurance upon the premises prior in date to this policy, then the insurers shall be answerable only for so much as the amount of such prior assurance may be deficient, &c., and shall return the premium on so much of the sum assured as they shall, by such prior assurance, be exonerated from; and in case of any insurance upon the premises, subsequent in date to this policy, the insurer shall be answerable for the full sum subscribed, &c., and be entitled to retain the premium in the same manner as if no such subsequent insurance had been made." Insurance was also effected on the same goods at *Hamburg*, on the 19th of *June*, 1798; *held*, that the assured was not entitled to a return of premium on account of the insurance at *Hamburg*. *New-York Insurance Company v. Thomas*, 3 J. C. 1.

405. Insurance on a vessel "at and from *Malta* to *St. Petersburg*, *with liberty to touch at *Cagliari*, *Algiers*, *Tangiers*, and *Wingo Sound*," &c., for a premium of 40 per cent., "to return fifteen per cent. if the vessel passed the Gut of *Gibraltar* on or before the 20th of *June*, and the risk ends without loss, or 15 per cent. if the risk ends in safety at *Gottenburgh*." The vessel sailed on the voyage insured, and passed the Gut of *Gibraltar*, on the 9th of *July*, 1812, and on the 17th of *July*, on account of adverse winds, was obliged to come to an anchor in the *Downs* for safety; and there hearing of the

advance of the French arms, and state of the ports in the north, the master concluded to abandon the prosecution of the voyage, and go to London, where the vessel and cargo were seized, on hearing of the war between the United States and Great Britain; held, that the risk was divisible, and that the underwriters being discharged, by the act of the insured, from all risk from *Gottenburgh* to *St. Petersburg*, were bound to return the 15 per cent., the stipulated premium for such risk. *Ogden v. New-York Firemen Insurance Company*, 12 J. R. 114.

406. Where by a memorandum added to the policy after the insurance was effected, and after a deviation, by which the insurer agreed for an additional premium, that the deviation should not prejudice the insurance, in which memorandum the deviation was not stated according to the fact; held, that as the memorandum was an agreement by the insurer, and not a warranty by the insured, and as the risk had been run, the insured was not entitled to a return of the additional premium. *Crowningshield v. New-York Insurance Company*, 3 J. C. 142.

407. Where the insured supposes, at the time the insurance is effected, that he has an interest in the subject matter, which turns out, however, to be a mistake, he is entitled to a return of premium, although, if he had been interested, the risk would have attached. *Steinback v. Rhinelander*, 3 J. C. 269.

408. If the risk have attached, but for a moment, there can be no return of premium. *Hendricks v. Commercial Insurance Company*, 8 J. R. 1.

409. In an action brought by insurers against the endorser of a promissory note, given to secure the payment of the premium on a policy of insurance, the insurers, before the commencement of the suit, having become liable to pay the insured, who was the maker of the note, a return of premium on the same policy; held, that the defendant was entitled to have the amount of such return of premium deducted from the amount of the note, notwithstanding the maker was, at the same time, indebted to the insurers for other notes given for premiums on other policies of insurance, and had become insolvent. *Phoenix Insurance Company v. Fiquet*, 7 J. R. 383.

410. The action for a return of premium must be brought against the underwriter, not the broker who transacted the business. *Boune v. Shaw*, 1 C. R. 489.

411. Where the plaintiff declares for a total loss on the policy, and adds the usual money counts, he is entitled to judgment for a return of premium, if the Court is of opinion, that he is not entitled to recover for a total loss, on the ground that the policy never attached; provided, the defendants have never compelled him to elect whether he should proceed for a return of premium or not. *Waddington v. United Insurance Company*, 17 J. R. 23.

412. And the premium not having been paid into Court, the plaintiff, in such case, will be entitled to interest thereon, from the com-

mencement of the suit, or from the time when the defendant ought to have paid the premium into Court. *Ibid.*

413. The allowance of interest in such cases, rests in the sound discretion of the Court; but costs are not allowed on the claim for a total loss under the policy. *Ibid.*

XV. Prior insurance.

414. Where a vessel was valued at 2,000 dollars, and insured for that sum, and there was a prior insurance for 3,000 dollars, the insured was allowed to prove that the vessel was worth enough to cover both policies. *Kenny v. Clarkson*, 1 J. R. 365.

415. Insurance was made to the amount of 15,000 dollars, on goat skins, valued at 50 cents; and the policy contained the usual clause as to prior insurance. A prior insurance had been made by an open policy on the cargo, on board of the same ship, for the same plaintiffs, to the amount of 22,000 dollars, and the prime cost of the skins was 22 cents each. Estimating the skins at 50 cents each, and the rest of the cargo at the invoice prices, and deducting the prime cost of the skins, the amount was sufficient for both policies; but the cargo, exclusive of the skins, was not sufficient to absorb the prior insurance. In an action on the second policy, held, that the whole of the goat skins were to be valued at 50 cents; and after deducting from this amount the difference between the invoice price of the cargo, charges, &c., exclusive of the goat skins, and the 22,000 dollars, or the amount of the prior insurance, the residue would be the interest covered by the second policy; that it was immaterial whether the first policy was open or valued, if the skins, at 50 cents each, would furnish interest sufficient for both policies. *Kane v. Commercial Insurance Company*, 8 J. R. 229.

416. Goods were insured from *New-York* to *Tenningen*, and the insurance was expressed to be on coffee, valued at 25 cents per pound, and there was the usual clause as to prior insurance. A prior open policy of insurance had been effected in *London*, on the cargo of the same ship, generally, consisting of coffee, pepper, sugar, and wood; the vessel was lost, with her cargo, a small part only being saved. In an action on the second policy, held, that part of the cargo being pepper, &c., not insured by the second policy, estimated at the first cost, without deducting the drawback, was to be deducted from the sum insured on the first policy, including the premium; and the residue was to be applied to the coffee, at its prime cost and charges, including the drawback; and the coffee remaining uncovered by the first policy, estimated at 25 cents per pound, and adding the difference between the first cost and the valuation, on the quantity covered by the first policy, together with the premium of insurance on the second policy, constituted the amount of interest to be covered by the second policy. *Mistura v. Columbian Insurance Company*, 10 J. R. 75.

417. Where a policy of insurance was ef-

fect on goods, from *Bayonne to New-York*, to the amount of 7,000 dollars, and afterwards another policy was effected on the same goods, with different underwriters, "at and from *Bayonne* to the first port the vessel might make in the *United States*," valued at 20,000 dollars, and the vessel arrived safe at *New-York*; held, that the risk on the second policy was not divisible, and that the insured were not entitled to a return of premium from the subsequent underwriters, on the amount covered by the prior insurance. *Columbian Insurance Company v. Lynch*, 11 J. R. 233.

418. To constitute a double insurance, it seems, that the two insurances must be not only for the benefit of the same person, and on the same subject, but for the same entire risk. *Ibid.*

XVI. Re-assurance.

419. The insurer is not bound to abandon, or give notice to the re-assurer, when the first insured abandons to him. *Hastie v. De Peyster*, 3 C. R. 190.

420. The re-insurer has no connection with the first insurance, and is bound to indemnify his own insured, when the latter can show that he has been damaged. *Ibid.*

421. The re-insurer may avail himself of every defence against his insured which the latter might have urged against the first insured. *Ibid.*

422. Hence it is incumbent for the re-assured to know that the claim against him is valid; and if, having given notice to the re-assurer of a legal demand having been made on him, the re-assurer does not prevent the suit, by payment, he will be liable for the costs in the former action, and also for interest on all the sums advanced by the re-assured. *Ibid.*

XVII. Action on the policy.

423. In actions upon policies of insurance, the Court will make an order for the assured to produce to the insurers, upon affidavit, all papers or letters, or true copies thereof, relative to the matters in issue between the parties. *Laurence v. Ocean Insurance Company*, 11 J. R. 245. n.

424. And upon such papers or letters being produced by the insurers at the trial, the insured are entitled to have the whole read, it being analogous to an answer in Chancery, when given in evidence in a Court of law. *S. C. Ibid.* 241.

425. Where two persons are joint owners of a ship or cargo, and one of them insures the whole, he can only recover, in case of loss, according to his proportion of interest in the subject. *Murray v. Columbian Insurance Company*, 11 J. R. 302.

*426. But under a general averment of interest in the entire thing insured, he may recover according to the quantum of interest he proves at the trial. *Ibid.*

XVIII. Insurance against fire.

427. Where there is an absolute loss of any article distinctly valued in the policy, the loss

is to be estimated according to the valuation, it being in the nature of liquidated damages. *Harris v. Eagle Fire Company*, 5 J. R. 368.

428. So where, *inter alia*, 380 kegs of manufactured tobacco, stated on the back of the policy as worth 9,600 dollars, were insured, and 157 kegs were destroyed by fire; held, that the insured was entitled to recover for the loss of the 157 kegs, according to the valuation of the whole number of kegs, and not the cost of the tobacco at the manufactory, or the prime cost. *Ibid.*

INSURANCE of lottery tickets. See LOTTERIES, 3, 4.

INTEREST.

I. On what debts, and when interest is recoverable.

II. Interest on a verdict or judgment.

III. Usury; what transactions are usurious, and how far usury affects the security.

IV. Action qui tam on the statute against usury.

I. On what debts, and when interest is recoverable.

1. Interest is allowable on money advanced. *Liotard v. Graves*, 3 C. R. 226.

2. On an account current, interest is allowable only on such items in it, as are for moneys advanced, except the usage of the trade in which the account arose has provided otherwise. *Ibid.*

3. Interest may be recovered in an action for money had and received. *Pease v. Barber*, 3 C. R. 266.

4. But whether it shall be recovered or not, must depend upon the justice and equity of the case. *Ibid.*

5. Interest is allowable in an action of covenant for a certain sum due for rent, and payable in money. *Clark v. Barlow*, 4 J. R. 183.

6. In trover, interest may be allowed on the value of the chattels from the time of their conversion, by way of damages. *Wilson v. Conine*, 2 J. R. 280.

7. In trespass, for taking the goods of the plaintiff, as well as in trover, the jury, in their discretion, may allow, [*86] besides the value of the goods at the time of the trespass, interest on the amount, from that time to the judgment, by way of damages. *Beals v. Guernsey*, 8 J. R. 446.

8. In an action on a recognizance of bail, the plaintiff is entitled to interest from the time that the bail became fixed, that is, eight days after *capias* returned. *Child v. Murray*, C. C. 59.

9. Interest is recoverable beyond the penalty of a bond, but the recovery depends on principles of law, and not on the discretion of the jury. *Smedes v. Hooghtaling*, 3 C. R. 48.

10. Interest is recoverable against a person intrusted with the collection of money, who retains and converts it to his own use, from

the time when the same ought to have been paid over. *The People v. Gasherie*, 9 J. R. 71.

11. Whether interest is recoverable, is a question of law, depending on the facts of the case. Per *Spencer, J. Liotard v. Graves*, 3 C. R. 234.

12. For goods sold and delivered, interest is not recoverable, unless there be evidence of an agreement to pay interest, until a liquidation of the account takes place. Per *Spencer, J. Ibid.*

13. If an account be transmitted by a creditor, and acquiesced in, or assented to by his debtor, it becomes thereby liquidated, and interest is allowable. Per *Spencer, J. Ibid.*

14. Interest is not recoverable on a bond, beyond the amount of the penalty. *The People v. Gaine*, 1 J. R. 343.

15. Interest is not recoverable for arrears of rent, payable in wheat. *Executors of Van Rensselaer v. Administrators of Platter*, 1 J. R. 276.

16. Interest is not recoverable for unliquidated damages, or on uncertain demands. *Anonymous*, 1 J. R. 315.

17. The jury have a discretion to allow interest on the amount of a partial loss on a policy of insurance, if, under all circumstances, they think it proper. *Ibid.*

18. Interest on rent arrear cannot be distrained for. *Lansing v. Rattoone*, 6 J. R. 43.

19. It cannot be recovered on an open running account, where there are no circumstances from which an agreement to allow interest can be inferred. *Newell v. Griswold*, 6 J. R. 45.

20. If a party accepts the principal of his debt, he cannot afterwards sue for the interest. *Tillotson v. Preston*, 3 J. R. 229.

21. It was covenanted between the lessor and lessee, that, at the expiration of the term, the buildings and improvements should be valued by a certain number of indifferent persons, to be chosen by the parties; at the expiration of the term, the lessee applied to the lessor to appoint appraisers, and, on his refusal to do so, the lessee had the buildings, &c. appraised; in an action by the lessee, on the covenant, he cannot recover interest on the appraisal, as it was *ex parte*, and inconclusive, and the damages remained unliquidated, to be ascertained by the jury. *Holliday v. Marshall*, 7 J. R. 211.

*22. Interest is to be calculated [*87] according to the law of the place where the contract was to be executed. *Smith v. Smith*, 2 J. R. 235.

23. Interest is chargeable, on a balance of accounts, only from the time that the party against whom the charge is made has notice of the deficiency on his part. *Kane v. Smith*, 12 J. R. 156.

24. A sheriff, after a rule served on him, (to pay over to the plaintiff money levied on execution,) is in default, and he is chargeable with interest from the time of the demand made of him. *Slingerland v. Stuart*, 13 J. R. 255.

25. In an action for the non-delivery of goods, the jury may give interest by way of damages. *Amory v. M'Gregor*, 15 J. R. 24. 38.

26. Interest is due on a balance of account from the time it is liquidated; and an account is considered as liquidated when rendered in the debtor, and no objection is made to it. *Walden v. Sherburne*, 15 J. R. 409.

INTEREST on a legacy. See LEGACY, II. See tit. CHANCERY, XXXIV. Interest.

II. Interest on a verdict or judgment.

27. In all actions founded on contracts carrying interest, where judgment is delayed by the making of a case, the plaintiff is entitled to interest on his verdict, until the time of taxing costs, and the same must be taxed together with the costs. *Vredenberg v. Hallett*, 1 J. C. 27.

28. But if the plaintiff obtaining a verdict has himself delayed the cause, he cannot have interest on the amount of it further than down to the time when it was rendered. *Williams v. Smith*, 2 C. R. 253.

29. In all cases where the defendant applies to set aside a verdict, and thereby delays the plaintiff, interest is awarded. *The People v. Gaine*, 1 J. R. 343.

30. Where damages have been assessed by a jury to the full amount of the penalty of a bond, and judgment has not been delayed by the defendant, no interest is allowed. *Ibid.*

31. Where a judgment has been obtained, and the issuing of execution has been delayed, if the plaintiff afterwards recover judgment against the bail, he is not entitled to interest on the original judgment, during the time he delayed to proceed against the bail. *Constable v. Colden*, 2 J. R. 480.

32. Where execution is issued in any action, (except in debt, for a penalty,) the plaintiff cannot levy the interest which has accrued since the judgment, but only the amount of the judgment. *Watson, v. Fuller*, 6 J. R. 283. (See tit. CHANCERY, XXXIV.)

III. Usury; what transactions are usurious, and how far usury affects the security.

33. A lends B. 687 dollars, to be repaid on a certain day, with interest, and B., in consideration of the loan and forbearance, purchases *of A. 16 shares of turn- [*88] pike stock, for the sum of 400 dollars, when, in truth, the real price of the shares was 250 dollars, and gives his bond for the 687 dollars, together with the 400 dollars for the stock: the sale of the stock being merely colorable, the transaction is usurious, and the bond void. *Rose v. Dickson*, 7 J. R. 196.

34. Whether, when a bond is given for the purchase money of lands, at which time the vendor, by his agreement, is to execute a deed to the vendee, and also promissory notes for the interest of the bond, at a higher rate than the legal interest of the place where the agreement is made, such notes are to be considered as usurious, or as constituting part of the price of the land? *Quære. Van Schaick v. Edwards*, 2 J. C. 355.

35. A contract usurious in its inception cannot be afterwards rendered valid; so, a note

given for a usurious consideration will be void in the hands of a *bona fide* endorsee without notice of the usury. *Wilkie v. Roosevelt*, 3 J. C. 206.

36. A note endorsed for the accommodation of the maker, and passed by him as security for a usurious loan, is a usurious contract in its inception, as the lender is, in fact, to be considered the first holder of the note. *Jones v. Hake*, 2 J. C. 60. *Wilkie v. Roosevelt*, 3 J. C. 66. 206.

37. An absolute deed of conveyance of real estate upon trust, to sell and pay certain debts, cannot be avoided on the ground that the debts to be paid are usurious. *Denn v. Dodds*, 1 J. C. 158.

38. A judgment in the hands of a *bona fide* assignee is, *if seems*, not affected by usury between the original parties. *Wardell v. Eden*, 2 J. C. 258. S. C. 1 J. R. 531. note.

39. A note given as collateral security for a judgment recovered, will not be affected by usury in the transaction upon which that judgment was obtained. *Stewart v. Eden*, 2 C. R. 150.

40. The contract and security are void only as between the original parties, or where the suit is upon the very instrument infected with usury. *Jackson v. Henry*, 10 J. R. 185.

41. And where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defence of usury cannot be set up against such innocent person. *Ibid.*

42. So, where a mortgage, containing a power of sale, has been given to secure a usurious debt, a vendee without notice under the power will not be affected by usury. *Ibid.*

43. The mortgagor, if he would avail himself of the objection of usury, should have taken advantage of it before the sale; afterwards, the purchaser has the better equity. *Ibid.*

44. Whether usury, or not, is a question of fact for the jury to decide. *Smith v. Brush*, 8 J. R. 84.

45. Where A. receives B.'s note, on giving B. his note at *ten* days, for the purpose of raising money on B.'s note; and pays B. *two and a half per cent.* commission, this is a usurious loan, within the meaning of the statute. *Dunkan v. Dey*, 13 J. R. 40. S. C. in error, 16 J. R. 367.

46. For it is a mere shift or contrivance to evade the statute. *Ibid.*

*47. Evidence of usage of trade to [*89] take a commission on such exchange of paper, is inadmissible, as usage cannot prevail where the transaction comes within the statute. *Ibid.* S. C. 16 J. R. 367.

48. *It seems*, that a person may lawfully receive a commission for becoming security for another. *Ibid.*

49. *It seems*, that the practice of banks in issuing *post notes* is not usurious. *Ibid.*

50. The plaintiffs, who were in the practice of receiving *produce* for the defendant, a country merchant, and freighting the same to the city of *New-York*, and accepting his drafts under an engagement that the produce was to be in their warehouse at or before the time the

drafts became payable, charged a *commission of two and a half per cent.* on all advances made by them to meet the payment of the drafts, where the defendants had no funds in their hands, and also, the *interest* from the time the different items of their account became due; *held*, that the *commissions* in this case were not usurious, or a cover for a usurious transaction; but a customary allowance for the trouble and inconvenience of transacting the business. *Trotter and others v. Curtis*, 19 J. R. 160.

51. A note was drawn payable to A. and B., which was held by C., who wished to sell the note to D., who refused to take it, unless it was endorsed by A. and B., and A. refused to endorse it, unless he received security, for his indemnification, which it was agreed to give, and the note was sold to D. at a discount of twenty per cent.; it being understood between B. and C. that part of the money raised by the sale of the note, should be lent to B. B. drew a note payable to C. or bearer, for the amount actually received by him from C., with an addition of twenty per cent. on the amount, and interest thereon from the date, which last mentioned note was deposited with A. as his security: in an action by A. against B. on this note, *held*, that it was usurious and void. *Yordan v. Hess*, 13 J. R. 492.

52. Where a mortgage is given as security on a usurious contract, with a power of sale, and the mortgagee, by virtue of the power, sells the land, pursuant to the *act concerning mortgages*, and becomes himself the purchaser, through an agent for that purpose, and in an action of ejectment brought by a purchaser of the equity of redemption, against the mortgagee, the defendant sets up a title so acquired by sale under the mortgage, the plaintiff may prove *usury* in the mortgage, and recover, notwithstanding the mortgage. *Jackson, ex dem. Sternberg, v. Dominick*, 14 J. R. 435.

53. The statute makes such sales a conclusive bar, only in favor of a *bona fide* purchaser, without notice; and the mortgagee, being a party to the usurious contract, is in no better situation, than if no foreclosure had taken place. *Ibid.*

54. Where a bill or note is valid between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an endorsee who has discounted it, at a higher rate than the legal interest, and he may recover the full amount of the note against the maker or acceptor. *Munn v. The Commission Company*, 15 J. R. 44.

55. But the holder of a note purchased at a discount greater than the [*90] legal rate of interest, can recover from his endorser no more than he has actually paid for the note. *Ibid.*

56. If the parties whose names are on a note, made to raise money, and discounted at a higher rate than the legal interest, could not, as between themselves, maintain an action on it when it became payable, if it had not been discounted, the transaction is usurious, and the note void. *Powell v. Waters*, 17 J. R. 176.

57. A bill or note drawn for the purpose of being discounted at a usurious rate of interest, and endorsed for the accommodation of the maker, is void in its original formation. *Munn v. The Commission Company*, 15 J. R. 44. *S. P. Bennet v. Smith*, 15 J. R. 355.

58. Discounting a note at *seven per cent.* is not usurious. *Manhattan Company v. Osgood*, 15 J. R. 162.

59. Where a note is given in renewal of a former note, and a *premium*, or interest above *seven per cent.*, is exacted for the renewal, the new note is usurious and void, although a separate note was given for the *premium*; but the old note is not thereby affected or destroyed. *Swartwout v. Payne*, 19 J. R. 294.

60. And where a note so made, in renewal of another note, on a usurious consideration, was passed by the defendant to the plaintiff, in part payment of the consideration, for the sale and conveyance of land; *held*, that the plaintiff, who had sued the *endorser* of the note, and failed to recover because of the usury, might maintain *assumpsit* for the amount upon the original contract, the note being deemed a nullity. *Ibid.*

61. A mere change of securities for the same usurious loan, to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. *Tuthill v. Davis*, 20 J. R. 285.

62. As where a new note, without any new consideration, is given to take up a note in the hands of the original party to the usurious contract, it is tainted by the original consideration of the first note. *Ibid.*

63. A note made payable to A. or bearer, but never delivered to A., but passed by the maker to H. as a security for a usurious loan, is usurious and illegal in its inception. *Marvin v. McCullum*, 20 J. R. 288.

IV. *Action qui tam on the statute of usury.*

(*Sees.* 10. c. 13. 1 N. L. R. 64.)

64. A borrower, who has paid more than the legal rate of interest, is not confined to the remedy given by the statute to prevent usury; but may bring an action of *assumpsit* for money had and received to his use, at common law, to recover the excess of interest; but to entitle him to maintain the action, he must show that he has paid or offered to pay all the principal lent with the lawful interest. *Wheaton v. Hibbard*, 20 J. R. 290.

*65. And where, in such action, [*91] the lender does not raise the objection at the trial, that the principal and legal interest have not been paid, but rests his defence on other and different grounds, the fact of payment will be intended from his silence; and he cannot afterwards make the objection on appeal or in error. *Ibid.*

66. In an action *qui tam*, by a common informer, under the second section of the act, the declaration must state that the party aggrieved neglected to sue within one year, in order to give the plaintiff a right of action. *Marrell v. Fuller*, 7 J. R. 402.

67. The general form of declaring mentioned in the act is given to the borrower only; but the common informer must set forth his cause of action specially, and state the usury. *S. C. 8 J. R. 218.*

See further, tit. CHANCERY, XXXIV.

INTRUSION.

To sustain an information for an intrusion on the lands of the people, it is necessary that the people should be in the actual seisin or possession of the subject intruded on. *The People v. Brown*, 1 C. R. 416.

JOINT DEBTORS AND JOINT AND SEVERAL LIABILITY.

1. Joint debtors must be sued jointly. *Robertson v. Smith*, 18 J. R. 459.

2. And if all of them are not sued, it must be pleaded in abatement. *Ibid.*

3. A joint and subsisting indebtedness in all the defendants must be shown. *Ibid.*

4. And in *assumpsit*, it is necessary to show a subsisting liability on the part of all the defendants; except in cases of infancy, death, or a discharge of one of them under the bankrupt or insolvent law. *Ibid.*

5. Where, in respect of any of the defendants, the right of action is gone or suspended, their joint liability being at an end, the other defendants may avail themselves of this suspension or discharge, whether it be produced by the act of the party, or by the operation of law, at the instance, and by the agency of the plaintiff. *Ibid.*

6. Thus, where the plaintiff brought an action of *assumpsit* against S. and S., as partners, under the firm of *S. and S. and Company*, and makers of a promissory note, and recovered a judgment which remained unsatisfied; and, afterwards, discovering that P. and V. were also partners under the firm at the time the note was given, he brought an action against the four, as makers of the same note; *held*, that the judgment recovered against the two defendants S. and S. on the note, was a bar to the subsequent suit against the four defendants for the same cause of action. *Ibid.*

7. B. and H., merchants in *New-York*, addressed a letter to M. and T., merchants in *Liverpool*, informing them of their being about to ship to them a cargo of flaxseed, and instructing them to make insurance, &c., and added, "the shipment is for our joint account; the proceeds, after deducting the insurance and other charges accruing thereon, you will place to the credit of each of us, individually, one half." M. and T., in their answer to this letter, acknowledged that the net proceeds were to be placed to the credit of B. and H. respect-

tively, in equal proportions. B. and H., after the shipment, individually drew separate bills for 500 pounds sterling, each, on M. and T., which were accepted and paid by them. M. and T. afterwards brought an action against B. and H., to recover the balance of an account accruing on this transaction, in which they charged the amount of the two bills of exchange paid by them to the joint account of B. and H.; *held*, that the defendants were not jointly answerable for the amount paid on these bills, they being accepted and paid, either on the personal and individual credit of the drawers, or on the credit of the fund to arise from the proceeds of the shipment; and if on the latter, it was on a divided, and not a joint fund, though they were jointly responsible for all disbursements and expenses of M. and T. in the management of property, until the net proceeds came into their hands. *Martin v. Buck*, 11 J. R. 271.

8. Execution may be issued against all the defendants against whom judgment has been recovered, although some of them were never arrested on mesue process. *Ballou v. Hulbert*, 1 J. R. 62.

9. But it can only be executed on such as were served with process; and if the bodies of the others be taken in execution, the Court will order them to be discharged. *Ibid*.

10. In an action against heirs and devisees, taking as tenants in common, under the will of their testator, the judgment can affect the shares only of those taken under the *capias ad respondendum*, and which can alone be sold under the execution. *Jackson, ex dem. Potan, v. Hoag*, 6 J. R. 59.

11. To an action of debt, on a judgment, the defendants, who were not brought into Court in an action in which it was obtained, cannot plead *nul tiel record*; for it is regular to enter judgment against all the defendants. *Dando v. Tremper*, 2 J. R. 87.

12. In an action of debt, on the judgment, the defendant not brought into Court, cannot plead that he was not arrested in the former suit; for, the first judgment being regular, debt lies against him. *Bank of Columbia, v. Newcomb*, 6 J. R. 98.

13. As to what defence he may set up in such an action? *Quere*. Perhaps any, which he might, in his distinct individual capacity, have made in the original suit. *Ibid*.

[*93] *JUDGE AND JUSTICE.

1. It is no objection to a justice of the peace who tries an action on a penal statute, that he is an inhabitant of the town, to the overseers of the poor of which a moiety of the penalty, when recovered, is directed to be paid. *Corwein v. Hames*, 11 J. R. 76.

2. A judge cannot be excepted to or challenged for corruption; but must be punished by indictment or impeachment. *MDowell v. Van Deusen*, 12 J. R. 356.

JUDGMENT.

- I. *Lien of judgments and executions.*
- II. *Priority of judgments.*
- III. *Satisfaction of a judgment.*
- IV. *Vacating a judgment.*
- V. *Arrest of judgment.*

I. *Lien of judgments and executions.*

1. The act concerning judgments (Sess. 36. c. 50. 1 N. R. L. 500.) was intended to protect purchasers, and does not alter the law between the parties; and, as between them, the goods of the defendant are bound from the teste of the *fi. fa.* *Holchkiss v. M'Vickar*, 12 J. R. 403.

2. And if a third person takes away goods of the defendant after the teste of the *fi. fa.*, they may still be levied upon. *Ibid*.

3. Where the body of a defendant is taken in execution, the lien of the judgment upon his land is suspended; and if, during his imprisonment, a *fi. fa.* is issued on a junior judgment under which the land is sold, and he is then discharged from imprisonment under the act for the relief of debtors with respect to the imprisonment of their persons, and then the plaintiff in the prior judgment issues a *fi. fa.*, this does not give that judgment a priority of lien, or defeat the title acquired under the later judgment. *Jackson, ex dem. Spencer, v. Benedict*, 13 J. R. 533.

4. A judgment will attach on lands of which the judgment debtor becomes seised at any time after the judgment, unless his seisin was instantaneous, or departed from him *eo instanti* that he acquired it. Per *Spencer, J. Stow v. Tyt*, 15 J. R. 458. 464.

5. A judgment by agreement, of the parties, may be entered up for a debt due, and also, as security for future advances to the defendant; and the plaintiff may collect, by execution, not only the sum actually due at the time the judgment was entered, but the amount subsequently advanced to [*94] the defendant, provided the whole does not exceed the amount in the condition of the bond, on which the judgment is given. *Livingston v. M'Inlay*, 16 J. R. 165.

6. A term for years is not bound by the docketing of a judgment. *Vredenberg v. Morris*, 1 J. C. 223.

7. An execution does not bind the goods of a debtor until delivered to the sheriff. *Beals v. Guernsey*, 8 J. R. 446.

8. Where an execution has lain dormant in the hands of a sheriff for a year, without any actual levy, a sale of a specific chattel for a fair price, and without any fraudulent intent on the part of the purchaser, is not void. *Bliss v. Ball*, 9 J. R. 132.

9. A judgment does not, of itself, transfer the title of the lands bound by it, or destroy the seisin of the defendant. *Seligwick v. Holtenback*, 7 J. R. 376.

II. *Priority of judgments.*

10. Where judgments in favor of different plaintiffs against the same defendant are filed

and docketed on the same day, the plaintiff who first issues a *fi. fa.*, the execution of which is commenced by the sheriff's advertising the defendant's lands for sale, gains a preference, as to the lands, which cannot be defeated by a subsequent execution issued by another plaintiff. *Adams v. Dyer*, 8 J. R. 347. *S. P. Waterman v. Haskin*, 11 J. R. 228.

11. Where judgments in favor of A. and B., respectively, against C., were filed and docketed the same day, and A. issued a *feri facias* to the sheriff of *New-York*, and B. afterwards issued a *testatum feri facias* to the sheriff of W., under which the sheriff levied on the lands of C., and advertised the same for sale, and A., a few days afterwards, issued a *testatum feri facias* to the sheriff of W.; *held*, that the sheriff of W. was first to apply the money levied by him to the satisfaction of B.'s execution. *Waterman v. Haskin*, 11 J. R. 228.

12. Where A. and B. had judgments against C., and some of A.'s judgments were older and some younger than B.'s judgment, and A. issued executions on all his judgments, under which the lands of C. were seized, and advertised for sale, and B. then issued an execution on his judgment, and the lands were purchased under A.'s executions, (as was stated in the sheriff's deed to B.) by B., and the sheriff paid part of the purchase money to A., on account of his executions, and retained the residue to satisfy B.'s execution; *held*, that the sheriff was precluded by his deed from denying that the sale was made under A.'s execution, and that A. was entitled to recover from the sheriff the balance of the purchase money. *Sandford v. Roosa*, 12 J. R. 162.

13. A sale of land on an execution issued on a junior judgment, *it seems*, would be valid, and the party whose execution is postponed has his remedy against the sheriff. *Ibid*.

14. Where A. was interested to the amount of 100 dollars, on a judgment recovered by B. against C., and an execution was afterwards issued, on a junior judgment at the suit of D. against C., under which A. *purchased the land, as trustee of B., and [*95] took a deed from the sheriff, and immediately conveyed the land to B., by whom the purchase money was advanced; and then an execution was issued upon the first judgment for the amount of A.'s interest therein, under which the same premises were sold and conveyed by the sheriff to A.; *held*, that A. having executed his trust by conveying the land purchased under the first execution to B., was not thereby estopped from subsequently acquiring a title to the same premises, and might, therefore, recover them in ejectment against a person holding under B.; and that although B. forbade the second sale, the conveyance under it was not inoperative; at least it could not be questioned or inquired into, in a collateral action; but could only be determined upon a direct application to the Supreme Court, for that purpose, or to the Court of Chancery. *Jackson, ex dem. Whillocke, v. Mills*, 13 J. R. 463.

15. Whether the Court will inquire into the parts of a day, or receive affidavits of the ex-

act time of filing different judgments on the same day, so as to determine the priority of the lien? *Dubitatur. Adams v. Dyer*, 8 J. R. 347.

16. E. gave a bond and warrant of attorney to W., who entered up judgment thereon against E. in the Supreme Court, and W. assigned the judgment to N. E. having paid the whole, or nearly the whole amount of the judgment to W., he acknowledged satisfaction. The day after the satisfaction had been acknowledged, B., finding the judgment against E. regularly satisfied, lent him a sum of money, and took a bond and warrant of attorney, on which he entered up judgment against E., in the same Court. N. afterwards applied to the Supreme Court, to have the satisfaction acknowledged by W., on the first judgment, vacated, on the ground of fraud. The Court ordered the satisfaction to be vacated, and the judgment to be restored; and thereupon N. took out a *feri facias* on that judgment, which was levied on the estate of E. B. then filed his bill against E. and others for relief, and to obtain restitution of the money levied on the execution, and in the hands of N. On an appeal from an interlocutory order in that cause, *held*, that E., having paid W. the amount of the first judgment before notice of the assignment, and the same having been satisfied on the record, at the time the second judgment was entered up, the latter was entitled to a priority, notwithstanding the subsequent *vacatur* of the satisfaction entered on the first; and the money levied on the first judgment, in favor of W., was ordered to be paid to B. *Bebee and others v. The Bank of New-York*, on appeal, 1 J. R. 529. *S. C. 2 J. C. 121. 258.*

See tit. CHANCERY, XVII. C. Debtor and Creditor. Codriss v. Gelston, 10 J. R. 507.

III. Satisfaction of a judgment.

17. If a debtor, for the benefit of all his creditors, gives to trustees a bond for the amount of all his debts, on which a judgment is recovered, and he afterwards gives a note to an individual creditor, for the *amount of his separate debt, such [*96] note will be satisfied by such creditor's discharging the debtor from execution on the judgment issued at the request of the creditor, and the assent of the trustees to the discharge will be implied. *Furman v. Haskin*, 2 C. R. 369.

18. Where an execution has been issued for the penalty of a bond, the Court will, on payment of the condition, interest and costs, set aside the execution, and order satisfaction to be entered on the record; although the bond was given to secure a debt larger than the penalty, and there were other sums due from the defendant to the plaintiff. *Bergen v. Boerman*, 2 C. R. 256.

19. Where the plaintiff resided in a foreign country, and the defendant, in 1810, produced affidavits, to show that the judgment which was obtained in 1803, was satisfied, a rule to show cause why a satisfaction should not be

entered up on the record was granted, which was directed to be served by delivering a copy to the attorney of the plaintiff on record, and putting up another copy in the clerk's office. *Lee v. Brown*, 6 J. R. 132.

20. Where a *ca. sa.* against a sheriff was delivered to a coroner, who being indebted to the sheriff, gave him a receipt in full for the debt and costs in the *ca. sa.*, and engaged to settle the amount with the plaintiff, and failed to do so; *held*, that admitting the coroner was authorized to receive the debt in money on the *ca. sa.*, yet it must be an actual and absolute payment of so much cash to him, for the plaintiff; and that the agreement between the sheriff and coroner was no payment or satisfaction of the debt. *Codwise v. Field*, 9 J. R. 263.

21. The authority of a person, as agent for the plaintiff, to discharge a defendant from custody on execution, without satisfaction of the debt, must be clearly and fully proved, and strictly pursued. *Crary v. Turner*, 6 J. R. 51.

22. Whether the attorney of the plaintiff on record has such power? *Dublatour. Ibid.* Adjudged that he has not. *Jackson, ex dem. M'Crea, v. Bartlett*, 8 J. R. 361.

23. Where a judgment is fully paid, and the plaintiff, on application by the defendant to him, refuses to acknowledge satisfaction, the Court will compel him to enter satisfaction at his expense, and to pay the costs of the notice. *Briggs v. Thompson*, 20 J. R. 294.

IV. Vacating a judgment.

24. A feigned issue, to try the truth and validity of payments made, on a judgment, depends on the sound discretion of the Supreme Court, and is only granted for the information of the Court, or where the party is otherwise without relief. *Wardell v. Eden*, 2 J. C. 258.

25. The Court have it in their power to stay execution upon a judgment until it is revived by *scire facias*, or action of debt, in order to enable the defendant to plead payment. *Ibid.*

26. On affidavit, that the defendant, after suit brought, had paid part of the debt, and the plaintiff had promised to stop all proceedings, but that he had, notwithstanding, gone on, obtained judgment by default, and taken out execution; the judgment was set [*97] aside, on the defendant's paying costs, pleading issuably, and taking notice of trial for the next circuit. *Cogswell v. Vanderbergh*, 1 C. R. 155.

27. An administrator, defendant, pleaded *plene administravit præter, &c.*; the plaintiff entered judgment for the amount confessed, and interlocutory judgment for the residue of his demand; the Court would not set aside the judgment, to let in the defendant to plead a judgment recovered against him in the Common Pleas, because it was entered for 28 cents more than the assets confessed. *Tremper v. Wright*, 2 C. R. 101.

28. If an attorney appear for a defendant, (whether process has been served or not,) without any authority from him, and confess judgment, [or let it go by default,] the judgment is regular, and will not be set aside. *Denton v. Noyes*, 6 J. R. 296.

29. But if there were fraud or collusion between the plaintiff and the defendant's attorney, or if he be not responsible, or perfectly competent to answer to his assumed client, the Court will relieve against the judgment. *Ibid.*

30. The Court will, however, extend its protection to both parties, and let the judgment stand as security; but stay all proceedings, and let in the defendant to plead, if he has any defence. *Ibid.*

31. A party entitled to relief by an *audita querela*, may be relieved on motion. *Baker v. Judges of Ulster*, 4 J. R. 191.

32. Where two suits are brought at the same time, for the same cause of action, and proceed, *pari passu*, to judgment and execution, a satisfaction of either judgment may be shown, upon *audita querela*, or otherwise, in discharge of the other. *Boume v. Joy*, 9 J. R. 221.

33. The Court will not set aside a judgment entered up on a bond and warrant of attorney, or stay execution thereon, on the ground of fraud, at the instance of a creditor at large, or whose debt has not been legally ascertained by judgment. *Wintringham v. Wintringham*, 20 J. R. 296.

And see AUDITA QUERELA.

V. Arrest of judgment.

34. Where the plaintiff's claim is in part good, and in part bad, and the jury find entire damages, judgment will be arrested. *Executors of Van Rensselaer v. Executors of Plattner*, 2 J. C. 17.

35. Where some of the counts are good, and some bad, and the jury find, generally, for the plaintiff, judgment must be arrested. *Hopkins v. Beedle*, 1 C. R. 347. *S. P. Highland Turnpike Company v. M'Kean*, 11 J. R. 98.

36. But the plaintiff may have a *venire de novo*, on payment of costs. *Ibid.*

37. Or, if judgment went by default, a writ of inquiry *de novo*. *Lyle v. Clason*, 1 C. R. 581.

38. In slander, where the damages arising from the words spoken are stated to have been to the injury of the plaintiff in two different characters, and there is a [*98] colloquium concerning him in only one character, and entire damages are given, judgment will be arrested. *Gilbert v. Field*, 3 C. R. 329.

39. Where there are several counts in a declaration, and, after interlocutory judgment, damages are separately assessed upon each, and judgment is arrested on the first count, no objection being made to the others, the plaintiff will be allowed to enter a *nolle prosequi* on the first count, and take judgment on the others. *Livingston v. Executors of Livingston*, 3 J. R. 189.

40. Where part of the declaration is good, and part bad, and the jury give entire damages, the verdict may be amended from the notes or certificate of the judge. *See AMENDMENT, VII.*

41. Judgment will be arrested for a defect of the record, in not awarding a *venire de novo*, where a new trial has been had. *Livingston v. Rogers*, 1 C. R. 583.

42. But the Court will allow the plaintiff, where there is one good count in the declaration, to sue out a *venue de novo*, and amend the counts that are bad, on payment of the costs since declaring. *Ibid.*

43. A defect of record is a ground for an arrest of judgment. *Ibid.*

44. The defendant may move in arrest of judgment, after having attended the execution of a writ of inquiry, for objections which go to the merits of the cause. *Callagan v. Hallett*, 1 C. R. 104.

45. On a motion in arrest of judgment, the promise stated in the declaration will be presumed to have been an express promise. *Beecker v. Beecker*, 7 J. R. 99.

46. If the defendant in a special plea tenders an issue on which the parties go to trial, instead of concluding with a verification, and a verdict is given for the plaintiff, he cannot move in arrest of judgment, for want of a replication to his special plea. *Coan v. Whitmore*, 12 J. R. 353.

47. After a verdict for the plaintiff, the defendant cannot take advantage of his own mispleading, to defeat the plaintiff's suit. *Ibid.*

48. On a motion in arrest of judgment for a defect in the declaration, it is not necessary to produce the whole record in Court; but the declaration alone, adding that a verdict had been found for the plaintiff, is sufficient. *Niven v. Munn*, 13 J. R. 48.

49. Averments are construed less strictly after a verdict. *Ibid.*

50. The arresting of judgment, after a conviction on an indictment for a felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. *The People v. Casborus*, 13 J. R. 351.

51. Where a Court of competent jurisdiction arrests a judgment at the instance of the defendant, it must be intended, legally, that the indictment was vicious. *Ibid.* Per *Spencer, J.*

52. The effect of arresting a judgment is the same as quashing an indictment before trial. *Ibid.* Per *Spencer, J.*

53. Where a count in the declaration contains a sufficient cause of action, but connected with matter senseless and void, or not actionable, it will be intended, after verdict for the plaintiff, that damages were given for the part only that is actionable, and judgment will not be arrested. *Borden v. Fitch*, 15 J. R. 121.

*54. A misjoinder of counts is a [*99] fatal defect, on a motion in arrest of judgment, or on a writ of error. *Cooper v. Bisell*, 16 J. R. 146.

55. No costs are given on an arrest of judgment. *Pangburn v. Ramsay*, 11 J. R. 141.

56. That a judge ordered a juror to be withdrawn, in a criminal case, is no cause for arresting the judgment on a subsequent trial for the same offence. *The People v. Barret & Ward*, 2 C. R. 100.

57. If, in a criminal case, a juror has been withdrawn without the consent of the defendant, at the instance of the public prosecutor, in order to enable him to obtain further testimony, and the defendant is tried again on the

same indictment, and found guilty, judgment will be arrested. S. C. 2 C. R. 304.

See PRACTICE. PLEADINGS. AMENDMENT.

JURISDICTION.

1. Inferior jurisdictions not proceeding according to the course of common law, cannot enlarge their authority by implication. *Jones v. Reed*, 1 J. C. 20. S. C. 1 C. R. 594. n. *Wells v. Newkirk*, 1 J. C. 228.

2. There should always appear sufficient on the face of the proceedings in an inferior Court to show that it has jurisdiction in the cause of which it takes cognizance. *Powers v. The People*, 4 J. R. 292.

3. The judiciary of one state has no cognizance of offences committed in another state, although the offender may be within the limits of its jurisdiction. *The People v. Wright*, 2 C. R. 213.

4. So, if a person commit theft in another state, and come into this state, and is taken here with the thing stolen, he cannot be tried in this state for the felony, but is to be considered merely as a fugitive from justice. *The People v. Gardner*, 2 J. R. 477.

5. And, if in custody, he is entitled to his discharge: but in this case, the prisoner, who had committed the felony in *New-Jersey*, and fled into this state, was ordered by the Court to be detained in prison three weeks, and notice thereof to be given to the executive of *New-Jersey*, and if the prisoner should not be demanded within that time, that he be discharged. *The People v. Schenck*, 2 J. R. 479.

6. The state Courts have no jurisdiction in causes arising under the laws of the *United States* respecting patent rights. *Parsons v. Barnard*, 7 J. R. 144.

7. Bonds given for duties to the *United States*, may be sued in the state Courts, which have concurrent jurisdiction with the Courts of the *United States*, of all suits at common law, where the *United States* are plaintiffs. *United States v. Dodge*, 14 J. R. 95.

8. A state Court has no jurisdiction of criminal offences against the *United States*, nor of the penal laws of the U. S.; nor can such *jurisdiction be conferred [*100] by act of Congress. *United States v. Lathrop*, 17 J. R. 4. 261.

9. Therefore, an action for a penalty incurred for selling spirituous liquors without a license, contrary to the act of Congress of August 2, 1813, (Cong. 13. sess. 1. c. 38,) cannot be brought in the Supreme Court of this state. *Ibid.*

10. The right of exclusive legislation or jurisdiction within the limits of any of the states, can be acquired by the *United States*, only by purchase of territory from the states, for the purpose and in the mode prescribed by the constitution of the *United States*. *The People v. Godfrey*, 17 J. R. 225.

11. The land on which *Fort Niagara* is erected, never having been actually ceded to the *United States*, still belongs to this state;

and its Courts have jurisdiction of all crimes committed within that fort, or its precincts, though it has been garrisoned by the troops of the *United States*, and held by them, since the surrender by *Great Britain*, pursuant to the treaties of 1783 and 1794; for the *United States* acquired no territory within this state, by virtue of those treaties. *Ibid.*

12. Whether the state Courts have jurisdiction in the case of a person enlisted in the army of the *United States*, and applying for a *habeas corpus*? *Dubitat.* *Matter of Ferguson*, 9 J. R. 239.

13. If a Court has no jurisdiction of the principal question, it has none of its consequences and incidents. *Per Kent*, Ch. J. *Ibid.*

14. Where a Court has originally no jurisdiction in a cause, it does not acquire it either by the consent of the defendant, or by his confessing judgment. *Coffin v. Tracy*, 3 C. R. 129.

15. Courts of this state have jurisdiction of actions brought for *torts* committed on board of a *foreign vessel*, on the *high seas*, where both parties are foreigners; for actions for personal wrongs are of a transitory nature, and follow the person or *forum* of the defendant. *Gardner v. Thomas*, 14 J. R. 134.

16. Though the injury is laid in the declaration to be *contra pacem*, &c., this is matter of form only, and is not traversable. *Ibid.*

17. But it rests in the sound discretion of the Court to exercise jurisdiction or not, according to the circumstances of the case. *Ibid.*

18. As, where an action was brought for an assault and battery, committed on board of a *British vessel*, on the *high seas*, by a seaman against the master of the vessel, both parties being *British* subjects, and intending to return to their own country at the completion of the voyage, the Court refused to take cognizance of the cause, but left the injured party to seek redress in the Courts of his own country. *Ibid.*

19. No action at common law lies for an illegal capture on the *high seas*, as prize of war; nor can any irregularity or misconduct of the captor, in the subsequent disposition of the prize, confer jurisdiction as to the original taking, or be, in itself, a ground of action at common law. *Novion v. Hallett*, in error, 16 J. R. 327.

20. And it makes no difference that the capturing vessel was fitted out of a port of the *United States*, in violation of the neutrality of the *United States*, or of an act of Congress; the District Courts of the U. S., in such case, having the clear and indisputable jurisdiction. *Ibid. Contra*, S. C. 14 J. R. 273.

21. Jurisdiction, in cases of prize, [*101] and of every thing incidental *and consequential thereto, belongs exclusively to the Admiralty Courts. *Ibid.*

22. And piracy and piratical captures, with all their incidents, are exclusively of admiralty cognizance. *Ibid.*

23. Courts of common law have jurisdiction of marine trespasses, where it is not a question of prize, or of any thing incidental or consequential thereto. S. C. 14 J. R. 273.

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24. A Court of common law has concurrent jurisdiction with the *instance* Court of Admiralty, of a *marine tort*. *Percival v. Hickey*, 18 J. R. 257.

25. If a Court of limited jurisdiction issues process which is illegal; or if a Court, whether its jurisdiction be limited or not, holds cognizance of a cause, without having gained jurisdiction of the person of the defendant, by having him before them, in the manner required by law, the proceedings are void. *Bigelow v. Stearns*, 19 J. R. 39.

26. And, in case of a limited and special jurisdiction, the magistrate attempting to enforce a proceeding, founded on any judgment, sentence, or conviction, in such a case, is a *trépasser*. *Ibid.*

27. And the party affected may, even in a collateral action, when the conviction is set up as a defence, show that the magistrate had no jurisdiction of the person convicted. *Ibid.*

28. Whenever a new power is given to a justice of the peace, he must proceed in the mode prescribed by the statute. *Ibid.*

29. After a plea in bar, it is too late to object to the jurisdiction. *Smith v. Elder*, 3 J. R. 105.

JURY.

- I. *Challenge to the jury.*
- II. *How the jury are to make up and deliver their verdict.*
- III. *Irregularities and misdemeanors of the jury, for which their verdict will be impeached.*
- IV. *Discharging the jury.*
- V. *Struck, or special jury.*
- VI. *Foreign jury.*
- VII. *Jury de medietate lingue.*

I. Challenge to the jury.

1. Jurors must be free from all exception, and wholly disinterested. *Wood v. Stoddard*, 2 J. R. 194.

2. In an action *qui tam*, under the act for preventing usury, which gives a moiety of the sum to be recovered, to the poor of the town where the offence is committed, and the other moiety to the person prosecuting, it is a good cause of challenge against the jury, that they are inhabitants of the town. *Ibid.*

3. If a sheriff, who is a party in a cause, serve the *venire*, it is a *good ground of challenge to the array. *Woods* [*102] v. *Rowan*, 5 J. R. 133.

4. A challenge lies to the array, for any partiality or default in the clerk, in selecting and arraying the jury. *Gardner v. Turner*, 9 J. R. 260.

5. It is a sufficient cause of challenge to the array, that the clerk drew seventy-two names out of the box and put them in a list, and then designated thirty-six names so drawn, to be a panel for the Circuit, and the other thirty-six a panel for the Court of Common Pleas. *Ibid.*

6. If the facts alleged in the challenge are admitted, the Court decides upon them; but, if denied, two *triers* are appointed by the Court

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out of the panel, or, perhaps, any two other persons named by the Court. *Ibid.*

7. If the plaintiff will not proceed to trial, because the judge has improperly overruled a challenge, the defendant is not entitled to judgment, as in case of nonsuit. *Ibid.*

8. Whether, that a juror is himself an underwriter by profession, is not a good cause of challenge on the trial of an insurance cause? *Quære. Steinbach v. Columbian Insurance Company*, 2 C. R. 129.

9. It is a good cause of challenge to a juror, that he has previously given his opinion on the question in controversy between the parties. *Blake v. Millsbaugh*, 1 J. R. 316.

10. If a juror has said, that if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right, it is not a sufficient objection to his being sworn and impanelled. *Durell v. Mosher*, 8 J. R. 445.

11. A juror challenged to the favor, may be sworn on his *voir dire*, and be asked such questions as do not tend to his infamy or disgrace. *Mechanics' Bank v. Smith*, 19 J. R. 115.

12. The *trials* are to decide whether the juror challenged, stands indifferent between the parties. *Ibid.* [See tit. TRIAL.]

II. How the jury are to make up and deliver their verdict.

13. A verdict is not valid and final until pronounced and recorded in open Court, and before it is recorded the jury may vary from the first offer of their verdict, and the verdict which is recorded shall stand. *Blackley v. Sheldon*, 7 J. R. 32. *S. P. Root v. Sherwood*, 6 J. R. 68.

14. After the verdict is received, the jury may be examined by the poll, and then either of the jurors may disagree to the verdict. *Blackley v. Sheldon*, 7 J. R. 32.

15. When the jury have retired, they may come back into Court to hear the evidence of a thing of which they are in doubt. *Ibid.*

16. The Court may send the jury back to reconsider their verdict, if it appears to be a mistaken one, and before it is received and recorded. *Ibid.*

17. Where a jury deliver a sealed verdict to the Court, and, on being polled, one of them disagrees to the verdict, the judge [*103] may *send the jury out again to agree on their verdict. *Bunn v. Hoyt*, 3 J. R. 255.

18. And if the parties agree that the jury may deliver a sealed verdict, it does not take away the right of either of them to a public verdict, and any of the jurors may dissent from the verdict to which they had before agreed. *Root v. Sherwood*, 6 J. R. 68.

19. Where a jury has been impanelled before Sunday commences, their verdict may be received on that day. *Hoghtaling v. Osborn*, 15 J. R. 119. *S. P. Butler v. Kelsey*, *id.* 177.

20. But it is otherwise in the case of a jury summoned on a writ of inquiry. *Butler v. Kelsey*, *id.* 177.

21. Where the judge directed the jury to declare by their verdict whether a will had been altered after its execution, and if so, by whom; and they declared by their verdict that the will

had been altered by some interested person, the verdict was held to be uncertain, and a new trial was granted. *Jackson, ex dem. Malin, v. Malin*, 15 J. R. 293.

III. Irregularities and misdemeanors of the jury, for which their verdict will be impeached.

22. If a jury agree, in order to ascertain the amount of damages, that each juror shall set down such sum as he thinks fit, that the aggregate shall be divided by 12, and that the quotient shall be their verdict, it will be set aside. *Smith v. Cheetham*, 3 C. R. 57. *S. P. Harvey v. Rickett*, 15 J. R. 87.

23. But if it is merely adopted as a mode of arriving at a reasonable measure, without their binding themselves to abide, at all events, by the contingent result, the verdict is good. *Dana v. Tucker*, 4 J. R. 487.

24. The affidavits of jurors to impeach a verdict cannot be received. *Ibid.* Contra, *Smith v. Cheetham*, 3 C. R. 57.

25. But affidavits in exculpation of themselves, and in support of their verdict, are admissible. *Dana v. Tucker*, 4 J. R. 487.

26. So, affidavits of the jurors are admissible to show that a mistake has been made in taking their verdict, and that it was entered differently from what they intended. *Jackson, ex dem. Noah, v. Dickenson*, 15 J. R. 309.

27. Where a jury was sworn and impanelled to try a prisoner on several indictments, and, after giving a verdict of not guilty on the first indictment, they separated and went to a tavern, and then returned into Court, when the prisoner was tried by the same jury on the other indictments, and found guilty, the Supreme Court held the proceedings on the other indictments irregular, and that the jury ought to have been sworn and impanelled again. *The People v. Meany*, 4 J. R. 294.

28. But whether the prisoner is to be discharged, or a new trial granted? *Quære. Ibid.*

29. After the jury, in a Justice's Court, had retired to deliberate on their verdict, they sent for the justice, and asked him whether they could add any thing to the charge of the plaintiff, and he answered "no," and left them without any thing further being said; this is not an irregularity for which the verdict will be set aside. *Thayer v. Van Fleet*, 5 J. R. 111.

30. If the jury take a paper out with them when they go to deliberate on their verdict, but never look at it, the verdict will not be set aside on that account. *Hackley v. Hastie*, 3 J. R. 252.

IV. Discharging the jury.

31. If, on a trial for a misdemeanor, after every reasonable endeavor has been made to obtain a verdict, the jury cannot, or will not, agree, they may be discharged, without the consent of the defendant. *The People v. Denton*, 2 J. C. 275. *The People v. Olcott*, *id.* 301. *S. P. People v. Goodwin*, 18 J. R. 187. And see tit. NEW TRIAL, V.

32. That a judge ordered a juror to be withdrawn, is no cause for arresting the judgment

on a subsequent trial for the same offence *The People v. Barrett and Ward*, 2 C. R. 100.

33. *Aliter*, where a juror is withdrawn without the consent of the defendant, at the instance of the public prosecutor, in order to enable him to obtain further evidence. *S. C. 2 C. R. 304.*

V. Struck or special jury.

34. If a cause be intricate or important, a struck jury will be allowed. *Spencer v. Sampson*, 1 C. R. 498.

35. It will be granted in an action for a libel against a public officer, on an affidavit stating that the libel was of him in his official character, and that it is false. *Ibid.* *S. P. Livingston v. Cheetham*, 1 J. R. 61.

36. Where the subject matter of a libel related to a remote transaction, and though concerning the conduct of a foreign minister resident here, but who had been long superseded, a struck jury was not allowed. *Genet v. Mitchell*, 4 J. R. 186.

37. It will be granted where a representative in Congress is libelled with respect to his official conduct. *Thomas v. Rumsey*, 4 J. R. 482.

38. The affidavit must expressly state that the slander or libel was of the plaintiff in his official character. *Foot v. Croswell*, 1 C. R. 498. *S. P. Van Vechten v. Hopkins*, 2 J. R. 373. *S. P. Thomas v. Croswell*, 4 J. R. 491.

39. It was granted on an affidavit of counsel, stating, that in his opinion it was a cause of importance, and that a large sum of money was depending. *Livingston v. Smith*, 1 J. R. 141.

40. It will be granted in an action by a turnpike company for opening a highway near a toll-gate. *New-Windsor Turnpike Company v. Ellison*, 1 J. R. 141.

41. It will not be granted, because the government of the *United States* is interested. *Hartshorn v. Gelston*, 3 C. R. 84.

42. It was not granted on an affidavit, stating that the action was on a policy of insurance, and involved questions of intricacy and importance; that another cause on the same policy had been tried, and *the jury were [*105] discharged, because they were unable to agree on a verdict. *Anonymous*, 1 J. R. 314.

43. It was refused in an action on a policy, where the plaintiff claimed a total loss to the amount of 27,500 dollars. *Wright v. Columbian Insurance Company*, 2 J. R. 211.

44. The affidavit, on which a struck jury is moved for, must state such facts as show that the cause is either intricate or important. *Manhattan Company v. Lydig*, 2 C. R. 380. *Livingston v. Columbian Insurance Company*, 2 C. R. 28.

45. But if the opposite party does not oppose, although those requisites are wanting, the Court will grant the motion. *Manhattan Company v. Lydig*, 2 C. R. 380.

At what time a struck jury must be moved for. *See PRACTICE.*

VI. Foreign jury.

46. Where the inhabitants of a town, in a small county, contribute towards the expenses

of prosecuting a cause, involving a claim of a general nature, as a right of fishery, the Court will grant a foreign jury. *Stryker v. Turnbull*, 3 C. R. 103.

47. Whether a foreign jury can be awarded in a capital case? *Quare. The People v. Ludlow*, C. C. 34.

VII. Jury de medietate lingue.

48. In case a prisoner, on his arraignment, suggests that he is an alien, and claims the privilege of a trial by a jury *de medietate lingue*, the Court of Oyer and Terminer may order such a jury to be summoned *instantly*. *The People v. M'Lean*, 2 J. R. 381.

49. This is a case to which the act concerning the qualification of jurors does not apply. *Ibid.*

See further tit. INDICTMENT. NEW TRIAL. TRIAL. ACTIONS, REAL. AMENDMENT. PLEADINGS.

JUSTICE OF THE PEACE.

1. A justice of the peace, in issuing process or execution, acts merely ministerially, and is bound to issue process demanded of him; but if he issues it officiously, and without authority from the party, he does it at his peril. *Perceival v. Jones*, 2 J. C. 49. *Hess v. Morgan*, 3 J. C. 84.

2. If a tavern be kept in the house of a justice, and for his benefit, though in the name of another, it is within the 19th section of the act, *Sess. 36. c. 53. (1 [*106] N. R. L. 387.) and the justice will be liable for issuing execution. *Schermerhorn v. Tripp*, 2 C. R. 108.

3. A justice is not liable to be sued by witnesses for their fees; but, they must look to the party who subpoenaed them. *Andrews v. Bates*, 5 J. R. 351.

4. No action lies against a justice for a judicial act. *Moor v. Ames*, 3 C. R. 170.

5. As to recover back a fine imposed by him for a contempt. *Ibid.*

6. The record of a conviction, under the 1st section of the act, *to prevent forcible entries and detainers*, if it show that the justice had jurisdiction, and proceeded regularly, is a bar to any suit against the justice. *Mather v. Hood*, 8 J. R. 44.

7. If a justice issue a warrant against the putative father of a bastard child, under the act, (Sess. 24. c. 8.) on the application of any other person than an overseer of the poor, he issues it without authority, and, acting ministerially, is liable to the party arrested, notwithstanding a subsequent assent by the overseers to the proceedings. *Wallsworth v. M'Cullough*, 10 J. R. 93.

8. If, on examination of a charge of suspicion of felony, or of having stolen goods, the magistrate be satisfied that there is no ground for suspicion, he may dismiss the person accused. *Secor v. Babcock*, 2 J. R. 203.

9. If a person uses abusive words to a justice, while out of Court, in relation to his

judicial character, it is not a contempt for which the justice can commit; but he may require the party to find surety of the peace, and for good behavior, and, in default thereof, commit. *Richmond v. Dayton*, 10 J. R. 393.

10. And where a justice, in such case, issued his warrant, commanding the party to be taken, and committed to gaol, until he should find sureties for his appearance at the next General Sessions, and for his good behavior in the mean time; and the party was arrested on the warrant, but immediately discharged, on giving bail before another justice; *held*, that that part of the warrant which required the party to be committed until, &c. not having been executed, must be rejected, and the warrant be good as to the residue. *Ibid*.

11. Though mesne process issued by a justice may be altered by his direction, yet a general authority, by him, to a constable, to alter the dates of executions instead of renewing them, or to fill up or alter process, is void. *Pierce v. Hubbard*, 10 J. R. 405.

12. A warrant issued by a justice of the peace, or other magistrate, acting as a conservator of the peace, may be in the name of the people, or of such magistrate; and it is most usually in his name. *Dickenson v. Rogers*, 19 J. R. 279.

13. Whenever a new power is conferred on a justice of the peace, he must proceed in the mode prescribed by the statute. *Bigelow v. Stearns*, 19 J. R. 39.

14. As, where the act for suppressing immorality, (Sess. 36. c. 24.) which authorizes a justice of the peace to convict for offences against the statute, requires him to *cause the party to be brought before him*, and upon proof, &c., to convict him in the manner prescribed; *held*, that the justice cannot, on the return of the summons or precept, personally *served, proceed to hear the proofs, and convict the party who failed to appear, without having him brought before him. *Ibid*.

And see COURTS OF JUSTICES OF THE PEACE.

KINGSTON, (Town of.)

The legal title in the property belonging to the freeholders and inhabitants of Kingston, continued in their trustees, until conveyed by them to the supervisors and overseers of the poor of the towns of *Esopus*, *Saugerties*, and *Kingston*, under the third section of the act, to divide the town of Kingston, (Sess. 34. c. 16.) passed April 5, 1811. *Jackson, ex dem. Trustees of K., v. Lous*, 12 J. R. 252.

LANDLORD AND TENANT.

1. The better opinion is, that a person entering on land, under a contract for a deed, is not a tenant; nor entitled to notice to quit;

nor liable to distress, or *assumpsit* for rent *Smith v. Stewart*, 6 J. R. 46.

2. But, on the non-performance of his contract, he is liable to be turned out as a trespasser, and is responsible in that character for the *mesne profits*. *Ibid*.

And see EJECTMENT, IV. LEASE. TENANT AT WILL. TENANT AT SUFFERANCE.

LARCENY.

1. A mere letter is not a subject of larceny, and the taking it away is not a criminal offence. *Payne v. The People*, 6 J. R. 103.

2. On the trial of an indictment for stealing a bank note, bill, &c., under the statute, (Sess. 24. c. 88.) parol evidence of the contents of the bills or notes stolen, is admissible, without accounting for their non-production. *People v. Holbrook*, 13 J. R. 90.

3. Where the indictment stated that the defendant stole "four promissory notes, commonly called bank notes, given for the sum of 50 dollars each, by the *Mechanics' Bank* in the city of *New-York*, which were due and unpaid, of the value of 200 dollars, the goods and *chattels of P. C. [*108] then and there found," &c.; *held*, that the description was sufficient, without saying that they were the property of P. C.; the word "chattels" denoting property or ownership. *Ibid*.

4. A *bona fide* finder of an article lost, as a trunk containing goods lost from a stage coach, and found on a highway, is not guilty of larceny, by any subsequent act in secreting or appropriating to his own use the articles found. *The People v. Anderson*, 14 J. R. 294.

5. To constitute larceny, the possession of the goods must have been acquired *animo furandi*, in the first instance; an intention, afterwards, to convert them to the party's use, is not felony. *Ibid*.

LEASE.

- I. *What is a lease.*
- II. *Assignment and surrender of a lease.*
- III. *Covenants in, and forfeiture of a lease.*
- IV. *Emblements.*
- V. *Tenant holding over after the expiration of the term.*

I. *What is a lease.*

1. A memorandum for a lease between A. and B., by which A. agrees to let, on lease, to the defendant, for the term of, &c., from the 1st day of *May*, then next, at a certain rent per annum, &c.; then follow certain conditions to be performed by B.; and it is added, that B., on his part, agrees to take the premises on the said terms and conditions; this is a lease, and not an agreement for a lease. *Hallett v. Wylie*, 3 J. R. 44.

2. A., by articles of agreement, covenants to let and hire to B., a certain farm, for the term of six years, from the 1st April, 1807, to the 1st April, 1813, on condition, and in consideration that B. should pay A. 250 dollars, on the 1st day of April, in each and every year during the term: this is not an agreement for a lease, but a lease in *presenti*, to commence on the 2d April, 1807, which is the evident intention of the parties; for, if the term were to be construed to commence on the 1st April, 1807, the lessee would have to pay seven years' rent instead of six; and, in case of B.'s being kept out of possession of the premises, his remedy is ejectment, and not an action for the breach of covenant. *Thornton v. Payne*, 5 J. R. 74.

3. A memorandum of an agreement between A. and B., stated, that A. "bath set, and to farm let unto B., all that farm, &c., for the rent of, &c., for the use of B., and his wife; the place to be surveyed on or before the 1st June next, and then the said B. is to take a lease for the same;" after a possession by B., and payment of rent for 14 years, this was held to amount to a lease in *presenti*. *Jackson*, ex dem. *Livingston*, v. *Kieselbrack*, 10 J. R. 336.

*4. Letting land to a person for [*109] one year, to cultivate on shares, makes him a tenant, and not a mere laborer or servant. *Jackson*, ex dem. *Colden*, v. *Brownell*, 1 J. R. 267.

5. Letting land upon shares, for a single crop, does not amount to a lease of the land, and the owner alone can bring trespass. *Bradish v. Schenck*, 8 J. R. 151.

6. Where land is leased for a number of years, the lessee rendering and paying one half of the annual crops, the interest in the soil passes to the tenant; and the proportion of the products yearly to be rendered being a payment of rent in kind, the interest or property in the crops is exclusively in the tenant, until he separate and deliver to the lessor his proportion. *Stewart v. Doughty*, 9 J. R. 108.

II. Assignment and surrender of a lease.

7. If the lease contains a covenant that the lessee shall not assign without the permission of the lessor, and the lessee does assign part of the premises with the consent of the lessor, it is not a surrender, but the lessee still remains liable for every act of his assignee, amounting to a breach of the covenants contained in the lease. *Jackson*, ex dem. *Church*, v. *Brownson*, 7 J. R. 227.

8. Where A. voluntarily delivered up and destroyed a lease of land, and took a new lease, and afterwards claimed under the old lease; held, that if the old lease was not duly surrendered, by writing, within the statute of frauds, yet, that A. could recover no more land than what he could prove, with absolute certainty, was covered by that lease, especially after the premises claimed had been in the possession of another, for near 16 years. *Jackson*, ex dem. *Butler*, v. *Gardner*, 8 J. R. 394.

9. A surrender of a lease is good, notwithstanding it contain an agreement that the sur-

renderer shall be liable for the payment of rent on the expiration of the year. *Bain v. Clark*, 10 J. R. 424.

10. Where a lessee for years, or for life, or *pur autre vie*, accepts a new lease, or a grant in fee of the same premises, this, without any actual surrender of the old lease, is a surrender in law of it. *Livingston v. Potts*, 16 J. R. 28.

11. And if the former lease gave the lessee a right of common in the other lands of the lessor, and no such right is granted by the second lease, the common is extinguished by the surrender. *Ibid*.

12. A surrender can only be to a person who has the remainder or reversion. *Springstein v. Schermerhorn*, 12 J. R. 357.

13. So, where land is leased in *fee*, the lessee cannot surrender the lease. *Ibid*.

14. An action in the case, in the nature of waste, lies against the assignee of a lessee. *Short v. Wilson*, 13 J. R. 33. [See FRAUDS, III.]

III. Covenants in, and forfeiture of a lease.

15. If it be covenanted in a lease, "that in case the lessee should suffer or permit more than one person to every hundred acres, to reside *on, use, or occupy [*110] any part of the premises, the lease should be void," and the lessee lets part of the premises to persons for a year, to cultivate for shares, in the proportion of more than one to each hundred acres, it is a breach of the condition, and defeats the lease. *Jackson*, ex dem. *Colden*, v. *Brownell*, 1 J. R. 267. *Jackson*, ex dem. *Colden*, v. *Rich*, 7 J. R. 194.

16. But where the quantity of land demised was 135 acres, and a like covenant in the lease, it is not a breach for the lessee to permit another tenant besides himself to occupy the premises. *Jackson*, ex dem. *Colden*, v. *Agan*, 1 J. R. 273.

17. A lessor reserved one quarter of the money arising from every letting, assigning or disposing of the premises by the lessee, who covenanted, that whenever he should incline, or be by law, or otherwise, obliged to sell, &c., he would make the first offer to the lessor, giving him notice of the price, &c.; and it was provided, that every sale, renting, &c. should be void, and the premises revert to the lessor, unless the seller or purchaser should pay the lessor the one fourth of the money offered, &c. The tenant who held under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff; that this was held not a forfeiture, unless the judgment had been confessed fraudulently, or for the purpose of enabling the creditor to take the lease in execution under the judgment, and with a view to defeat the lessor's reservation of one fourth of the money offered. *Jackson*, ex dem. *Schuyler*, v. *Corliss*, 7 J. R. 531.

18. If the lessor is ignorant that a forfeiture has incurred, acceptance of rent is not a waiver of it. *Jackson*, ex dem. *Church*, v. *Brownson*, 7 J. R. 227.

19. A covenant in a lease on the part of the lessor, to let the lot, at the expiration of the

term, to the lessee, without mentioning any price for which it is to be let, is not a covenant for a perpetual lease, or for a perpetual renewal of it; nor is it even a covenant for a single renewal of the term, but is altogether void for uncertainty. *Abeel v. Radcliff*, 13 J. R. 297.

20. Where a lessee for lives covenanted not to sell, dispose of, or assign his estate in the demised premises, without the permission of the lessor, &c., and the lease contained a clause of forfeiture for non-performance of covenants; *held*, that a lease of part of the premises by the lessee for twenty years, was not such a breach of the covenant; and that nothing short of an assignment of his whole estate, by the lessee, would produce a forfeiture of the lease. *Jackson, ex dem. Stevens, v. Silvernail*, 15 J. R. 278.

21. Nor would a sale of the whole premises under a judgment and execution against the lessee, work a forfeiture, there being no evidence of any fraud or collusion on the part of the lessee. *Ibid.*

22. So, where a lease for the term of seven years, contained a like covenant, that the lessee "should not assign over, or otherwise part with the indenture, or the premises thereby leased, or any part thereof," &c., and there was a clause of re-entry for a breach of covenants; *held*, that no forfeiture was incurred by an underletting for two years. *Jackson, ex dem. Weldon, v. Harrison*, 17 J. R. 66.

23. Where one of the conditions of the lease was, that the lessee should pay all taxes, &c.; *held*, that the lessor had no right to [*111] re-enter *for a breach of the condition, without showing a demand of payment of the tax within the period required by law, in order to create a forfeiture. *Ibid.*

24. Nor can the lessor re-enter on the ground of forfeiture for the non-payment of rent, without showing a demand of the rent due on the last day, from the tenant on the premises, a convenient time before sunset, &c., or a strict compliance with all the formalities, required by the common law; his claim being regarded, *stricti juris*. *Ibid.*

25. Proving a demand of the rent of the tenant, at his house, on the premises, in the afternoon of the last day, is sufficient. *Ibid.*

26. Where at the bottom of a lease containing a clause of re-entry for non-performance of the covenants, conditions, &c.; the lessee agreed not to make any alterations in the buildings without the consent of the lessor; *held*, that this rested merely in covenant, and was not a condition for the breach of which the lease was to be forfeited. *Ibid.*

27. A covenant or condition in a lease to a person, his heirs and assigns, forever, yielding and paying a certain yearly rent, &c., that in case the lessee or his heirs, &c. should be minded to dispose of the premises, or any part thereof, he should give to the lessor, or his heirs, &c. the right of pre-emption, or refusal of buying, and would not sell, without his leave, under his hand and seal first obtained; and that on every such sale, with such license,

he should pay to the lessor one tenth of the purchase money for which the premises were sold, with a clause that in case of non-performance, &c., the estate demised should cease, &c., and a clause of re-entry for a breach of the covenants, &c.; *held*, that the lessor might bring ejectment to recover the possession of the premises on the forfeiture. *Jackson, ex dem. Lewis, v. Schutz*, 18 J. R. 174.

28. The estate of the lessee under such a lease, is a fee simple conditional at common law, or a fee simple subject to be defeated upon a condition subsequent. *Ibid.* Per *Platt, J.*

29. And if the condition had been absolute not to alienate, it would have been repugnant to the grant, and, therefore, void. *Ibid.*

30. Where the lessor proceeds for a forfeiture, or to enforce a penalty, he must show a demand of the rent on the very day on which it was payable; but where the rent is payable on the land, and the lessor brings covenant or proceeds by distress, to recover the rent, he need not show a previous demand, although the rent was payable on demand. *Remsen v. Conklin*, 18 J. R. 447.

31. And it is a good defence for the tenant that he was ready on the land to pay, but that the lessor was not there ready to receive the rent. *Ibid.*

32. But if the rent is payable off the land, and there is a clause of distress, in case the rent, being lawfully demanded at such place, is in arrear, the lessor cannot distrain without a previous demand of rent. *Ibid.*

33. In a lease of land, in the county of Oneida, the rent was reserved in wheat, to be delivered annually, in such place in the city of Albany as the lessor should appoint; *held*, in an action of covenant for arrears of rent, that it was the duty of the lessor to appoint a place in Albany, and give notice thereof to the lessee; and, in default of *such appointment and notice, the rent was [*112] payable on the land, and, therefore, the lessee should plead a tender, or that he was ready on the land to deliver the wheat, &c. *Ibid.*

34. If a tenant does an act proper in itself, he cannot be made a wrong doer, by a consequence which he could not anticipate: as if by turning the water of a creek, being an act of good husbandry, by causing the water to flow into a swamp, the timber growing there is killed, it is not to be deemed waste, so as to produce a forfeiture of the lease; especially, where the landlord has lain by for twenty years, during which time new trees had grown up, of more value than the old, and, therefore, no permanent injury had been done to the inheritance. *Jackson, ex dem. Van Rensselaer, v. Andrew*, 18 J. R. 431.

35. Where a plaintiff in replevin denies in his plea, that the place in which the distress was taken, was within the demised premises, such denial does not amount to a general disclaimer of all holding under the lessor, so as to work a forfeiture of the lease. *Jackson, ex dem. De Ridder, v. Rogers*, 11 J. R. 33.

36. And in an action of ejectment by the

landlord to recover the premises, on the ground of their being forfeited by such disclaimer, the tenant may give in evidence that the disclaimer was intended only as to the place in which the distress was taken, and also, that such place was not covered by the lease. *Ibid.*

37. Whether the doctrine of forfeiture applies at all to a disclaimer by tenant for life. *Quære. Ibid.*

See tit. COVENANT, II. TAXES, 2, 3, 4.

IV. Emblements.

38. In the lease of a farm for six years, it was agreed that either party might put an end to the lease, on giving to the other six months' notice; but if the lessor gave notice to the lessee to quit, he was to allow the latter for preparing the ground for seed, and for any other extra labor, &c. Notwithstanding this agreement, if the lessor determines the tenancy, by giving notice to quit, after the lessee has sowed the ground, the lessee is entitled to emblements. *Stewart v. Doughty*, 9 J. R. 108.

39. And if, before the notice to quit was given, the crop was levied upon under an execution against the tenant, the purchaser may, after the tenant has quit the premises, enter and gather, and carry it away. *Ibid.*

40. By the determination of an estate at will, the lessee is entitled to emblements, but not to any compensation for improvements. *Per Kent, Ch. J. Ibid.*

41. The tenant is not entitled to emblements where the termination of the lease is fixed and certain; for it is his folly to sow when he knows that his term will expire before he can reap. *Whitmarsh v. Cutting*, 10 J. R. 360. *S. P. Bain v. Clark, id.* 424.

42. So, where there is a lease for a year, and an agreement for its renewal for another year, provided the lessor did not [*113] want the farm for his own use, if the lessee leave the premises at or before the expiration of the first year, he is not entitled to the emblements. *Bain v. Clark*, 10 J. R. 424.

V. Tenant holding over after the expiration of the term.

43. Where a tenant wilfully holds over, after the expiration of the term, and a notice to quit, the landlord is entitled to double rent. *Hall v. Ballentine*, 7 J. R. 536.

44. It seems, that where there is no mistake or pretence of right, the holding over will be considered wilful. *Ibid.*

And see EJECTMENT, IV. V. VI. IX. LANDLORD AND TENANT. RENT. CHANCERY, XXXIX. Lease.

LEGACY.

I. When legacies are cumulative.

II. Payment of legacies.

III. Action for a legacy.

I. When legacies are cumulative.

1. Where, in a will, the same sum of money is given twice, and to the same legatee, he can take only one of the sums bequeathed. *Dewitt v. Yates*, 10 J. R. 156.

2. And the latter sum is held to be a substitution, and is not taken cumulatively, unless there be some evident intention of the testator that they should be so considered, and it lies with the legatee to show that intention, and rebut the contrary presumption. *Ibid.*

3. But, where the two bequests are in different instruments, as by a will in one case, and by a codicil in another, the presumption is in favor of the legatee, and the burden of rebutting that presumption is cast on the executor. *Ibid.*

4. And the presumption, in either case, is liable to be controlled and repelled by internal evidence and the circumstances of the case. *Ibid.*

II. Payment of legacies.

5. A legacy charged on land, and no time of payment mentioned in the will, carries interest from the time of the testator's death. *Van Bramer v. Executors of Hoffman*, 2 J. C. 200.

*6. But a legacy to be paid out of funds which the executor is to [*114] receive from the devisee of the real estate, is not a legacy charged on land. *Ibid.*

7. Interest will be given on a legacy payable to a child at a particular time, where no provision is made for its maintenance. *Ibid.*

8. But not to a grandchild. *Ibid.*

9. And a legacy payable to a grandchild when he comes of age, carries interest only from that period. *Ibid.*

III. Action for a legacy.

10. In an action against executors for a legacy, under the statute, (1 N. R. L. 314. s. 19.) the plaintiff must allege in his declaration, and prove, that the executors, at the time of bringing the action, had sufficient assets to pay the debts and legacies. *Dewitt v. Schoonmaker*, 2 J. R. 243.

11. The testator devised all his estate to his wife during her life, in case she remained a widow, and after her death or marriage, to his son, chargeable with the payment of a legacy to his daughter; whether an action for the legacy will lie against the executors? *Quære. Ibid.*

12. *Assumpsit* lies against a devisee, upon his express promise to pay a specific sum bequeathed as a legacy, and charged on the land devised, made after the executors had assented to the legacy, and in consideration of the devisee having become seised of the land under the devise. *Beecker v. Beecker*, 7 J. R. 99.

13. But whether the action can be sustained on an implied promise? *Quære. Ibid.*

14. Where an estate is devised, charged with the payment of an annuity, acceptance and enjoyment of the estate devised, and an actual payment of part of the legacy, by the devisees, is conclusive evidence of, and equiv

alent to, an express promise by them to pay the annuity. *Van Orden v. Van Orden*, 10 J. R. 30.

15. Where land is devised, subject to the payment of a specific sum of money as a legacy, no action will lie against the personal representatives of the devisee, but it must be brought against the heirs and terretenants. *Livingston v. Executors of Livingston*, 3 J. R. 189.

16. No action at law lies against terretenants, for a legacy, though an annuity for life is expressly charged on the real and personal estate of the testator; but the proper remedy is in the Court of Chancery. *Pelletreau v. Rathbone*, 18 J. R. 428.

See *tit. CHANCERY, XL. Legacy.*

[*115]

*LETTING AND HIRING OF CHATTELS.

If A. delivers cattle to B., and B. promises to redeliver them within one year, with the natural increase, and to pay for such as should be lost or destroyed, and not redelivered; it is letting of the chattels for a year, for a valuable consideration, and not a mere naked bailment. *Putnam v. Wyley*, 8 J. R. 432.

LIBEL.

- I. *What is a libel.*
- II. *Publication.*
- III. *Justification.*
- IV. *Action for a libel.*

I. *What is a libel.*

1. A libel is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent, toward government, magistrates, or individuals. By *Hamilton*, *arguendo*, in *The People v. Crowell*, 3 J. C. 354. Sanctioned and adopted by the Court. *Steele v. Southwick*, 9 J. R. 214.

2. To charge a counsellor at law with offering himself as a witness, in order to divulge the secrets of his client, is libellous. *Riggs v. Denniston*, 3 J. C. 198.

3. Charging a commissioner of bankrupts with being a misanthropist, and violent partisan, stripping unfortunate debtors of every cent, and then depriving them of the benefit of the act, is libellous. *Ibid.*

4. No action will lie for charges against a public officer, contained in a petition to the council of appointment, praying his removal from office, although the words used are false and actionable in themselves, without proving express malice, or that the petition was actually malicious and groundless, and presented merely to injure the plaintiff's character. *Thorn v. Blanchard*, 5 J. R. 508.

5. And it seems, that where a person ad-

dresses a complaint to persons competent to redress the grievance complained of, no action will lie against him, whether his statement be true or false, or his motives innocent or malicious. *Ibid.*

6. To publish of a member of Congress, that "he is a fawning sycophant, a misrepresentative in Congress, and a grovelling office-seeker; he has abandoned his post in Congress in pursuit of an office," is libellous. *Thomas v. Creswell*, 7 J. R. 264.

7. And whether the person so libelled, did leave his post for the *purpose imputed to him, or had violated his [*116] duties as a representative in Congress, are questions for the jury to decide. *Ibid.*

8. Though a person may publish a correct account of the proceedings in a Court of justice, yet, if he discolors or garbles the proceedings, or adds comments and insinuations of his own, in order to asperse the character of the parties concerned, it is libellous. *Ibid.*

9. A. was a witness in a cause between B. and C.; and C., afterwards, printed and published the following words of A.: "Our army swore terribly in *Flanders*, said uncle *Toby*; and, if *Toby* were here now, he might say the same of some modern swearers; the man (meaning A.) is no slouch at swearing to an old story." Held, that these words, if they did not import a charge of perjury, in the legal sense, yet they were libellous, as they held up the plaintiff to contempt and ridicule, as being so thoughtless, or so criminal, as to be regardless of the obligation of a witness, and therefore, utterly unworthy of credit. *Steele v. Southwick*, 9 J. R. 214.

10. Where C. published a direct and positive contradiction of what a witness, at a trial between B. and C., had sworn that A. had said; held, that it was not a libel, as it was not accompanied with any imputation of a crime in A. *Ibid.*

11. A publication, charging the plaintiff with insanity, is libellous. *Southwick v. Stevens*, 10 J. R. 443.

12. An action does not lie by an officer of a regiment of militia, for a publication reflecting upon the officers of the regiment generally, without averring special damage. *Sumner v. Buel*, 12 J. R. 475.

II. *Publication.*

13. Sending a letter sealed up is no publication; and a letter is always to be understood as being sealed up, unless otherwise expressed. *Lyle v. Clason*, 1 C. R. 581.

14. No action will lie without publication, but an indictment may. *Ibid.*

15. That the defendant sent a letter to the plaintiff, and the same was, by means of such sending thereof, received and read by the plaintiff, is bad, as showing no publication, and is cause for arresting the judgment. *Ibid.*

16. Whether the libel was published of and concerning the plaintiff, or whether, by the person mentioned in the libel, the plaintiff was intended, is a question of fact for the jury. *Van Vechten v. Hopkins*, 5 J. R. 211.

17. The defendant had been chairman of a

public meeting, at which the libel in question had been signed by him, and ordered by the meeting to be published: on a demurrer to evidence, an affidavit of the defendant, and one of A., which the defendant in his own affidavit referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits, and referred to in them, were held, sufficient evidence of publication. *Lewis v. Few*, 5 J. R. 1.

*18. Where a witness swore [*117] that he was a printer, and had been in the office of the defendant where a certain paper was printed, and he saw it printed there, and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office; held, that this was *prima facie* evidence of the publication by the defendant. *Southwick v. Stevens*, 10 J. R. 443.

III. Justification.

19. In an action for charging a counsellor at law with offering himself as a witness, in order to divulge the secrets of his client, it is not a sufficient justification, that he disclosed matters communicated to him by his client which had no relation or pertinency to the cause in which he was engaged. *Riggs v. Denniston*, 3 J. C. 198.

20. A justification, in an action for a libel, charging the plaintiff with having wilfully and knowingly perverted the law, while acting as commissioner of bankrupts, for illegal and oppressive purposes, must state such facts as import with certainty, that the plaintiff wilfully perverted the law for illegal and oppressive purposes. *Ibid.*

21. It is no justification, that the defendant signed the libellous paper, as chairman of a public meeting of citizens, convened for the purpose of deciding on a proper candidate for the office of governor, at an approaching election, and that it was published by the order of such meeting. *Lewis v. Few*, 5 J. R. 1.

22. In an action for a libel, charging the plaintiff, who had been a minister of France to the United States, with having traitorously betrayed the secrets of his government, proof that he had published his instructions is not a justification; for a public minister may, if he deems it necessary, publish his instructions. *Genet v. Mitchell*, 7 J. R. 120.

23. And whether the plaintiff had traitorously made public his instructions, is a mixed question, to be submitted to the jury under the advice of the Court; and the criminality of the act altogether depends upon the intent with which it was done. Per *Kent*, Ch. J. *Ibid.*

24. Where the libel charges the plaintiff with being a liar, evidence that "sundry honest men, to wit, A., B., &c. naming them, "and others, believed and considered the plaintiff not to be a man of truth, but addicted to falsehood," is not admissible in justification; but the defendant can only justify by proving the facts charged. *Brooks v. Benias*, 8 J. R. 455.

25. Whether a person who repeats a slander, but who at the same time names the person from whom he received it, may plead that circumstance in justification, seems to depend on the intent, or *quo animo*, with which the words with the name of the author are repeated. *Dole v. Lyon*, 10 J. R. 447.

26. In an action for a libel, the defendant may give in evidence a former publication by the plaintiff, to which the libel was an answer to explain the subject matter, occasion, and intent of the defendant's "publication, and in mitigation of damages. [*118] *Hotchkiss v. Lothrop*, 1 J. R. 286.

27. But such prior publication by the plaintiff, though a libel on the defendant, does not amount to a justification of the defendant, nor will it be received in evidence as a justification. *Ibid.* (See *Southwick v. Stevens*, 10 J. R. 443.)

28. On an indictment for a libel before the act, (s. 28. c. 90.) could the defendant give the truth in evidence? and were the jury to decide both on the law and on the fact? *Quere. The People v. Cronwell*, 3 J. C. 337.

IV. Action for a libel.

29. An action for a libel lies against the proprietor of a gazette edited by another, though the publication was made without the knowledge of such proprietor. *Andres v. Wells*, 7 J. R. 260.

30. But if a printing press and newspaper establishment be assigned to a person merely as security for a debt, and the press remain in the sole possession and management of the assignor, the ownership of the person holding the security or lien, is not such as will render him liable to an action as a proprietor. *Ibid.*

31. The publisher of a libel is responsible to the party libelled, notwithstanding the libel is accompanied with the name of the author. *Dole v. Lyon*, 10 J. R. 447.

32. Where the publication is the joint act of two or more persons, they may be joined in the same action. *Thomas v. Rumsey*, 6 J. R. 26.

33. If separate suits are brought against each, the plaintiff can have but one satisfaction, but may elect *de melioribus damnis*. *Ibid.*

34. Where libellous matter is charged against some particular person, who is so ambiguously described that the person meant cannot be identified without the aid of extrinsic facts, there, by the introduction of proper averments, and a *colloquium*, the words taken in connection with the whole libel, may be rendered sufficiently certain to maintain an action. *Van Vechten v. Hopkins*, 5 J. R. 211.

35. And all the extrinsic facts, as well as the libel, must be submitted to the jury, under the direction of the judge, as in other cases; and if the plaintiff's evidence is too inconclusive to entitle him to carry the cause to the jury, the judge may nonsuit him. *Ibid.*

36. The plaintiff cannot prove by witnesses that from reading the libel, they believe the person intended in the libel was the plaintiff. *Ibid.*

37. The plaintiff, at the trial, may abandon

any part of the libellous matter in any one count in his declaration, and the part so abandoned may be used in connection with the part retained, to show its meaning; and he will be entitled to recover, if the part retained be sufficient to sustain an action. *Genet v. Mitchell*, 7 J. R. 120.

38. It seems to be improper to suffer distinct libellous matter subsequent to that charged in the declaration to be given in evidence, to *show the intent with which the matter charged was published. Per *Spencer, J. Thomas v. Croswell*, 7 J. R. 264.

39. Matters stated in the declaration as inducement to the action, may be proved by parol. *Southwick v. Stevens*, 10 J. R. 443.

40. Whether the plaintiff may give in evidence, in aggravation of damages, that the defendant had been indemnified for the publication of the libel? *Quære. Hotchkiss v. Lothrop*, 1 J. R. 286. *Dole v. Lyon*, 10 J. R. 447.

41. By a default and interlocutory judgment, the fact of publication and the truth of the innuendoes are admitted. *Tillotson v. Cheetham*, 3 J. R. 56.

42. The defendant, before the jury of inquiry, is not to be allowed to call their attention to the other paragraphs contained in the same publication, in order to show a different meaning of the words complained of than that set up by the plaintiff. *Ibid.*

43. The public character of the plaintiff, as an officer of government, and the evil example of libels, are considerations with the jury for increasing the damages. *Ibid.*

44. The defendant is not allowed to give in evidence, in mitigation of damages, a former recovery of damages against him, in favor of the same plaintiff, in another action for a libel, which formed one of a series of numbers published in the same gazette, and containing the libellous words charged in the declaration in the second suit. *Ibid.*

45. Where A. published a libel taken from a paper published by B., as an extract from a paper published by C., it was held, in an action brought by C. against A., that the testimony of D., that he had heard A., before he published the libel, ask E. whether he had not seen it in the paper of C., and that E. answered that "he had," was inadmissible in mitigation of damages; but that E. himself should be produced, if his declarations were proper evidence. *Coleman v. Southwick*, 9 J. R. 45.

Pleadings in an action for a libel. See PLEADING, XVI.

LIEN.

Where a broker, who has an insurance effected, knows that his employer was acting as agent for a third person in obtaining the insurance, and not on his own account, he cannot retain money received from the insurer for a loss, for a debt due from such agent to himself. *Foster v. Hoyt*, 2 J. C. 327.

Judgments and executions, when a lien. See JUDGMENT, I.

Attorney's lien for his costs. See ATTORNEY AND COUNSEL, VI.

And see MORTGAGE.

[*120]

*LIMITATION OF ACTIONS.

I. When the statute of limitations (Sess. 24. c. 183. 1 N. R. L. 184.) is a bar.

II. Exceptions in the statute, and what will revive the right of action.

I. When the statute of limitations (Sess. 24. c. 183. 1 N. R. L. 184.) is a bar.

1. When the statute once begins to run, it continues to run, notwithstanding any subsequent disability. *Peck v. Randall*, 1 J. R. 165.

2. The trustees of an absent or absconding debtor may avail themselves of the statute to the same extent that the debtor might do, if an action were brought against him. *Ibid.*

3. The exhibition of the creditor's claim to the trustee, is equivalent to the commencement of a suit, so as to prevent the statute from attaching. *Ibid.*

4. A remainderman, or reversioner, cannot enter, so as to avoid the statute, during the continuance of the particular estate; and, consequently, as to them, the statute does not commence running until after the determination of the particular estate. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 4 J. R. 390.

5. An entry to avoid the statute must be an entry for the purpose of taking possession. *Ibid.*

6. In trover, for taking goods under an irregular execution, the statute begins to run from the time the goods were taken, and not from the time that the execution was set aside. *Read v. Markle*, 3 J. R. 523.

7. The statute is a bar to an action on a contract made in another state, and on which, by the law of that state, the time of limitation had not yet expired. *Nash v. Tupper*, 1 C. R. 402.

8. So, to a set-off of demands arising in another state. *Ruggles v. Keeler*, 3 J. R. 263.

9. In an action on a foreign judgment, or a judgment recovered in another state, the statute is a bar; for such judgment is but a simple contract debt. *Hubbell v. Coudrey*, 5 J. R. 132. *S. P. Bissell v. Hall*, 11 J. R. 168.

10. If an action be instituted under the statute of the 27th of March, 1797, (Sess. 20. c. 52.) "limiting the period of bringing claims and prosecutions against forfeited estates," within the five years thereby limited, and it abates by the death of the defendant, who dies after the five years have expired, whether another action, though instituted directly after, can be maintained? *Quære. Jackson, ex dem. Frost, v. Horton*, 3 C. R. 197.

11. A judgment in a Justice's Court is not

within the statute, like a foreign judgment; for it is, in an action founded upon it, conclusive evidence of debt, and therefore not a simple contract debt, but a specialty. *Pease v. Howard*, 14 J. R. 479.

*12. Besides, the actions of debt [*121] founded upon any contract, without specialty, which are barred by the statute, are only actions of debt founded upon actual contracts, and not such debts as are created by construction of law. *Ibid.*

13. An action for rent reserved by indenture of lease, is not within the statute of limitations. *Bailey v. Jackson*, 16 J. R. 210.

14. But where more than twenty years before the commencement of the action have elapsed since the last quarter's rent became due, payment of the rent will be presumed. *Ibid.*

15. As, however, the presumption of payment is not a legal bar, it may be repelled by circumstances. *Ibid.*

16. As where the lease was made in England, of land in that country, the subsequent removal of the lessee to the United States, his denial that he ever paid rent, or executed the lease, and the continued residence of the lessor in E., were held to be circumstances sufficient to rebut the presumption. *Ibid.*

17. The People not being named in the fifth section of the statute, (Sess. 24. c. 183. 1 N. R. L. 184.) are not bound by it, and may bring a personal action at any time. *The People v. Gilbert*, 18 J. R. 227.

18. Where, to an action of *assumpsit* for negligence, want of skill, and fraud in the performance of work, the defendant pleads the statute in bar, the plaintiff cannot reply a fraudulent concealment of the badness of the work, by the defendant, so that the plaintiff did not discover the fraud, until within six years before the commencement of the suit, so as to deprive the defendant of the protection of the statute, to which he would otherwise be entitled. *Troup v. Smith's Executors*, 20 J. R. 33.

19. A *qui tam* action on the fourth section of the statute of frauds, (Sess. 10. c. 44.) which gives a moiety of the sum recovered to the people, and the other moiety to the party aggrieved, is not within the statute. *Wilcox, qui tam, &c., v. Fitch*, 20 J. R. 472.

II. Exceptions in the statute, and what will revive the right of action.

20. The clause excepting "actions which concern the trade of merchandise, between merchant and merchant," (Sec. 5. 1 N. R. L. 186.) extends only to open and current accounts, and does not admit of a greater extension than what has been given by the English Courts to the words of the statute of James I., which excepts accounts concerning the trade of merchandise, &c. *Ramchander v. Hammond*, 2 J. R. 200.

21. The saving (sect. 5.) of actions against persons out of the state, extends to foreigners, or those who have resided altogether out of the state, as well as to citizens of the state, who

may be absent for a time. *Ruggles v. Keeler*, 3 J. R. 263.

22. Where the defendant has come into the state publicly, so that the creditor, with ordinary diligence and due means, might have arrested him, it is a return into the state, within the meaning of the proviso "in the 5th section, and the statute be- [*122] gins to run from the time of such return. *Fowler v. Hunt*, 10 J. R. 464.

23. But it is otherwise if the return from abroad be clandestine, and with an intent to defraud the creditor, by setting the statute in operation, and then departing. *Ibid.*

24. By the act of the 21st of March, 1783, the statute of limitations was suspended during the war; and by the act of the 26th of February, 1788, the plaintiff's right of action is saved, where the defendant is out of the state. The maker of a promissory note, dated the 17th of December, 1777, having been within the British lines during the war, and departing with the British at the close of the war, is to be deemed out of the state during that time; and the cause of action being considered as accruing on the 21st of March, 1783, the plaintiff having brought his action within six years after the return of the maker to the state, the latter cannot avail himself of the statute. *Sleight v. Kane*, 1 J. C. 76.

25. Where a subsequent disability of the plaintiff to sue arises, the period of disability is, in cases of presumption arising from lapse of time, (though it is otherwise, under the statute of limitations,) to be deducted from the twenty years. *Bailey v. Jackson*, 16 J. R. 210.

26. Therefore, if after the cause of action accrued the plaintiff becomes an alien enemy, the whole time of the continuance of the war must be excluded from the calculation. *Ibid.*

27. A party claiming the benefit of the proviso in the statute, can only avail himself of a disability existing when the right of action accrued. *Jackson, ex dem. Roosevelt, v. Wheat*, 18 J. R. 40.

28. An infant who has been disseised, is bound to bring his action within ten years after coming of age. Per *Kent and Benson, Js. Jackson, ex dem. Rensselaer, v. Whillock*, 1 J. C. 213.

29. A right of entry does not accrue to the remainderman, or heir, until the determination of the particular estate; and if, on its determination, the person in remainder or heir, should be a *feme covert*, she is not bound to bring her action within twenty years thereafter, but is protected by the statute during her coverture. *Jackson, ex dem. Beekman, v. Sellick*, 8 J. R. 262.

30. A party having a right to land, has, in every event, twenty years to make an entry, and if under legal disability when his right of entry first accrued, he may, though twenty years have elapsed, bring his action within ten years after his disability is removed. *Jackson, ex dem. Corson, v. Cairns*, 20 J. R. 301.

31. Where A., by direction of B., entered on land, in 1779, which C. claimed as his own; and wrote a letter to B., who also claim-

ed it, that when the times became more peaceable, he and C. would have it surveyed, and if the land belonged to C., A. should pay him rent, &c.; *held*, that this letter, if it had any effect, merely suspended the operations of the statute during the war, on the termination of which the statute began to run against C. *Jackson, ex dem. Brott, v. Hunt*, 6 J. R. 16.

32. Where the defendant, in an action on a promissory note, on being shown the note, admitted that he had executed it, but said that it was outlawed, and that he meant to avail himself of the statute of *limitations, *held*, that this was not sufficient to take the case out of the statute. *Danforth v. Culver*, 11 J. R. 146.

33. An acknowledgment does not revive the old debt; but is evidence only of a new promise, of which the former debt is the consideration. *Ibid.*

34. An acknowledgment, or promise to pay, made after the commencement of the suit is sufficient. *Ibid.*

35. If the defendant, on being arrested by the sheriff, promise to settle with the plaintiff, if he will give time for payment, it is a sufficient acknowledgment to prevent the operation of the statute. *Stubbs v. Champlin*, 4 J. R. 461.

36. If the defendant promise to pay a debt, barred by the statute of limitations, in certain specific articles, the promise is conditional, and the plaintiff is bound to show that he offered, and was ready to accept the specific articles. *Bush v. Barnard*, 8 J. R. 407.

37. Where the maker of a note admitted that he had made it, but said that it was paid; that he had sent money to B., who, he supposed, had paid it, but if B. had not paid it, he would pay it; that he would not plead the statute unless the money had been paid, and he thought he could make that appear; this was a sufficient acknowledgment, and threw the burden of proving payment on the defendant. *Dean v. Pitts*, 10 J. R. 35.

38. An acknowledgment by one of the partners, after the dissolution of the partnership, of a partnership debt, will take it out of the statute. *Smith v. Ludlow*, 6 J. R. 267.

39. Where, after a dissolution of the partnership, one of the partners, on an account against the partnership being presented to him, said, that he had made out the account, but he thought that it had been settled by the other partner, and that he would see him, and inform the plaintiff of the result; this was *held* a sufficient acknowledgment. *Ibid.*

40. So, if one of the partners, in the name of the partnership, state an account, admitting the debt due to the plaintiff, it will take it out of the statute. *Ibid.*

41. The promise of one joint debtor, to pay a debt barred by the statute of limitations, is sufficient to take the case out of the statute. *Johnson v. Beardslee*, 15 J. R. 3.

42. In an action against the heirs and devisees of a deceased debtor, a promise by two of the defendants, who were, also, his executors, to pay the debt, was *held* sufficient to charge all the defendants. *Ibid.*

43. *It seems*, that the acknowledgment of the

debt unaccompanied with a protestation against the payment of it, is evidence sufficient for the jury to presume a new promise. *Ibid.*

44. Where the defendant admits that he has received the money which the plaintiff claims, but denies the validity of the claim, such acknowledgment is not evidence of a new promise, so as to take the case out of the statute. *Sands v. Gelston*, 15 J. R. 511.

45. To take a demand out of the statute, there must be a promise express or implied; and no promise can be inferred from a declaration of the defendant that he was not holden to pay any thing, and that the contract could not be enforced at law, and that he never would *pay any thing, [*124] as it was an unjust debt. *Lawrence v. Hopkins*, 13 J. R. 268.

46. An offer by a defendant to compromise a suit, which is rejected, cannot be made use of to take the case out of the statute. *Ibid.*

47. Where the defendant did not pretend that the demand was not due, and said that he did not recollect paying it, but that he would examine his papers, and if he had paid it, he would write to the witness, who never received any communication, afterwards, from the defendant; *held*, that this was sufficient evidence from which to imply a promise by the defendant to pay the money, if he should find that he had not paid it, and thus to take the case out of the statute. *Mosher v. Hubbard*, 13 J. R. 510.

48. Where the defendant says, if the plaintiff has a claim either in law or equity, he will compromise the business, or submit it to arbitration, but, at the same time, denies that the plaintiff has any claim in law or equity, this is not sufficient to take the case out of the statute. *Sands v. Gelston*, 15 J. R. 511.

49. In an action of *assumpsit* brought more than six years after the cause of action accrued, it is not necessary to aver a new promise within the six years; but proof of an acknowledgment of the debt within the six years is sufficient to repel a defence set up under the statute. *Martin v. Williams*, 17 J. R. 330.

50. So, where the defendant offers to set off a demand against the plaintiff which accrued more than six years before the bringing of the suit, it is not necessary that the defendant, in the notice annexed to his plea, should state a promise to pay within six years. *Ibid.*

51. Nor is it an objection, that the demand offered to be set off was not originally due to the defendant, but had been assigned to him; the assignment being before the commencement of the suit. *Ibid.*

52. To an action for a *deceit*, the defendant pleaded not guilty within six years, on which issue was joined: *held*, that proof of the acknowledgment of the fraud within six years, did not support the issue, or take the case out of the statute of limitations. *Oothout v. Thompson*, 20 J. R. 277.

53. A writ was issued against A. within six years from the time the cause of action accrued; the plaintiff's attorney finding that the demand was on a partnership account against A. and B., filed his declaration against A. and B., as of the day of the term on which the writ

was returnable, which was after the six years had elapsed: *held*, that this was a good commencement of the action within six years. *Garland v. Chatte*, 12 J. R. 430.

Adverse possession, when a bar in ejectment. *See* EJECTMENT, V. 54—84. *See* CHANCERY, XXXVIII. *Laches*, &c. XLI. *Limitations*.

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*LOAN OFFICE ACT AND LOAN OFFICERS.

The Supreme Court refused to compel, by *mandamus*, the supervisors of *Ulster* county, to assess and levy on the county, the amount of the deficiency of payment of sums loaned under the act, passed the 18th of *April*, 1786, commonly called the *loan office act*, (Sess. 9. c. 40. s. 28. 1 Greenl. ed. Laws, 240.) prior to the year 1795; such changes having since taken place in that county, by the erection of new counties, as to render it impracticable, after such a lapse of time, to do what is right and just in the case. *The People v. The Supervisors of Ulster*, 16 J. R. 59.

See MORTGAGE, VI. CHANCERY, XLII.

LOTTERIES.

1. A lottery, instituted by the laws of another state, is within the act to prevent private lotteries, (Sess. 6. c. 12. 1 N. R. L. 188.) *Hunt v. Knickerbocker*, 5 J. R. 327.

2. And a contract for the sale of tickets in such lottery is void. *Ibid*.

3. Insurance of tickets in a lottery established by a law of this state, having been declared illegal by statute, the insurance of tickets in a foreign lottery, although not punishable under the act and before the act of the 17th of *February*, 1809, (Sess. 32. c. 36.) extending its provisions, was *held* illegal; such insurance being contrary to the policy indicated by the former act. *Mount & Wardell v. Waite*, 7 J. R. 434.

4. But the insured not having violated any statute, was *held* not to stand in *pari delicto*, and therefore, entitled to recover back the premium paid for insurance. *Ibid*.

LUNATICS AND IDIOTS.

1. Sanity is to be presumed, and the burden of proof lies on the party denying it. *Jackson*, ex dem. *Van Dusen*, v. *Van Dusen*, 5 J. R. 144.

2. But after a general derangement has been shown, it is then incumbent on the other side to show, that the party who did the act was sane at the very time it was performed. *Ibid*.

3. A defendant *non compos mentis*, but of full age, and not an idiot from his birth, may

appear by attorney; and the Court, on motion, will appoint an attorney for him. *Faulkner v. McClure*, 18 J. R. 134.

See tit. CHANCERY, XLIII.

*MANDAMUS. [*126]

- I. *When, and to whom a mandamus lies.*
- II. *Rule to show cause, mandamus, and proceedings thereon.*

I. *When, and to whom a mandamus lies.*

1. A mandamus lies to the Sessions, to compel them to give judgment, on a verdict which they have undertaken to set aside on the merits. *The People v. Justices of Chenango*, 1 J. C. 179. *S. C. 2 C. C. E. 319.*

2. It lies to a Court of Common Pleas, to restore an attorney whom they had removed from office. *The People v. Justices of Delaware*, 1 J. C. 181.

3. It will not lie to a Court of Common Pleas, to compel them to enter judgment on a verdict, where the party applying afterwards submitted to a new trial on the merits. *Weavel v. Lasher*, 1 J. C. 241.

4. It will not lie to a Court of Common Pleas, where the party may have a writ of error, as where they have given judgment for damages only, to compel them to give judgment for the costs likewise. *Jansen v. Davison*, 2 J. C. 72.

5. It lies to a Court of Common Pleas, to compel them to seal a bill of exceptions. *The People v. Judges of Westchester*, 2 J. C. 118. *S. C. C. C. 135. The People v. Judges of Washington*, 1 C. R. 511. *Sikes v. Ransom*, 6 J. R. 279.

6. So, to amend a bill of exceptions according to the truth of the case. *Sikes v. Ransom*, 6 J. R. 279.

7. But it will not be granted, if it appear from the affidavits, that the bill of exceptions was untrue; and the relator shall, in such case, pay costs to the defendants. *The People v. Judges of Westchester*, 2 J. C. 118.

8. It lies to a Court of Common Pleas, to compel them to give judgment; as where the plaintiff in the Court below obtained a verdict, and judgment was afterwards arrested, he may have a *mandamus*, to compel the Court below to give judgment against himself, in order that he may bring a writ of error. *Fish v. Weatherwar*, 2 J. C. 215.

9. So, where a Court of Common Pleas arrests a judgment for the insufficiency of the declaration, and the plaintiff thereupon prays a judgment against himself, in order that he may bring a writ of error, and the Court of Common Pleas refuses to grant such judgment, the plaintiff may have a *mandamus*. *Horne v. Barney*, 19 J. R. 247.

10. Where an office is already filled by a person, who is in by color of right, a *mandamus* is never issued to admit another person; the

proper remedy is by an information in the nature of a *quo warranto*. *The People v. Corporation of New-York*, 3 J. C. 79.

11. A rule to show cause will be granted to a Court of Common Pleas, why a *mandamus* should not issue to compel them to [*127] permit a *plaint to be filed, *nunc pro tunc*, after a writ of error had been brought to the Supreme Court, and the want of such plaint assigned for error. *The People v. Judges of Westchester*, C. C. 55.

12. Where no one of the judges of a Court of Common Pleas is a counsellor of the Supreme Court, and, after verdict, they refuse to give judgment, under pretext of irregularity, but in truth, because the verdict was against evidence, a *mandamus* lies to compel them to enter judgment. *Haight v. Turner*, 2 J. R. 371.

13. Where, on the return to an alternative *mandamus*, commanding the judges of the Court of Common Pleas to sign and seal a bill of exceptions, or to show cause, &c., it appeared that the bill of exceptions was not tendered to the judges at the trial, but was presented to them, individually, at different times, after the Court had adjourned for the term, the Supreme Court refused to grant a peremptory *mandamus*. *Midberry v. Collins*, 9 J. R. 345.

14. A *mandamus* will not be granted where the party has an adequate remedy by action. *Shipley v. Mechanic's Bank*, 10 J. R. 484.

15. So, where a stockholder in a bank, having become insolvent, assigned his estate, including the shares, to B., a *mandamus* will not lie, at the instance of B., to the president, &c. to compel them to transfer the shares; but the party is left to his ordinary remedy, by a special action on the case, to recover the value of the stock refused to be transferred. *Ibid*.

16. Whenever a discretionary power is vested in officers, and they have exercised that discretion, a *mandamus* to them will not be granted. *The People v. Supervisors of Albany*, 12 J. R. 414. *S. P. Hull v. Supervisors of Oneida*, 19 J. R. 259.

17. After the supervisors of a county have passed upon the account of a constable, for the expense of removing paupers, and have allowed a part and disallowed a part, a peremptory *mandamus* directing them to audit and allow the account of the relator, will not be granted on the ground of the improper rejection of part of the account. *Ibid*.

18. But if subordinate public agents refuse to act, or to entertain a question for their discretion, in cases where the law enjoins them to do the act required, the Court may enforce obedience to the law by a *mandamus*, where no other remedy exists. *Hull v. Supervisors of Oneida*, 19 J. R. 259.

19. As, where the supervisors of a county refuse to allow a claim for services, as a county charge, the Court, if it be a legal charge, may guide and instruct the supervisors, in the exercise of their duty by a writ of *mandamus*, and compel them to admit the claim as a county charge, or, in other words, to set them in motion without controlling the exercise of their discretion as to the amount to be allowed. *Ibid*.

20. A peremptory *mandamus* in the first instance, lies to the clerk of a county, who refuses to record a deed presented to him for that purpose, and which has been duly acknowledged by the grantor, and the proper certificate and proof of the identity of the grantor endorsed thereon. *Ex parte Goodell*, 14 J. R. 325.

21. A *mandamus* lies to the supervisors of a county, to compel them to allow the account of the clerk of the county, for advances *made by him in purchasing books for recording mortgages, &c. and sending notices to judges and justices of the pedlars licensed, with interest on such advances; such services being required by law of the clerks of counties, and no specific compensation provided for them, are properly chargeable to the county, and ought, therefore, to be allowed and paid, according to the "act for defraying the public and necessary charges in the respective counties," &c. (Sess. 36. c. 49.) *Bright v. Supervisors of Chenango*, 18 J. R. 242.

II. Rule to show cause, *mandamus* and proceedings thereon.

22. A peremptory *mandamus* to a Court of Common Pleas, will not be granted in the first instance, but the party must obtain a rule to show cause why it should not issue. *The People v. Judges of Cayuga*, 2 J. C. 68. *The People v. Judges of Washington*, 1 C. R. 511.

23. The affidavit on which the *mandamus* is moved for, must not be entitled. *Haight v. Turner*, 2 J. R. 371.

24. If an alternative *mandamus* has been duly served, the Supreme Court may, in their discretion, award a peremptory one, although the former writ has not been returned, and without compelling a return of it. *The People v. Judges of Ulster*, 1 J. R. 64.

25. But if, in the opinion of the Supreme Court, the defendants have not had time to make up their return, they will allow them a further day before the peremptory *mandamus* issues. *Ibid*.

26. On a motion for a *mandamus* to a Court of Common Pleas, to show cause why an attorney should not be restored to his office, the affidavit should show that the Court below acted improperly, or that the fact charged against the attorney was founded in error or mistake. *In the matter of P. Gephard*, 1 J. C. 134.

27. A peremptory *mandamus* will be set aside, on motion, if unfairly issued. *Everitt v. The People*, 1 C. R. 8.

28. An alternative *mandamus* had been directed to a town clerk, commanding him to record the survey of a road pursuant to the act, (Sess. 24. c. 186. 1 N. R. L. 270.) or show cause; and the clerk returned, that he did not record the survey, because one of the commissioners had signed the survey by the name of *Zaccheus Higby*, whereas he was elected by the name of *Zaccheus Higby, junior*; and because the commissioners had not taken the oath of office, and filed a certificate of the oath with the clerk according to the act; *held*,

that the return was insufficient, and a peremptory *mandamus* was awarded. *The People v. Collins*, 7 J. R. 549.

29. A *mandamus* to commissioners of highways to compel them to lay out a road, need not, in the first instance, be directed to them in their individual names; it is only in case of disobedience that they are to be proceeded against *personally*. *People v. Champion*, 16 J. R. 61.

30. The affidavit to obtain an attachment against the judges of a Court of Common Pleas, for disobeying a peremptory *mandamus*, commanding them to seal a bill of exceptions, must show that the persons served were those who ought to have sealed it. *The People v. Judges of Washington*, 2 C. R. 97.

*31. The *relator* or party prosecuting a *mandamus*, may demur to the return of the writ. *People*, ex *relat. Shaul*, v. *Champion*, 16 J. R. 61.

MARTIAL LAW.

1. A citizen of the *United States*, not in military service, is not amenable to a Court Martial. *Smith v. Shaw*, 12 J. R. 257.

2. Where a citizen of the *United States* is arrested as a *spy*, and detained in custody until that fact can be tried by a Court Martial, the party arresting, and the commanding officer by whose orders he is detained in custody, are trespassers. *Ibid*.

3. The martial law is not altogether a written law, but is composed in part of military usage, which must govern in all well organized troops, when such usage is not unreasonable, or contrary to special enactment. *Schuneman v. Dibley*, 14 J. R. 235.

4. A soldier who has been arrested and imprisoned, is not, therefore, exonerated from such duty as he is capable of performing while under restraint; and he may be compelled by further restraint to perform such duty. *Ibid*.

5. An officer, civil or military, may increase the rigor of confinement in order to prevent the escape of his prisoner. *Ibid*.

6. Where a soldier, arrested and committed to the custody of the commandant of a garrison, was ordered by him to do certain duty which was reasonable and according to military usage; *held*, that the disobedience of the soldier to the order of the commandant, justified the officer in causing him to be tied, and was a defence in an action for false imprisonment. *Ibid*.

See COURTS MARTIAL, OF THE UNITED STATES. MILITIA.

MASTER AND SERVANT.

1. Where an apprentice is employed by a third person without the knowledge or consent of his master, the master is entitled to all his

earnings, whether the person or persons did or did not know that he was an apprentice. *James v. Le Roy*, 6 J. R. 274.

2. But in the case of a hired servant, the employer must have notice of his being the servant of another to make him answerable *Ibid*.

See APPRENTICE.

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*MILITARY BOUNTY LANDS.

1. By the act of the 5th of *April*, 1803, (Sess. 26. c. 88.) titles to the military bounty lands (although the patents were issued after the death of the patentees) relate back, and are deemed to have vested in persons who died before the 27th of *March*, 1783, at the time of their death. *Jackson*, ex dem. *Sherwood*, v. *Phelps*, 3 C. R. 62. (And see *Fisher v. Fields*, 10 J. R. 495.)

2. A soldier in the *New-York* line of the *American* army became entitled to land, and died in 1778, without issue. Letters patent were issued in 1798, for the land, in his name. His father died in 1803, leaving five sons and three daughters. The eldest brother sold and conveyed the land, in 1801, to H. In an action of ejectment brought to recover the possession of the land by H., who held under the deed of the eldest brother, against W., who held under a person who was in actual possession of the land when the deed to H. was given; *held*, that the deed from the elder brother was void, and that the land became vested in the father, on the death of the patentee, by the 8th section of the act of the 5th of *April*, 1803. *Jackson*, ex dem. *Miller*, v. *Winslow*, 2 J. R. 80.

3. A soldier in the revolutionary war, entitled to a lot of land as bounty, died prior to the 27th of *March*, 1783, before the statute of descents. On the 1st of *July*, 1808, his brothers and sisters, (being his next of kin,) except his eldest brother, executed a deed for the land to B. The eldest brother had previously conveyed the lot to C., who was in possession under the deed, at the time of the conveyance to B. In an action of covenant, brought by B. against the grantors in his deed, for a breach of the covenant of seisin; *held*, that the plaintiff was entitled to recover, the defendants not having shown that they came within the special provision of the 8th section of the act, (Sess. 26. c. 88.) passed *April* 5th, 1803; and the Court would not, by intendment, help the claim of the defendants, in opposition to the title of the presumptive heir at law, and of a *bona fide* purchaser, holding under him at the time. *Stevens v. Woolsey*, 9 J. R. 325.

4. A person who had settled on land in the military tract, under color of a *bona fide* purchase, made prior to the 5th *April*, 1803, cannot be put out of possession until he is paid for his improvements, according to the act of the 5th *April*, 1803, (Sess. 26. c. 88.) *Jackson*, ex dem. *Heet*, v. *Bush*, 3 J. R. 512.

5. Where a person enters upon a military lot, under color of title by descent, and leases it, the defendant is not entitled to compensation for his improvements, under the act, (Sess. 26. c. 28.) *Jackson, ex dem. Dickson, v. Stanley*, 10 J. R. 132.

6. Where a party brings an action of ejectment, before he has offered to have the improvements valued, and to pay for them, pursuant to the act, (1 N. R. L. 304.) he cannot recover costs, nor be put into possession until the improvements are valued and paid for. *Jackson, ex dem. Smith, v. M'Connell*, 11 J. R. 424.

7. A tenant entering under a person claiming the whole in severalty, *is not [*181] entitled to the value of his improvements from persons recovering as co-tenants. *Jackson, ex dem. Van Denberg, v. Bradt*, 2 C. R. 303.

8. A deed of military lands, recorded in the secretary's office, before the passing of the act, of the 8th January, 1794, will be void as to a subsequent purchaser for a valuable consideration, whose deed is first deposited with the clerk in Albany. *Jackson, ex dem. Potter, v. Hubbard*, 1 C. R. 82.

9. A sheriff's deed for land in the military tract, must be recorded; and if, after a sale under an execution, and a conveyance by the sheriff, but before such conveyance is recorded, the debtor or former proprietor conveys the land to a bona fide purchaser, for a valuable consideration, and his deed is first recorded, it will gain priority over the sheriff's deed. *Jackson, ex dem. Merrit, v. Terry*, 13 J. R. 471.

10. In an action of ejectment brought by the heirs of *Moses Miner*, the lessors claimed under a patent issued to *Moses Minner*, a soldier in the New-York line; held, that the patent was prima facie evidence of the service of the soldier mentioned in it, and as it did not appear, that there was any man in the army by the name of *Minner*, the variance must be considered as a misspelling merely of the name, which could not affect the identity of the person, nor did it make a distinct name; and besides, the defendant claimed under a soldier by the name of *Moses Miner*, who, there was strong evidence to show, was the person under whom the lessors claimed. *Jackson, ex dem. Miner, v. Boncham*, 15 J. R. 226.

11. An officer in the New-York line, during the revolutionary war, died in 1781, having devised all his estate to his father; and in 1790, a patent was issued in the name of the testator for a lot of land in the military tract; and after the death of the father, the only brother of the testator, in 1811, entered upon the lot, and in 1814, conveyed part of it to A., under whom the defendant claimed; held, that the title to the lot was vested in the testator at the time of his death, and that he might devise it; that his father was entitled both as devisee and as heir to his son, and having conveyed in 1794, the lessors of the plaintiff, who claimed under the conveyance from the father, were entitled to recover, the defendant claiming under a conveyance from the testator's brother. *Smith, v. Roosevelt, v. Van Dursen*, 15 J. R. 343.

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12. C., who had been a soldier in the New-York line, during the revolutionary war, and was entitled to military bounty land, executed an instrument to B., dated Sept. 11th, 1786, which commenced as a bond, in the penalty of 300 pounds, under which there was a condition written, reciting that C. was entitled to a bounty in land, and that no law having been passed by the legislature, C. had no legal title, nor could he convey the same, but notwithstanding, C., in consideration of four pounds, bargained and sold his right and title to B., his heirs and assigns; and C. also, by the same instrument, appointed B. his attorney, to procure a deed, binding himself not to revoke the power, and when he should have obtained a title, to convey the land to B.; held, that this instrument was intended by the parties to operate as a conveyance, in present, if it could legally have that effect; and if not, then, as an agreement for a conveyance; that it was a sufficient *bargain and sale to pass [*132] a present interest; and that by virtue of the act of the 6th April, 1790, (Sess. 13. ch. 59.) which gave effect to antecedent conveyances, by persons afterwards obtaining patents for military bounty lands, the title of the patentee actually vested in the grantee. *Jackson, ex dem. Troup, v. Blodget*, 16 J. R. 172.

13. A sale to defray the expenses of survey of the fifty acres reserved for that purpose, in a corner of each lot of the Military Tract, vests a complete title in the purchaser, which cannot be affected by showing that there was a mistake in the original survey, according to which patents were issued, and that those fifty acres ought to be added to an adjoining lot, in which there was a deficiency of land, to give it the full quantity of six hundred acres. *Jackson, ex dem. Overacker, v. Cole*, 16 J. R. 257.

14. And it seems, that in all cases, the boundaries of lots in the military tract depend upon the actual survey and location, and not on the description in the patent, or on the map filed in the office of the secretary of state; so that if by an error in the actual location, one lot falls short of 600 acres, and an adjacent lot has an excess equal to that deficiency, the deficiency of the former cannot be supplied out of the excess of the latter. *Ibid.*

15. K., a soldier entitled to bounty lands, by a deed, dated January 12th, 1788, granted, bargained and sold, for a valuable consideration, to B., all the bounty lands to which he was entitled, and in the same deed, empowered A. as his attorney, for him, and in his name, to grant, bargain and convey the same to B., his heirs and assigns, in case the same should be necessary, upon the grants having passed the great seal of the state, for such bounty lands. On the 25th February, 1792, K., for a valuable consideration, by deed, granted, bargained and conveyed the same bounty lands to C., his heirs and assigns, forever; and on the 9th February, 1802, A., as the attorney of K., in his name, executed a release of the same lands to B., and his heirs, in fee, pursuant to the power contained in the first deed; held, that the first deed from K. to B. conveyed a life estate; and K. having, before the execution of the power,

conveyed the reversion, for a valuable consideration, to C., a *bona fide* purchaser, without notice of the prior deed of K., C. became seised of the legal estate or reversion on the death of B. *Jackson, ex dem. Henderson, v. Davenport, 18 J. R. 295. S. C. in error, 20 J. R. 537.*

16. Where a soldier endorsed a conveyance on his discharge, in which he described the land as follows: "The six hundred acres of land due from the public, as a soldier in *Col. Lamb's* regiment of artillery," when, in fact, he was not a soldier in that regiment, but in the first, or *Van Schaick's* regiment; *held*, that the description of the premises conveyed was sufficient, without the words, "*Col. Lamb's* regiment," and might be rejected as surplusage. *Jackson, ex dem. Bond, v. Root, 18 J. R. 60.*

17. The act of the 14th April, 1820, (Sess. 43. ch. 245. a. 3.) relative to deeds given for military bounty lands, does not prohibit the reading in evidence a deed executed prior to the 1st May, 1797, duly recorded according to the provisions of the act of the 12th April, 1813, (Sess. 36. ch. 97.) or the exemplification of the record of a deed so recorded. *Jackson, ex dem. Yates, v. How, 19 J. R. 80.*

*18. The only operation of that [*133] section of the act, taken in connection with the act of the 4th February, 1814, (Sess. 37. ch. 6.) is to prevent the reading in evidence a deed not recorded, though it may have been duly proved or acknowledged, according to existing laws, but which the party had neglected to have recorded in due season. *Ibid.*

19. The act of the 6th April, 1790, relative to the military bounty lands, did not authorize a grant to a soldier who was not alive in March, 1783; so that nothing passes by such a grant. *Jackson, ex dem. M'Cloughry, v. Skeels, 19 J. R. 198.*

20. By the act of the 3d April, 1807, (Sess. 30. ch. 114.) which vests the lands patented to J. M., a deceased soldier, in his heirs, though aliens, in like manner as it would have descended to them had they been citizens of this state, at the time of his death, (1781,) according to the law of descents of this state, it is intended that the heirs of J. M. should take according to the law of descents at the time of passing the act; and the title of the heirs, as it respects any limitation, is to be deemed to have accrued from the time of passing the act. *Ibid.*

21. The act of the 14th April, 1820, (Sess. 36. ch. 245.) does not apply to the case where the subscribing witnesses to the deed are produced at the trial to prove its execution, or where such evidence is offered as is competent to prove its execution at common law. *Jackson, ex dem. Hungerford, v. Eaton, 20 J. R. 478.*

22. A deed, therefore, which has not been proved or acknowledged, or recorded, according to that section of the act of April 12, 1813, (Sess. 36. ch. 97.) on being proved at the trial, by evidence competent at common law, may be read in evidence. *Ibid.*

MILITIA.

1. Under the militia act, (Sess. 24. c. 166. s. 30.) *held*, that a summons to appear before a regimental Court Martial, to show cause why a fine should not be levied, was in the nature of process, and must be served personally. *Capron v. Austin, 7 J. R. 96.*

2. And that an action lay against the president of a regimental Court Martial, for issuing a warrant by which a fine was collected, when the party had not been personally served with a summons to appear and show cause, but only a copy thereof left at his house. *Ibid.* (But see stat. sess. 32. c. 165. s. 76. *contra.*)

3. The master of a sloop sailing on the *Hudson* river, between *Poughkeepsie* and *New-York*, enrolled as a coasting vessel and sailing under a license, is not a mariner employed in the sea service, and exempt from militia duty, within the purview of the 2nd section of the act of Congress, (2d Cong. 1 sess. c. 33.) passed May the 8th, 1792, but is liable to militia duty under the laws of this state. *Brush v. Bogardus, 8 J. R. 157.*

*4. Whether the decision of a [*134] Court Martial, under the militia law, on a question of which they have cognizance, can be reviewed or traversed in a collateral action? *Quære. Ibid.*

5. A., being a private in an artillery company, in the city of *New-York*, received from B., the captain, a certificate of discharge, in the usual form, signed by the captain, but not countersigned by the commandant of the regiment, and C., who was then lieutenant of the same company, knew that A. had this certificate; B. having resigned, C. succeeded him in the command of the company, and A.'s name not having been struck off of the company roll, C. returned him to the regimental Court Martial as a delinquent at several parades; A. did not attend the Court Martial, relying on his certificate for an exemption, and was fined by the Court for his delinquency. A. brought an action on the case against C. for falsely and maliciously returning him as a delinquent, by reason whereof he was compelled to pay a fine, &c.; *held*, that the action was not maintainable, it being the duty of C. to return A. as a delinquent, and leave it to the Court to decide on the validity of his discharge; and A., having had an opportunity to make his defence before the Court Martial, the decision of that Court was conclusive, that C. had not made a false and malicious return of the delinquency of A. *Ferris v. Armstrong, 10 J. R. 100.*

6. An infant under 18 years of age, is not liable to be enrolled in the militia; but if, with the consent of his father, he agrees to go, as a substitute for another, into actual service, for a certain sum of money, which is paid, such contract is binding on the infant. And, if he deserts the service of the *United States*, he may be lawfully arrested as a deserter; and the officer commanding the arrest, or the person apprehending him, is not liable to an action. *Wilbur v. Grace, in error, 12 J. R. 68. Contra S. C. 10 J. R. 453.*



7. No action will lie against a militia officer for returning a Quaker to a Court Martial as a delinquent, in not appearing at parade, pursuant to a notice for that purpose, if the plaintiff had not claimed his exemption, and offered proper proof of it, unless malice, express or implied, be shown. *Vanderbilt v. Downing*, 11 J. R. 83.

8. In a plea of justification in an action of trespass, assault and battery, and false imprisonment, brought by a militia man of this state, employed as a soldier in the service of the *United States*, against the president of a Court Martial, it is not necessary to allege, that a case had occurred which gave authority to the president of the *United States* to call forth the militia of the states under the act of Congress of the 28th of February, 1795. (Cong. 3. sess. 1. c. 91.) *Vanderheyden v. Young*, 11 J. R. 150.

9. The president of the *United States* alone is made the judge of the happening of such event, and he acts upon his responsibility, under the constitution. *Ibid.*

10. So he is the sole judge of the number, time, and disposition of the militia called into service. *Ibid.*

11. It is not necessary in the plea to allege, what president, by name, issued his orders to the governor of this state to order into the service of the *United States* a portion [*135] of the militia of this state, or *the number of militia ordered out.

Ibid. Or, that the officers composing the Court Martial were in the service of the *United States*. *Ibid.* Or, that the general ordering the Court Martial, commanded in the army of the *United States* when he issued the order, or approved the sentence of the Court. *Ibid.*

12. The Court Martial may, after conviction, keep the person of the delinquent, until the will of the commanding general, affirming or reversing the sentence, be known. *Ibid.*

13. Militia ordered into the service of the *United States*, under the act of the 28th of February, 1795, are subject to the rules and articles of war of the *United States*, though made subsequent to that act, which is prospective. *Ibid.*

14. Whether a militia man, ordered into the service of the *United States*, under that act, is liable to be arrested, tried, and punished for desertion, &c., after his time of service has expired? *Quære. Ibid.*

15. Where a party arrested waives all objection to the jurisdiction of the Court Martial, he cannot afterwards allege that the Court had no jurisdiction. *Ibid.*

16. The party aggrieved by the sentence of the Court Martial, which has no power to carry the sentence into execution, must apply for redress to the commanding officer, to whose revision all the proceedings of the Court are subject, and who is to order the execution of the sentence. *Ibid.*

17. Under the 25th section of the act to regulate elections, (Sess. 36. c. 41.) no officer can order out any part of the militia during an election, or ten days previous thereto, even

for the purpose of enrolling and organizing them, and not to exercise. *Hyde v. Melvin*, 11 J. R. 521.

18. A defendant, sued under that section, cannot justify that he acted in pursuance of the orders of his superior officer. *Ibid.*

19. The defendant cannot object, that the corporal, who warned the men to appear, had not received his warrant, and therefore was not legally authorized to execute the order. *Ibid.*

20. It is no defence, that the defendant was ignorant of the existence of the act. *Ibid.*

21. A contractor for carrying the mail of the *United States*, is not exempt from military duty. The exemption in the statute extends only to persons actually employed in the conveyance of the mail. *Johnson v. Hunt*, 13 J. R. 186.

22. In an action against the president of a Court Martial to recover back a fine, the objection cannot be made that the person who warned the plaintiff to appear on the parade, and before the Court Martial, was not duly appointed a *serjeant*, even if the objection could have been taken before the Court Martial. *Ibid.*

See COURTS MARTIAL OF THE UNITED STATES.

*MONEY.

[*136]

1. The plaintiff may state his debt, or damages, in pounds, and the Court will, *ex officio*, take notice of their value, and in rendering judgment convert them into dollars. *Johnston v. Hedden*, 2 J. C. 274.

2. There is no distinction in law or in common parlance between the words "*moneys*" and *money*. *Mann v. Mann*, in error, 14 J. R. 12.

MONEY paid. See ASSUMPSIT, IV. 99—110. — had and received. See ASSUMPSIT, IV. 135—181.

Paying money into Court. See PRACTICE.

MORTGAGE.

- I. What will be deemed a mortgage.
- II. Nature of a mortgage.
- III. Estate and interest of the mortgagor and mortgagees.
- IV. Registry of mortgages, and priority of incumbrances.
- V. Satisfaction of a mortgage.
- VI. Foreclosure.
- VII. Power to sell in a mortgage, and sale under it.

I. What will be deemed a mortgage.

1. An absolute assignment of a lease, accompanied with a bond, executed at the same time, reciting the assignment, and stating it to have been made to secure the payment of a sum of money to the assignee, and an agree-

ment to re-assign on payment of the money, is a mortgage. *Jackson, ex dem. Carr, v. Green*, 4 J. R. 186.

2. B., to secure the payment of the rent of a house, demised to him by A., executes a bill of sale of his furniture, goods, &c., in the house, on condition to be void, on the payment of rent, provided it did not impair A.'s right to distrain; this is a mortgage, and not a pledge. *Barrow v. Parton*, 5 J. R. 258.

3. A. gave a bill of sale of three horses to B., for the consideration of 210 dollars, and B. at the same time gave to A. a writing or defeasance, engaging on the payment of the 210 dollars to him by A., in 14 days, to deliver the horses to A.; this is a mortgage. *Brown v. Bement*, 8 J. R. 96.

4. After the condition is forfeited, the mortgagee of a chattel has an absolute interest in the thing mortgaged, so that the [*137] mortgagor *cannot, by tendering the debt, entitle himself to an action of trover against the mortgagee. *Ibid.*

5. If a turnpike company pledge their income and tolls, it does not amount to a mortgage of the road, &c., but of their income merely; and the property still remains in them. *Farmers' Turnpike Company v. Coventry*, 10 J. R. 389.

6. Where land is conveyed absolutely, and the grantee by a separate instrument or defeasance, covenants to reconvey to the grantor on his paying a certain sum of money, the transaction amounts only to a mortgage. *Peterson v. Clark*, 15 J. R. 205.

See tit. CHANCERY, XLIV. Mortgage.

II. Nature of a mortgage.

7. An assignment of a mortgage by mere delivery, without writing, is valid at law. *Runyan v. Mersereau*, 11 J. R. 534.

8. A mortgage is not a conveyance within the statute of frauds. *Ibid.*

9. Forgiving the debt, with delivery of the security, is an extinguishment of the mortgage. *Ibid.*

10. A. conveys land to B. with covenants, and B. takes a mortgage for the consideration. The mortgage being unsatisfied, C. cannot release A. from his covenants in his deed; as, by the mortgage, the seisin was revested in B. *Kane v. Sanger*, 14 J. R. 89.

11. It seems, that Courts of law will take notice of the rule in equity, that the debt is the principal, and the mortgage the incident. *Jackson, ex dem. Norton, v. Willard*, 4 J. R. 41. And that the mortgagee has only a chattel interest. *Runyan v. Mersereau*, 11 J. R. 534. *Coles v. Coles*, 15 J. R. 319

III. Estate and interest of the mortgagor and mortgagee.

12. The mortgagor, notwithstanding the mortgage, is deemed seised, and is the legal owner of the land, as to all persons, except the mortgagee and his representatives. *Hilcock v. Harrington*, 6 J. R. 290. *S. P. Runyan v. Mersereau*, 11 J. R. 534.

13. A mortgage at law as well as in equity, is regarded as a mere security for the money; the mortgagee has only a chattel interest, and the freehold remains in the mortgagor. Per *Spencer, J. Coles v. Coles*, 15 J. R. 319.

14. So, an outstanding mortgage is not a breach of the covenant of seisin. *Sedgwick v. Hollenback*, 7 J. R. 376.

15. The wife of the mortgagor is entitled to dower out of the lands mortgaged, (or the equity of redemption,) as against all but the mortgagee, or those claiming under him. *Collins v. Torry*, 7 J. R. 278. *S. P. Coles v. Coles*, 15 J. R. 319.

16. Lands mortgaged cannot be sold on an execution against the mortgagee, before a foreclosure of the equity of redemption, though *the debt is due, [*138] and the estate of the mortgagee has become absolute at law. *Jackson, ex dem. Norton, v. Willard*, 4 J. R. 41. *S. P. Runyan v. Mersereau*, 11 J. R. 534.

17. The mortgagee may maintain an action of ejectment against the mortgagor, and those that claim under him. *Jackson, ex dem. Tuthill, v. Dubois*, 4 J. R. 216. See *Jackson, ex dem. Ireland, v. Hull*, 10 J. R. 481.

18. A mortgagor, or his assignee in possession, may maintain trespass against the mortgagee, or a person acting under him. *Runyan v. Mersereau*, 11 J. R. 534.

19. And, if the defendant plead *liberum tenementum*, the plaintiff may reply, that the freehold is in himself. *Ibid.*

20. A mortgagee cannot maintain an action of waste against the mortgagor; at least, not until after a forfeiture of the mortgage. *Peterson v. Clark*, 15 J. R. 205.

21. A mortgagee has no property in trees cut down by the mortgagor, so as to maintain trover for them. *Ibid.*

22. A tenant of a mortgage in possession, after the mortgage has become forfeited, during the continuance of the lease from the mortgagor, may *attorn* to and take a lease from the mortgagee; and in an action brought by the mortgagor for rent under his lease, may set up such *attornment* as a legal defence. *Jones v. Clark*, 20 J. R. 51.

23. Where land is conveyed to the husband during coverture, who, at the same time, executes a mortgage to the grantor to secure the payment of the consideration money, the seisin of the land is but for an instant in the grantee, and is immediately revested in the grantor, and, consequently, the widow of the grantee cannot claim dower in the premises. *Stow v. Tift*, 15 J. R. 458.

24. Where a conveyance of land, and a mortgage to secure the purchase money, are executed at the same time, they are to be taken in connection as forming parts of the same agreement; and the effect of the transaction is, that if the price of the land shall not be paid at the stipulated time, the grantor shall be re-seised of the land free of the mortgage; and whether such an agreement be contained in one and the same instrument, as well it may be, or in distinct instruments, can make no difference as to the effect. *Ibid.*

And see IV. *Jackson*, ex dem. *Beebe*, v. *Austin*, 15 J. R. 477.

25. Where a mortgage is given of an undivided part or share in a large tract of land, and, on partition, the right or share of the mortgagor is allotted in severalty, the mortgage will be considered as attached to the part so assigned as the share of the mortgagor, and will cover his whole interest therein. *Jackson*, ex dem. *The People*, v. *Pierce*, 10 J. R. 414.

IV. Registry of mortgages, and priority of incumbrances.

26. A mortgage not registered, has a preference over a subsequent judgment docketed; but, if the land should be sold by the sheriff, under the judgment, prior to the registry of the mortgage, a *bona fide* purchaser at the sheriff's sale would be protected against the mortgage. *Jackson*, ex dem. *Tuthill*, v. *DuBois*, 4 J. R. 216.

*27. Where the mortgage is registered, the interest of the mortgagee cannot be affected by a sale under an execution; and if he does not prevent the sale, or even becomes himself a bidder, it will not countervail the presumption of notice. *Ibid*.

28. The preference of a mortgage, given by the purchaser of lands sold and conveyed at the same time, to secure the payment of the purchase money, over any previous judgment which may have been obtained against the purchaser or mortgagor, is not restricted to a mortgage to the vendor of the land, there being no such restriction in the words of the statute, (Sess. 36, c. 32, s. 15,) by which that preference is created; therefore, if the purchase money be advanced by a third person, to whom the purchaser, at the time the conveyance is made to him, executes a mortgage of the land to secure the payment of the money so advanced, such mortgage is entitled to the same preference over a prior judgment, as the vendor's mortgage would have been, if he had executed the mortgage. *Jackson*, ex dem. *Beebe*, v. *Austin*, 15 J. R. 477.

V. Satisfaction of a mortgage.

*29. The mortgagor granted and released the premises, in fee, to the mortgagee; but the mortgagee retained the mortgage in his hands, and made an endorsement thereon, by which he covenanted not to bring any action against the mortgagor, or his representatives, for the money due on the mortgage, and declaring that the mortgage was kept on foot merely to protect the title of the mortgagee, and his heirs, in the premises; held, that the covenant endorsed was no satisfaction of the mortgage, in law or equity; and the mortgage being unredeemed, the mortgagee might set it up as a defence, in ejectment against the mortgagor, or those claiming under him. *Denn v. Wynkoop*, 8 J. R. 168.

30. Where two persons purchase separate parcels of a lot of land, previously mortgaged, and one of them, afterwards, pays more than his share of the mortgage money, in proportion to the part of the lot owned by him, he may call on the other for contribution of his aliquot

share, or such part of it as has been so paid; but not for any part advanced by him less than his proportion, though the other has paid nothing. *Sauyer v. Lyon*, 10 J. R. 32.

31. Where no possession had been taken under a mortgage, nor any interest paid, nor steps taken to enforce it, for 19 years, it was held not to be a subsisting outstanding title, and that a jury might presume it satisfied. *Jackson*, ex dem. *Martin*, v. *Pratt*, 10 J. R. 381.

32. Where a mortgage debt had lain dormant from April, 1774, to March, 1802; held, that, after deducting the period of the American war, the lapse of time was sufficient to afford the presumption of payment. *Jackson*, ex dem. *The People*, v. *Pierce*, 10 J. R. 414.

33. But the period of 20 years is only a circumstance on which to found a presumption, and is not, of itself, a bar. *Ibid*.

34. And where the attorney-general and surveyor-general, to whom the petition of the occupants of land, mortgaged by a person attainted, *had been referred by [*140] the senate, in March, 1802, reported the mortgage as outstanding, and a balance due thereon; this was held sufficient to repel the presumption of payment, especially when connected with other circumstances. *Ibid*.

35. A creditor who takes a mortgage to secure a debt, by bond or otherwise, has three remedies, either of which he is at liberty to pursue, and all of which he may pursue, until his debt is satisfied: he may bring an action of debt upon the bond, or he may put himself in possession of the rents and profits of the land mortgaged, by means of an ejectment, or he may foreclose the equity of redemption, and sell the land to satisfy the debt. *Jackson*, ex dem. *Ireland*, v. *Hull*, 10 J. R. 481.

36. If a creditor, having obtained judgment on his bond, issue an execution by which the mortgaged premises are taken in execution, and sold to a person who has notice of the mortgage, and of its being unpaid, it will be deemed a sale merely of the equity of redemption or interest of the mortgagor, so that the mortgagee may bring an action of ejectment against the purchaser to recover the possession. *Ibid*.

37. And the mortgage interest is no further touched by the sale, than that the purchase money of the equity of redemption may go to diminish the amount of the debt. *Ibid*. See I.

38. L., by his agent B., agreed to purchase a farm of F. for 2000 dollars, and gave the money to B., that they might complete the purchase. B. paid F. 1000 dollars, and gave him the bond to pay off a prior mortgage for 1000 dollars to P., retaining in his own hands the 1000 dollars, unknown to L.; held, that though P. knew that B. retained the 1000 dollars, instead of paying off the mortgage, and agreed with B. that he might pay it off in land, but the agreement was never performed by B., yet P.'s title under the mortgage was not affected by this arrangement, there being no fraud on his part; but that L. must bear the loss arising from the misconduct of his own agent. *Jackson*, ex dem. *Potter*, v. *Leonard*, 13 J. R. 180.

39. Where a mortgage is paid off and satisfied, no release is necessary to re-convey the

title to the mortgagor. *Jackson, ex dem. Randall, v. Davis*, 18 J. R. 7.

40. Therefore, a recital of a mortgage, in another deed, is no evidence of its existence as an outstanding mortgage. *Ibid.*

41. If a legal tender is made of the money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the land is discharged from the mortgage, though the debt remains. *Jackson, ex dem. Bowers, v. Crafts*, 18 J. R. 110.

42. The assignee of a bond and mortgage having put them in the hands of his attorney, for foreclosure, afterwards told the attorney not to receive the money due, if it was tendered, nor do any thing further about it, as he would attend to the business himself: proceedings for a sale of the premises under a power contained in the mortgage having been commenced, a purchaser under the mortgagor, on the day before the sale at auction was to take place, tendered the principal and interest due on the mortgage, and the costs of the proceedings, to the attorney who held the bond and mortgage, and he refused to receive the money, assigning as a reason, the instructions he had received from his client; held, that there was a good and sufficient tender of the debt, &c. to the principal. *Ibid.*

VI. Foreclosure.

43. Where a mortgage to the loan officers has become forfeited by non-payment, an indefeasible estate in the land vests in them. *Sherrill v. Crosby*, 14 J. R. 358.

44. Where money is loaned on mortgage, by the loan officers, pursuant to the act of the 14th of March, 1792, (Sess. 15. c. 25.) after a default of payment of interest by the mortgagee, for 22 days after the same is payable, all equity of redemption is forever foreclosed, *ipso facto*, by such default; and the loan officers become vested with an absolute and indefeasible estate in the land, so that this Court cannot regard any estate as existing in the mortgagor. *Jackson, ex dem. Limerick, v. Voorhis*, 9 J. R. 129.

See LOAN OFFICE AND LOAN OFFICERS. CHANCERY, XLII. XLIV.

VII. Power to sell in a mortgage, and sale under it.

45. The notice of sale of the mortgaged premises may be postponed to a further day, provided notice of such postponement be also inserted in the gazette, and put up on the court-house door. *Jackson, ex dem. Rogers, v. Clark*, 7 J. R. 217.

46. And it seems, that it is not necessary to give a further notice of six months of such postponement. *Ibid.*

47. But, where a notice of sale was given in February, to take place on the 12th of August following, which was duly published, and in June, a notice was inserted in the gazette, that the sale was postponed to September, which notice of the postponement was not put up at the court-house door, and the sale took place on the 12th of August, pursuant to the original

notice, the sale was held irregular and void. *Ibid.*

48. A sale under a power is equivalent to a foreclosure and sale under a decree of a Court of Equity, and cannot be defeated to the prejudice of a bona fide purchaser. *Jackson, ex dem. Bartlett, v. Henry*, 10 J. R. 185.

49. Not even if the mortgage were given for a usurious debt. *Ibid.*

50. A foreclosure of a mortgage, by virtue of a power of sale, under the statute, is not founded upon any judgment or decree of a Court; but is the act merely of the mortgagee. *Jackson, ex dem. Sternberg, v. Dominick*, 14 J. R. 435.

51. The statute makes such sales a conclusive bar only in favor of a bona fide purchaser without notice; and the mortgagee, if he is party to a usurious contract, is in no better situation than if no foreclosure had taken place. *Ibid.*

52. As, where a mortgage was given as security on a usurious contract, with a power of sale; and the mortgagee, by virtue of the power, sold the land, under the statute, and became the purchaser, through an agent for that purpose; in an action of ejectment brought by the purchaser of the equity of redemption against the mortgagee, the defendant set up the title he had acquired under the sale pursuant to the power; held, that he was not protected by such sale, but that the plaintiff might prove usury in the mortgage, and recover, notwithstanding the mortgage and sale under it. *Ibid.*

53. The public notice required by the statute (Sess. 36. c. 32. s. 6.) to be given in case of sale of land under a power contained in a mortgage, is sufficient, if published for six successive lunar months previous to the time of sale. *Loring v. Halling*, 15 J. R. 119.

Mortgage of chattels. See further FRAUDS, II. See further tit. CHANCERY, XLIV. Mortgage.

NAME.

The addition of junior to a name, is mere description of the person; and the omission of it does not affect or invalidate any act or proceeding done by the same person. *The People v. Collins*, 7 J. R. 549.

And see PLEADINGS, I.

NEW TRIAL.

- I. When a new trial will be granted on the merits, either for a misdirection or error of the judge, or where the verdict was contrary to law or evidence, or not founded on sufficient evidence.
- II. When a new trial will be granted on the ground of newly discovered evidence.
- III. Excessiveness of damages, and other causes for granting a new trial.

IV. Motion for a new trial, and when costs will be required on granting or refusing it.

V. New trial in criminal cases.

I. When a new trial will be granted on the merits, either for a misdirection or error of the judge, or where the verdict was contrary to law or evidence, or not founded on sufficient evidence.

1. The Court will take into consideration how the misdirection of the Court was material, and grant a new trial, or not, accordingly. *Fleming v. Gilbert*, 3 J. R. 528. *Dole v. Lyon*, 10 J. R. 447.

2. Where the judge charged the jury, that in his opinion, the weight of evidence was in favor of the defendant, and the jury [*143] found a verdict accordingly, a new trial, on account of the misdirection, was refused, the Court being satisfied that the plaintiff ought not to recover. *Goodrich v. Walker*, 1 J. C. 250.

3. The Court would not grant a new trial, because a witness who was regularly subpoenaed by the defendant, was out of the way when the trial of the cause commenced, and did not appear in Court until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up the evidence, and the witness, on being offered to be examined, was refused by the judge, and a verdict found for the plaintiff; the admission of the witness being altogether discretionary with the judge, who, under the circumstances of the case, acted reasonably in refusing to admit him. *Alexander v. Byron*, 2 J. C. 318.

4. If the counsel on one side, after he has summed up to the jury, and whilst the opposite counsel is addressing them, should discover new and material evidence, and offer to produce it, it is in the discretion of the judge to admit it; and if he exercises his discretion erroneously, in refusing it, a new trial will be granted, with costs, to abide the event. *Mercer v. Sayre*, 7 J. R. 306.

5. It will not be granted for misdirection, where there is good reason to think that the party could not have been injured by the judge's mistake. *Depeyster v. Columbian Insurance Company*, 2 C. R. 85.

6. Where the cause of action is trifling, and the plaintiff recovers only nominal damages, the Court will not, on application of the defendant, set aside a verdict for the misdirection of the judge, if the plaintiff will elect to discontinue without costs. *Fleming v. Gilbert*, 3 J. R. 528.

7. On a mere affidavit of merits, the Court will not set aside a regular verdict. *Gilliland v. Morrell*, 1 C. R. 154.

8. If the plaintiff goes to trial on a bad plea, he cannot, afterwards, set aside the verdict, because the judge admitted evidence which was not authorized by the issue. *Meyer v. M'Lean*, 1 J. R. 509.

9. Where the jury, on a second trial, find a verdict contrary to a point of law decided by the Court on granting the new trial, a rule for a third trial will be allowed. *Silva v. Low*, 1 J. C. 336.

10. Although the verdict was in favor of a bona fide endorsee of a note; and usury was the defence. *Wilkie v. Roosevelt*, 3 J. C. 206.

11. The Court will not set aside a verdict for the plaintiff, though against law, where, from the amount of the recovery, he is liable to pay costs to the defendant; as in trespass, where five dollars were recovered, no certificate was given, nor had the title to land come in question. *Hunt v. Burrell*, 5 J. R. 137.

12. A new trial will be granted, where the former verdict was contrary to evidence. *Hart v. Hosack*, 1 C. R. 25.

13. It will be granted where the weight of evidence is in favor of the applicant, and it appears that justice has not been done. *Jackson, ex dem. Le Roy, v. Sternbergh*, 1 C. R. 162.

14. It will be granted in an action on a policy of insurance, where the jury has found for the plaintiff, but it appears, from the evidence, that the vessel was not seaworthy. *Mumford v. Smith*, 1 C. R. 520.

*15. In actions on two policies [*144] of insurance on the same vessel, where there had been two trials in each cause, and two verdicts for the plaintiff on the subject of seaworthiness, the Court refused to grant a third trial. *Talbot v. Commercial Insurance Company*, 2 J. R. 467.

16. Where there was contradictory or doubtful evidence, whether the sale of a chattel was absolute or not, the Court refused to set aside the verdict. *De Foncleare v. Shottenkirk*, 3 J. R. 170.

17. In penal actions, in actions for a libel or defamation, and other actions vindictive in their nature, a new trial will not be granted because a verdict for the defendant was against the weight of evidence, unless some rule of law has been violated, or there has been tampering with the jury. *Jarvis v. Hatheway*, 3 J. R. 180. *Hurtin v. Hopkins*, 9 J. R. 36.

18. Though a verdict was against the weight of evidence; yet the action sounding in tort, being against a sheriff for an escape, and the sum in controversy small, and the evidence, as to the damages, contradictory, a new trial was refused. *Feeler v. Whipple*, 8 J. R. 369.

19. Where there is evidence on both sides, and the jury are not misdirected, on a question of fraud, the Court will not set aside their verdict; fraud being a question of fact for the decision of the jury. *Ward v. Center*, 3 J. R. 271.

20. Where the plaintiff is clearly not entitled to recover, the Court will not grant him a new trial, on the ground of defect or informality in the defendant's evidence. *Hugh v. Wilson*, 2 J. R. 46.

21. So, in trespass against a sheriff for taking the goods of a stranger, where it appeared that there had been a fraudulent transfer of the property, and a verdict was found for the defendant, the Court would not set it aside, because the judgment had not been produced at the trial. *Ibid.*

22. A new trial will not be granted in ejectment because the plaintiff gave evidence of title to an undivided moiety only, but a general verdict was taken. *Jackson, ex dem. Moore, v. Van Bergen*, 1 J. C. 101.

23. A new trial will not be granted because the printed statute book was given in evidence of a private act, when it appears, from an exemplification of the act, that the printed book was correct. *Duncan v. Dubois*, 3 J. C. 125.

24. A justice of the peace tried an action for an assault and battery, and gave judgment for the plaintiff for 15 dollars, and issued an execution thereon, under which a constable sold a pair of horses, wagon and harness; in an action of *trespass* brought by the defendant against the justice and constable, in which a verdict was given for the plaintiff for 270 dollars damages, the Court refused to grant a new trial, though there was reason to believe that the justice had not acted maliciously, but under a mistake as to the extent of his jurisdiction, and there were strong circumstances to show that the party himself had, through his agent, purchased the goods under the execution, at a price about equal to the amount of the judgment, and therefore could not have sustained damages to a greater amount; but still, the case admitted of doubt, and the question was fairly submitted to the jury. *Woodward v. Paine*, 15 J. R. 493.

[*145] *II. When a new trial will be granted on the ground of newly discovered evidence.

25. In order to obtain a new trial, on the ground of newly discovered evidence, it ought to appear that the testimony has been discovered since the last trial, or that no laches is imputable to the party, and that the testimony is material; if the party had known of the existence of the testimony, and could not procure it in time, he ought to have applied to postpone the former trial. *Vandervoort v. Smith*, 2 C. R. 155. *Hollingsworth v. Napier*, 3 C. R. 182. *Palmer v. Mulligan*, *id.*, 307. See 15 J. R. 293, 18 J. R. 489.

26. The Court will decide on the materiality of the evidence, and grant the motion, or not, accordingly. *Halsey v. Watson*, 1 C. R. 24. *Kendrick v. Delafield*, 2 C. R. 67.

27. The party applying for a new trial should lay before the Court the facts in the knowledge of his witnesses, or give an excuse for the omission. *Hollingsworth v. Napier*, 3 C. R. 182.

28. On motion for a new trial in ejectment, the affidavits stated, that C., who claimed title to the land in the possession of B., his tenant, had the care and management of the defence of the suit, and was present at the trial; that F. was a witness at the trial, but that C. did not know, until after the trial, that F. knew, or could testify the facts, stated as material; though it appeared that B., the tenant, who was not present at the trial, did know, before the trial, what F. could testify. A new trial was granted, on payment of costs, as the evidence was material, and the suit being to change a possession of several years. *Jackson*, ex dem. *Gardner*, v. *Laird*, 8 J. R. 489.

29. A new trial will be granted in a feigned issue out of Chancery, on an affidavit of newly discovered evidence. *Doe v. Roe*, 1 J. C. 402.

30. Evidence to impeach testimony given at a former trial, is not material evidence, and a new trial will not be granted in order to admit it. *Halsey v. Watson*, 1 C. R. 24. *S. P. Shumway v. Fowler*, 4 J. R. 425. *S. P. Especially* if the witness is since dead. *Duryee v. Dennison*, 5 J. R. 248. *S. P. Bunn v. Hoyt*, 3 J. R. 255. *S. P. Jackson*, ex dem. *Rowley*, v. *Kinney*, 14 J. R. 186.

31. But in causes concerning the title to military lands, where the *identity* of the soldier or original patentee is in question, a new trial may be granted, to give the defendant an opportunity of impeaching the character of the principal witness for the plaintiff; especially when the defendant has been a long time in possession. 14 J. R. 186.

32. It will not be granted on an affidavit by a witness, that he was mistaken, or surprised on his examination, and explaining and correcting a mistake in his deposition. *Steinbach v. Columbian Insurance Company*, 2 C. R. 129.

33. It will not be granted to admit the testimony of another witness to the same fact. *Ibid.* *S. P. Smith v. Brush*, 8 J. R. 84.

34. Or where the newly discovered evidence consists merely of cumulative facts, or circumstances relative to the same matter controverted *at the former trial. *Smith v. Brush*, 8 J. R. 84. *S. P. Pike v. Evans*, 15 J. R. 210.

35. But in actions of ejectment for lands in the military tract, where the principal or turning point in the cause is as to the *identity* of the soldier or person entitled to the bounty land, each party claiming under a person of the same name, by different deeds, the Court will grant a new trial on affidavits of newly discovered evidence relative to the *identity* of the patentee, though such evidence consists of cumulative facts to the same point which was the subject of inquiry at the former trial; these cases as to the title in the military tract being peculiar, and not strictly to be governed by the ordinary rules relative to granting new trials in other cases. *Jackson*, ex dem. *Wolcott*, v. *Crosby*, 12 J. R. 354.

36. A new trial will not be granted on an affidavit, stating that the newly discovered witness had told the party what he would say. *Shumway v. Fowler*, 4 J. R. 425.

37. In slander, for charging the plaintiff with felony, a new trial will not be granted to let in newly discovered evidence in support of a plea of justification. *Beers v. Root*, 9 J. R. 264.

38. *Aliter*, if the new evidence goes only to the plea of not guilty. *Ibid.*

39. On motion for a new trial, on an affidavit of newly discovered evidence from A. B., a man of good character and reputation, the opposite party may read affidavits to question his credibility. *Pomroy v. Columbian Insurance Company*, 2 C. R. 260.

40. Where the defendant is apprised of a material witness whose appearance he cannot procure in time for the trial, he ought to apply to the judge to postpone the trial; and if he goes to trial without the testimony of the

witness, and a verdict is found against him, the Court will not grant a new trial, for the purpose of letting in the evidence of such witness. *Jackson, ex dem. Malin, v. Malin*, 15 J. R. 293.

41. A new trial will not be granted, on the ground of newly discovered evidence, if it appear that the evidence might, with reasonable diligence, have been procured before the first trial. *Williams v. Baldwin*, 18 J. R. 489.

III. Excessiveness of damages, and other causes for granting a new trial.

42. In actions for slander, libel, and other personal torts, the Court will not grant a new trial, on the ground of excessive damages, unless the amount of damages be so flagrantly outrageous and extravagant, as manifestly to show that the jury must have been actuated by passion, partiality, prejudice, or corruption. *Coleman v. Southwick*, 9 J. R. 45. *Southwick v. Stevens*, 10 J. R. 443.

43. In an action for an assault and false imprisonment, against a military commander, for arresting the plaintiff, a private citizen, on a charge of treason, confining him for five days, and trying him before a Court Martial, the jury found a verdict for the plaintiff, for nine *thousand dollars damages; and a new trial was granted for excessiveness of the damages. *McConnell v. Hampton*, 12 J. R. 234.

44. The importance and novelty of the case are reasons for granting a new trial. *Abbott v. Sebor*, 3 J. C. 39.

45. If, on making up a special verdict, a fact, which was not controverted before the jury, has been omitted, the Court will order a *venire de novo*, to ascertain such fact, unless the opposite party will consent to amend the special verdict by inserting it; it appearing to have been omitted by the counsel at the time, from a belief that it might be inserted when the special verdict was drawn up in form. *Watson v. Delafield*, 1 J. R. 150.

46. The plaintiff's witness, having been examined by him, and given over to the opposite party, was seized with a fit, and could testify no further; the plaintiff proceeded with the trial, and a verdict was found against him; he cannot, under these circumstances, have a new trial. *Depeyster v. Columbian Insurance Company*, 2 C. R. 85.

47. A new trial will not be granted because a juror was challenged by the opposite party, and, in consequence, did not serve, when the counsel of the party moving, who was present when the cause was brought on, had gone out of Court. *Steinbach v. Columbian Insurance Company*, 2 C. R. 129.

48. It will not be granted because one of the party's counsel was absent at the former trial. *McKay v. Marine Insurance Company*, 2 C. R. 384.

49. A new trial is never granted for a defect in the pleadings, on the ground that the judge had thereby admitted improper evidence; for the judge at *nisi prius* is not to decide on the pleadings. *Meyer v. McLean*, 1 J. R. 509. *S. P. Van Vechten v. Graves*, 4 J. R. 403.

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50. Where a plaintiff was nonsuited at the trial, the Court refused to set aside the nonsuit, and grant a new trial, on the ground that the plaintiff was surprised by the defence set up, and had come unprepared to meet it. *Jackson, ex dem. Horton, v. Roe*, 9 J. R. 77.

51. Where, in an action of debt for the escape of a prisoner in execution, the whole defence was let in, as if it had been an action on the case, and the jury found for the plaintiff nominal damages only, the Court refused to grant a new trial, merely to give the defendant an opportunity to get rid of the suit, as he would be entitled to costs as the verdict stood. *Van Slyck v. Hogeboom*, 6 J. R. 270.

52. A new trial will not be awarded, on the application of a plaintiff, where it appears that, if it were awarded, he could only recover nominal damages. *Brantingham v. Fay*, 1 J. C. 255. *S. P. Hyatt v. Wood*, 3 J. R. 239.

53. On a motion for a new trial, the defendant cannot object to the form of action. *Smith v. Elder*, 3 J. R. 105.

54. Where a question of adverse possession was not, at the trial, submitted to the jury, it cannot be made the ground for moving for a new trial, but will be presumed to have been abandoned at the trial. *Jackson, ex dem. Beckman, v. Stephens*, 13 J. R. 495.

55. Where a material witness had been regularly subpoenaed by the defendant, and attended at the Circuit, and shortly before the cause was called on, absented himself, without the knowledge or consent of the defendant or his attorney, and his absence was not discovered *until after the jury [*148] were sworn, by which means a verdict passed against the defendant; held, that a new trial ought to be granted, especially as it appeared, that as well the witness, as the persons answerable over to the defendant, were insolvent. *Ruggles v. Hall*, 14 J. R. 112.

56. Where the judge directed the jury to declare by their verdict, whether a will had been altered after its execution, and, if so, by whom; and they declared by their verdict, that it had been altered by some interested person, the verdict was held to be uncertain, and a new trial was granted. *Jackson, ex dem. Malin, v. Malin*, 15 J. R. 293.

57. The admission of an improper set-off, not objected to at the trial, cannot be a ground for a new trial. *Sherman v. Crosby*, 11 J. R. 70.

IV. Motion for a new trial, and when costs will be required on granting or refusing it.

58. A motion for a new trial must be made within the first four days of the term, and before judgment is perfected, unless an order to stay proceedings on the verdict has been obtained, which operates as an enlargement of the rule of four days. *Jackson, ex dem. Colden, v. Chace*, 15 J. R. 354.

59. It can in no case be made after a judgment has been regularly perfected; although it be on the ground of evidence newly discovered since the trial. *Ibid.*

60. On motion for a new trial by the defendant, he will not be compelled to bring into

Court the amount of the verdict against him; not even if his bail are insolvent. *Hallet v. Cotton*, 1 C. R. 11.

61. A new trial had, without an award of a *venire de novo* on the record, is void, and is not aided by the appearance of the opposite party. *Livingston v. Rogers*, 1 C. R. 583. Such omission is not amendable. *Ibid.* But the party may move for an award of a new *venire*, in order that the cause may be tried again, on payment of costs. *Ibid.*

62. A motion for a new trial on the ground of newly discovered evidence, is an enumerated motion. *Chandler v. Trayard*, 2 C. R. 94.

63. It seems, that on a motion for a new trial on the ground of newly discovered evidence, it is competent to the adverse party to show, by affidavit, that the witness whose testimony is stated to be material and newly discovered, is wholly unworthy of credit. *Williams v. Baldwin*, 18 J. R. 489.

64. The Court will not, on a motion for a new trial, receive affidavits to prevent a further investigation. *Watson v. Delafield*, 2 C. R. 224.

65. But evidence or affidavits to open an inquiry will be received. *Ibid.*

66. Where on the first trial the jury has found a verdict contrary to law, costs must abide the event of the suit. *Van Rensselaer v. Dole*, 1 J. C. 279.

67. So, where there have been two verdicts against law, and a third trial is granted. *Silva v. Low*, 1 J. C. 336.

*68. If the motion be not granted, [*149] ed, the party moving must pay the costs of opposing. *Williams v. Smith*, 2 C. R. 253.

69. Granting a new trial is always on payment of costs, when not otherwise expressed, unless granted for the misdirection of the judge, in which case they abide the event. *Ibid.*

70. A verdict rendered in the Supreme Court for the plaintiff for less than 250 dollars, was set aside on payment of costs; the plaintiff made out a bill of costs according to the rate established for that Court, notice of taxation was given, and the bill taxed *ex parte*, no person attending for the defendant, who paid the costs thus taxed: the Court refused to grant a retaxation, and to order what had been paid beyond Common Pleas costs, to be returned. *Hinckley v. Boardman*, 3 C. R. 134.

V. New trial in criminal cases.

71. A new trial may be awarded by the Court of Oyer and Terminer. *The People v. Townsend*, 1 J. C. 104.

72. But not by the Sessions, except for irregularity. *The People v. Justices of Chezan-go*, 1 J. C. 179.

73. Where a juror has been withdrawn by order of the Court, the defendant is not to be discharged, but must be tried anew. *The People v. Denton*, 2 J. C. 275. *The People v. Olcott*, *id.* 301.

74. In cases of felony as well as of misdemeanor, if the jury, after deliberating so long

on the prisoner's case, as to preclude a reasonable expectation, that they will ever agree on their verdict, unless compelled to do so by famine and exhaustion, they may be discharged, and the prisoner be again tried by another jury. *The People v. Goodwin*, 18 J. R. 187.

75. As, where on an indictment for manslaughter, the jury, after a trial which lasted five days, and after being kept together to consider of their verdict for seventeen hours, declared that there was no probability of their agreeing on a verdict; and it being within half an hour of the time when the Court was bound by law to close its session, the jury were discharged, and the prisoner was again tried at another Court. *Ibid.*

76. The new trial, where the prisoner, after being tried in the Court of Sessions, is brought before the Supreme Court, on *habeas corpus* and *certiorari*, may be before the Court of Oyer and Terminer and General Gaol Delivery, or at the next Sittings in New-York or Albany, under the act, (Sess. 36. c. 66.) *Ibid.*

77. Where a prisoner was tried at a Court of Oyer and Terminer, &c. for murder, and convicted, without a *venire* returned and filed; (the paper purporting to be a *venire*, not having the seal of the Court;) held, that the want of a proper writ of *venire* was error, and judgment was arrested, and a new trial awarded. *The People v. McKay*, 18 J. R. 212.

78. Where a prisoner has been tried and found guilty, and judgment is arrested on his own motion, and in his favor, a new trial may be awarded. *Ibid.*

See CHANCERY, XLVI. New Trial.

*NEW-YORK CITY. [*150]

1. Under the 5th section of the act for supplying the city of New-York with pure and wholesome water, April 2d, 1790, (Sess. 22. c. 84.) notice of preferring a petition to a judge must contain the time and place of presenting it. *Matter of the Corporation of New-York and the Manhattan Company*, 1 C. R. 507.

2. A freeholder of the city of New-York cannot act as an appraiser of the damage done to the streets by laying the Manhattan pipes. *Ibid.*

3. Excessiveness of the damages assessed may be objected against the report of the appraisers. *Ibid.*

4. The party aggrieved may object to the report, at the time application is made to confirm it. *Ibid.*

5. The judge, who has granted the order for the appointment of appraisers, cannot afterwards revoke it. *Ibid.*

6. The act of the 3d of April, 1801, for regulating wharves and slips, (Sess. 24. c. 129.) contains no implied grant of the soil under water, therein mentioned, to the corporation of New-York, and they are, under that act, only attorneys for the public, and are not entitled to the wharfage of vessels lying in the front of the piers in South street. *Corporation of New-York v. Scott*, 1 C. R. 544.

7. Such of the inhabitants of the city of *New-York* as are not members of the corporation, or made free of the city, in the manner prescribed by the charter, are not exempted from serving on juries out of the city. That exemption extends only to the mayor, aldermen, commonalty, and freemen, or persons made free of the city. *Cortelyou v. Vanbrundt*, 1 J. R. 313.

8. A vessel above 50 tons, coming from *Connecticut* through the *Sound*, to the port of *New-York*, though a registered vessel, and not having a coasting license, yet, if actually employed in the coasting trade, is not liable to the penalty given in the 16th section of the act, (Sess. 34. c. 198.) relative to the wardens of the port of *New-York*, for not being reported to the office of the wardens within 48 hours after her arrival. *Griswold v. The Master and Wardens of the port of New-York*, 9 J. R. 76.

9. A by-law of the corporation, made under the authority of the act of the 2d of *April*, 1806, (Sess. 29. c. 126.) ordained, that if any person kept a greater quantity of gunpowder than 28 pounds, at any one time, or in any one place, and not in the manner prescribed by the by-law, he should forfeit the gunpowder, and also the sum of 125 dollars for every 100 pounds of gunpowder so kept, and in that proportion for a greater or less quantity, &c.; by the act the corporation were authorized to provide for the forfeiture of the gunpowder, if kept contrary to their ordinance, and to impose penalties in all other cases not provided for by the act, for the non-observance of the by-laws made under the authority granted by the act: in an action by the corporation under their by-law to recover penalties to the amount of three thousand dollars; *held*, that the plaintiffs could not exact, as penalties for any one offence, or for the violation of the

[*151] by-laws in any one transaction, a greater sum than 250 dollars. *Corporation of New-York v. Ordrenan*, 12 J. R. 122.

10. And whether, under the act, the corporation could impose any penalty beyond the forfeiture of the gunpowder, so unlawfully kept? But, at any rate, the corporation, in passing the by-law in question, exceeded the power given by the act of the legislature. *Ibid*.

11. Whether, under the general powers conferred by the charters of the corporation, they had authority to pass such a by-law, and the action can be supported on that authority alone? *Quere. Ibid*.

12. But as the act of the legislature, on the subject matter of the by-law, is to be presumed to have been passed at the instance of the corporation, it so far operates as a limitation of the general and undefined powers in their charters. *Ibid*.

13. On motion to confirm the report of commissioners appointed under the act relative to the city of *New-York*, (Sess. 36. ch. 86. s. 178. 2 N. R. L. 342. 408.) for opening, enlarging, and extending streets, &c.; *affidavits*, in opposition to the report, cannot be read, unless copies of them have been duly served on the commissioners, with the objections of the par-

ty, so that they may decide whether there are reasons for altering their report. *In the matter of enlarging, &c. Harman street, in the city of New-York*, 16 J. R. 231.

14. The Supreme Court, setting in review over the commissioners, cannot take into consideration facts not laid before the commissioners previous to their final report. *Ibid*.

15. Before an appointment of commissioners of estimate and assessment for opening, &c. of streets in the city of *New-York*, under the act, (Sess. 36. ch. 86.) the Supreme Court, on petition of the corporation for that purpose, will order all further proceedings to be discontinued. *Matter of enlarging, &c. of Dover street, &c.*, 18 J. R. 506.

16. The power of the Supreme Court, under the act (Sess. 36. ch. 86. s. 177, 178. 2 N. R. L. 408.) as to opening, &c. of streets, &c. are confined to the authority delegated by the act, and do not come within the general powers and jurisdiction of the Court; and in the exercise of it, the judges act collectively, as commissioners, rather than as judges. *Matter of Beckman street*, 20 J. R. 269.

17. Where, on petition of the corporation of this city, commissioners of estimate and assessment were appointed by the Supreme Court, in *May*, 1816, pursuant to the act, and they made a report in *January*, 1819, which was rejected, and new commissioners appointed, who took the oath prescribed, and were ready, or nearly ready, to report, when the corporation petitioned for leave to discontinue the proceedings, to withdraw the first petition, and for the appointment of other commissioners, for widening and extending the same street, on a plan different from that contained in the first petition, the motion for leave to discontinue, &c. was denied. *Ibid*.

18. In the proceedings under the act, (Sess. 36. ch. 86.) relating to opening of, &c. streets, &c., the assessment laid by the corporation for that purpose, and the notice thereof, must describe the property assessed with accuracy and precision, so as to apprise the owner distinctly of the ground charged with the expense of the improvement. If, therefore, the assessment described lots fronting on *Stanton street*, as *25 feet wide in front, be- [*152]

longing to H., without mentioning the length or depth of the lots, and they are, afterwards, sold and conveyed by the corporation as fronting on *Stanton street*, and "about 100 feet deep," when in fact, the lots of H. were only 75 feet deep, such conveyance will not be construed to extend the lots in depth beyond 75 feet, so as to include the lots of B. in the rear, and which fronted on another street. *Jackson, ex dem. Bayard, v. Healy*, 20 J. R. 495.

19. The city and county of *New-York* includes the whole of the rivers and harbors adjacent to the city, to actual low water mark on the opposite shores, as the same may be formed, from time to time, by docks, wharves, and other permanent erections; and although the jurisdiction of the city does not extend so as to include such wharves or artificial erections, yet it extends over ships and vessels floating

on the water, though they may be fastened to such wharves or docks. *Stryker v. The Corporation of New-York*, 19 J. R. 179. [And see *BROOKLYN VILLAGE*.]

20. According to the true construction of the "act to lay a duty on spirituous liquors, and to regulate inns and taverns," (Sess. 24. ch. 164.) a person having a license from the mayor of *New-York*, according to the charter of the city, and who has entered into a recognition pursuant to the act, cannot sell spirituous liquors by retail, without being liable to the penalty imposed by the act, unless he also has a license, for that purpose, from the commissioner of excise. *Furman v. Knapp*, 19 J. R. 248.

21. Where the corporation of the city were authorized by statute to cause sewers to be made in the city, and to make a just and equitable assessment of the expense thereof, on the owners and occupants of houses and lots, intended to be benefited thereby; though the commissioners appointed for the purpose have a discretion in determining the quantum of benefit which each owner or occupier of a house or lot within the district, may derive from the common sewer, and with the exercise of that discretion the Supreme Court cannot interfere; yet as to the persons who are to be assessed, which must depend on the sound construction of the statute, as applied to the circumstances of the case, that Court has power to establish the principle on which the assessment is to be made, and to compel the corporation to act upon such principle. *Le Roy v. The Corporation of New-York*, 20 J. R. 430.

Assessment for opening streets. See COVENANT, II. 11.

And see further tit. TAXES, 2, 3, 4.

NON-INTERCOURSE LAWS OF THE UNITED STATES.

1. Goods shipped contrary to the non-intercourse law of the *United States*, were forfeited immediately, and the owner's property devested, by the act of shipment. *Amory v. McGregor*, 15 J. R. 24.

*2. But goods shipped in *Great Britain*, after the declaration of war by the *United States*, were not forfeited by the non-intercourse act, which was virtually repealed by the declaration of war. *Ibid*.

3. Where goods were shipped in *Great Britain*, after the declaration of war, to be sent to the *United States*, on account of an *American* citizen, and the agent of the charterer of the ship procured the vessel and cargo to be captured as prize of war by a *British* cruiser, and libelled in the vice admiralty of *New-Providence*, and the cargo, of which the goods in question were a part, were claimed by the agent of the charterer and various other persons, who in their petitions alleged, that if the

property were transported to the *United States*, it would be forfeited under the non-intercourse law; held, that the goods were lost by the act of the defendant, who was the charterer of the vessel, and who was liable on the bill of lading; as the shipment, under the circumstances, was not illegal, as a trade with an enemy; and even if the non-intercourse act were deemed to be still in force, yet there could be no doubt that the forfeiture would have been remitted under the act of Congress of *January 2, 1813*: but as the defendant had not acted fraudulently, interest was not allowed to be added to the value of the goods. *Ibid*.

NOTICE.

1. A conveyance with a recital of the intent of a purchase, is a conveyance with notice, and the grantee takes subject to trusts implied, as well as expressed. *Cuyler v. Bradt*, 2 C. C. E. 326.

2. Where an agreement has been made for the sale of land, if the vendor, for a valuable consideration, convey to a third person without notice of a previous contract of sale, and before it has been carried into execution, such conveyance will transfer the legal title to such third person. *Ibid*.

3. A purchaser for a valuable consideration, without notice, has a good title, though he purchased of one who had obtained a conveyance by fraud. *Jackson, ex dem. Bartlett, v. Henry*, 10 J. R. 185.

4. Where a deed reciting a letter of attorney, by virtue of which the conveyance was made, was duly deposited with the clerk of *Albany*, according to the act of the 8th of *January, 1794*; (Sess. 7. c. 44.) it was held to be sufficient notice of the power, by means of the recital, to a subsequent purchaser, who was equally affected by it, as if the power itself had been deposited. *Jackson, ex dem. Livingston, v. Neely*, 10 J. R. 374.

5. Where R. lets a house to H., and a dispute arises between R. and G. to which of them the rent should be paid, and they agree, in the presence and with the assent of H., to submit the question to arbitrators, and that H. should, in the mean time, take possession of the premises, who enters accordingly, H. is bound to take notice of the award, when made, and cannot set up the want of actual notice as a *defence in an action [*154] for the rent by the persons to whom the arbitrators had awarded that it should be paid. *Humphreys v. Gardner*, 11 J. R. 61.

6. Wherever magistrates proceed judicially, both parties to the proceedings are entitled to be heard, and notice to both is indispensably requisite, notwithstanding there is no direction in the act by which the tribunal is constituted, that notice shall be given. *Commissioners of Kinderhook, v. Claw*, 15 J. R. 537.

Notice to quit. See EJECTMENT. LANDLORD AND TENANT.

—— to produce papers. See EVIDENCE.

Notice of an assignment of a chose in action. See AGREEMENT.

— to a purchaser, and how far he is affected by it. See CHANCERY, LXXIV. *Vendor and Purchaser*, XLIV. *Mortgage*, II. VIII.

NUISANCE.

The Court will not grant a writ to prostrate a nuisance, until the record of the conviction below is regularly made out and returned. *The People v. Valentine*, 1 J. C. 336.

2. Keeping gunpowder near dwelling-houses, and near a public street, or transporting it through a public street, are not nuisances, unless rendered so by particular circumstances, such as negligent keeping, &c. *The People v. Sands*, 1 J. R. 78.

And see ACTION ON THE CASE, V. See *til* CHANCERY, XLVII.

OATHS.

A person who has administered an oath under the authority given by the act, (Sess. 32. c. 141.) without his name being inserted in a commission of *dedimus potestatem*, is not liable to the penalty given by the act, (Sess. 24. c. 113. s. 13.) for not filing the oath within six months. *Bell v. Dole*, 11 J. R. 173.

See ATTORNEY AND COUNSEL, 7. 13.

OFFICE AND OFFICER.

1. A public officer, who is required by law to act, in certain cases, according to his judgment or opinion, sworn to discharge his duties, *and subject to penalties for his neglect, is not liable to a party for an omission arising from mistake, or want of skill, if acting *bona fide*. *Seaman v. Patten*, 2 C. R. 312.

2. A mere ministerial officer is not responsible for the issuing, or the execution of process, so long as the officer, under whose authority the process was awarded, had jurisdiction over the subject matter. *Beach v. Furman*, 9 J. R. 229.

3. Officers required by law to exercise their judgments, are not answerable for mistakes of law, or mere errors of judgment, without any fraud or malice. *Jenkins v. Waldron*, 11 J. R. 114.

4. Whenever the law vests any person with the power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power, is invested with discretion, and is, *quoad hoc*, a judge. Per *Spencer*, *J. Vanderheyden*, v. *Young*, 11 J. R. 150.

5. And his mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents; and it is not their duty or business to investigate the facts thus referred to their superior, and to re-judge his determination. Per *Spencer*, *J. Ibid*.

6. The judges of a Superior Court of general jurisdiction are not liable to action or indictment for acts done by them in a judicial capacity, but only to impeachment, in case they have acted corruptly. *Yates v. Lansing*, 5 J. R. 282. S. C. 9 J. R. 395.

7. So, if the chancellor commit one of the officers in Chancery, for mal-practice and contempt, who is discharged by a judge of the Supreme Court, on *habeas corpus*, and afterwards re-committed by the chancellor, for the same offence, the chancellor is not liable to an action, by the officer, for the penalty given by the 5th section of the *habeas corpus* act. *Yates v. Lansing*, 5 J. R. 282. S. C. 9 J. R. 395.

8. Judges of all Courts of record, from the highest to the lowest, and even jurors, are exempt from prosecution for acts done by them in their judicial character, and within their jurisdiction. Per *Kent*, Ch. J. *Yates v. Lansing*, 5 J. R. 282.

9. But where Courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non jndice*, and all concerned in such void proceedings are liable in trespass. Per *Kent*, Ch. J. *Ibid*.

10. A judge, in allowing a *habeas corpus* in vacation, acts ministerially, and, if he refuse, is liable to the penalty of the act; but his proceedings, after the prisoner has been brought before him, are judicial, and he will not be liable to prosecution for what he may then do, or refuse to do. Per *Kent*, Ch. J. *Ibid*.

11. Where a Court has jurisdiction of the person of a delinquent, and of the subject matter, they are not answerable for their sentence in an action at the suit of the party. *Vanderheyden v. Young*, 11 J. R. 150.

12. The acts of an officer *de facto*, who comes into office, by color of title, are valid, as it concerns the public, or third persons, who have an interest in his acts. *The People v. Collins*, 7 J. R. 549. *Ministry v. Tanner*, 9 J. R. 135.

13. A mere ministerial officer has no right to decide on the act of *such officer, *de facto*, or adjudge them to [*156] be null. *The People v. Collins*, 7 J. R. 549.

14. An officer, intrusted by the common law or statute, is liable to an action for negligence in the performance of his trust or duty, or for fraud or neglect in the execution of his office. *Jenner v. Joliffe*, 9 J. R. 381.

15. If an officer, having authority to attach the goods of a person, keeps them in an unsafe place, or exposes them to destruction, he is liable for the damage sustained. *Ibid*.

16. A probable cause of seizure will not justify a custom-house officer for taking goods, where he is not protected by the act under which the seizure is made. *Amley v. Sands*, 1 C. R. 566.

17. In the case of a public officer, as a sheriff, deputy sheriff, justice of the peace, constable, &c., it is sufficient to prove, by reputation, that he acts as a public officer, without producing his appointment. *Potter v. Luther*, 3 J. R. 431.

18. Neglect of duty, as an inspector of an election, is indictable at common law. Per *Kent, J.* 2 J. C. 277. n.

19. The oppression of officers in executing process, is indictable. *Rogers v. Brewster*, 5 J. R. 125.

20. In an action of trespass against the trustees or officers created by the act relative to common schools, they are not entitled to give evidence of justification under the general issue; not being within the act, (Sess. 24. c. 47.) *Drake v. Barrymore*, 14 J. R. 166.

21. Any officer, civil or military, may increase the rigor of the confinement of a prisoner, if necessary to prevent his escape. *Schuneman v. Diblee*, 14 J. R. 235.

22. Where a public office is instituted by the legislature, an implied authority is conferred on the officer, as incident to his office, to bring all suits which the proper and faithful discharge of his official duties requires. *Overseers of Pultstown v. Overseers of Plattsburgh*, 18 J. R. 407.

23. Thus, the overseers of the poor, being the public agents and trustees of the town, in respect to the poor, without any express authority by the statute for that purpose, have a capacity to sue co-extensive with their public trusts and duties. *Ibid.*

24. Where a public agent or officer acts ostensibly in the line of his official duty, his contracts are public, not personal. *Olney v. Wickes*, 18 J. R. 122.

25. It seems, that an express promise to pay by the officer, does not establish the criterion of personal responsibility. *Ibid.*

26. And where the transaction shows the engagement to be on account of the public, it is not necessary, in order to avoid personal responsibility, that the officer should expressly say, that he acts in his official capacity. *Ibid.*

27. As, where the overseer of the poor of a town contracted with the plaintiff for the support of a pauper, for which he agreed to pay a certain sum per week; held, that he was not personally responsible in the contract, as, from the facts and circumstances of the case, it did not appear that he intended to bind himself personally. *Ibid.*

And see ACTION ON THE CASE, II. 13—33. IV. 35. ASSUMPSIT, IV. 136, 137, 138.

[*157]

*ONONDAGA COMMISSIONERS.

1. The act to settle disputes concerning titles to lands in the county of Onondaga, (Sess. 20. c. 51.) is a constitutional act. *Jackson, ex dem. Lepper, v. Grinnold*, 5 J. R. 139.

2. The award of the commissioners, under the act, is considered as a matter of record, to take effect from its date; and, unless a dissent

has been entered within two years from the date of the award, it is conclusive. *Ibid.*

3. The date of the award is *prima facie* evidence of the time of its being made; and strong evidence will be required to show that the date on the face of the award is not the true time. *Ibid.*

4. An award of the Onondaga Commissioners is a public act, of which parties are presumed to be conusant, and of which they are bound to take notice. *Folliard v. Wallace*, 2 J. R. 395.

5. It seems, that the powers of the commissioners ceased on the first Tuesday of March, 1802, and were not so revived by the act of the 6th of April, 1803, as to render acts done in the intermediate time valid. *Jackson, ex dem. Reiley, v. Livingston*, 6 J. R. 149.

6. A dissent filed in the clerk's office of the county of Cayuga, is sufficient; and, perhaps, it may be filed either in Onondaga or Cayuga, indifferently. *Ibid.*

7. An award in favor of the grantor in a deed, will ensure in favor of the grantee, it being in favor of the title; and the grantee, there being no dispute between him and the grantor, need not dissent. *Jackson, ex dem. Fonda, v. Teale*, 7 J. R. 28.

8. None but persons aggrieved need file a dissent. *Ibid.*

9. The act applies only to interfering and adverse claims. *Ibid.*

10. Infants, and others, under legal disabilities at the time of the award, must file their dissent within three years after coming of age, or the removal of the disability, otherwise they will be barred. *Jackson, ex dem. Cornelius, v. M'Kee*, 8 J. R. 429. *S. P. Jackson, ex dem. Boyd, v. Lewis*, 13 J. R. 504.

11. But as to filing his dissent, he must give notice to the commissioners to commence a suit within three years, &c., according to the third section of the act. *Jackson, ex dem. Boyd, v. Lewis*, 13 J. R. 504.

12. It is not sufficient to bring an action within the three years, without having filed a dissent. *Jackson, ex dem. Cornelius, v. M'Kee*, 8 J. R. 429.

13. Whether the land was vacant or not, the dissent is equally necessary. *Ibid. S. P. Jackson, ex dem. Robicheau, v. Swartwout*, 8 J. R. 490.

14. Where no dissent is filed, the title, under the award of the commissioners, is final and conclusive. *Jackson, ex dem. Robicheau, v. Swartwout*, 8 J. R. 490.

15. An award of the Onondaga Commissioners, was made in favor of the defendant, November 5th, 1800, to which the plaintiff filed a dissent, according to the act, in February, 1801, and it appeared that the defendant was in actual possession in June, 1801; held, that though the possession commenced after the award and dissent, but before the expiration of three years; yet the party filing the dissent was bound to take notice of the possession, and to bring his action against the party in possession within the three years, and prosecute the same to effect within three years; otherwise, the award was conclusive. *Jackson, ex dem. Bond, v. Root*, 18 J. R. 60.

16. If the party in whose favor the award is made, is out of possession, and his adversary in possession, the party out of possession must bring his action and prosecute it to effect within three years; and if he does so, his title is established, and the recovery is conclusive on the right. *Ibid.*

17. And it is the same, if the party dissenting brings a suit against a tenant in possession claiming under the party in whose favor the award was made, if a verdict, after trial as to the right, is found for the defendant; for the intention of the legislature in regard to these military lands, was to make a single trial as to the right, in an action of ejectment brought within the time limited, a conclusive bar to another suit; and if there is a trial on the merits, in a suit brought by either party, within the period prescribed, it is within the true meaning and intent of the act. *Ibid.*

18. By the *proviso* contained in the 8th section of the act, *infants* have three years after coming of age, within which to file their dissent to the award of the commissioners. *Jackson, ex dem. Boyd, v. Lewis, 17 J. R. 475.*

19. The limitation in the act, as to the time of filing a dissent, cannot be set up against such of the lessors in ejectment as were *feme covert*s at the time the award was made; and bringing the action during the coverture is no waiver of the saving clause in the statute. *Jackson, ex dem. Hunt, v. Ransom, 10 J. R. 407.*

20. But the filing a dissent being, by the act, a condition precedent to a right of recovery, an action cannot be maintained before a dissent has been filed; but the wife, by herself, or by her husband, in her name, may file a dissent, and bring her action with her husband, and recover during coverture; or she may, within three years after the death of her husband, file her dissent, and bring an action. *Ibid.*

21. If a party, conceiving himself aggrieved by an award of the *Onondaga Commissioners*, has given them notice of his dissent, within two years, that is sufficient to prevent his being concluded by the award, whether the commissioners have entered such dissent in their book of awards or not; and whether the dissent was delivered to the commissioners or not, is a question for the jury. *Jackson, ex dem. Reiley, v. Livingston, 3 J. R. 455.*

22. Where the heirs of N., a native of Ireland, and living in Ireland, neglected to enter their dissent to the award of the *Onondaga Commissioners*, in relation to a lot of land of which N. died seised, within the two years limited by the act, they were held forever barred, and concluded by the award, except L., who was a *feme covert*, and within the saving of the act, there being no saving on account of absence from the state. *Jackson, ex dem. Folliard, v. Wright, 4 J. R. 75.*

23. A. having title to a lot of land [*159] in the county of *Onondaga*, *directed B. to take charge of the lot, and sell it, and B. went on the lot occasionally to show it. C. also claimed the lot, and the claims of the parties were litigated before the commis-

sioners, who, on the 20th *January, 1802*, made an award in favor of C.; and, in *July, 1802*, about half an acre of the lot was cleared and fenced by the order of A., and logs cut and laid as the foundation for a house, which was not, however, built or occupied. In *March, 1802*, A. filed his dissent to the award, and brought an action in 1807; *held*, that the acts of A. did not constitute an actual possession of the lot, within the meaning of the act, so as to oblige C. to bring his action within three years; and that the land being vacant, A. was not bound to bring his action within the three years, the act not extending to the case of a vacant possession; and that, therefore, neither party being barred, they must stand on the strength of their respective titles. *Jackson, ex dem. Scott, v. Huntley, 5 J. R. 59.*

24. *Dunbar*, an infant in 1784, conveyed a lot of land in the military tract, to *Macey*, who conveyed the same, in 1794, to *Platt*, who conveyed it to *Thorn*. *Dunbar* came of full age in 1785, and, afterwards, in 1791, without having made any entry on the land, or done any act to avoid the deed to *Macey*, executed another deed, for the same lot, to *Brooks*; and the executors of *Brooks*, afterwards, in 1794, conveyed the same lot to *Isaacs*, who contracted to convey the same to *Cady*, who assigned the contract to *Todd*, who entered into possession in 1795, and afterwards, in 1797, received a deed from *Isaacs*. On the 18th of *November, 1802*, the *Onondaga Commissioners* awarded the lot to *Thorn*; and *Todd*, in *May, 1802*, filed his dissent, pursuant to the statute. In an action of ejectment, brought on the demise of *Dunbar, Macey, Platt, and Thorn*, against *Todd*, to recover the lot; *held*, that though the deed from *Dunbar* to *Macey* was voidable, *Todd* could not avail himself of the subsequent deed from *Dunbar* to *Brooks*, to avoid it; and that, though the dissent of *Todd* would enure to the benefit of those from whom he derived his estate, yet as it did not appear that the executors of *Brooks* had any authority to convey, no privity of estate was shown between him and *Todd*; and that as, by the award in favor of *Thorn*, the deed to *Brooks* was rendered inoperative, no dissent having been filed by the heirs of *Brooks*, the award was conclusive against them, and so *Todd* could not avail himself of the deed to *Brooks*, as a subsisting outstanding title; and that though the deed to *Thorn*, on account of the adverse possession of *Todd*, was void; yet the award of the commissioners was on the title, and being in favor of *Thorn*, it must extend and enure to the benefit of all those from whom he derived title, and confirmed the deeds to *Macey* and *Platt*, who were not bound to enter any dissent, as the award was in favor of their alienee. *Jackson, ex dem. Dunbar, v. Todd, 6 J. R. 257.*

25. The claim of defendants to the value of their improvements must depend upon the report of the circuit judge. *Jackson, ex dem. Spilbury, v. Watson, 2 C. R. 105.*

26. If the plaintiff, before bringing his action, offer to pay the value of the improvement, he will be entitled to costs. *Ibid.*

[*160]

*PARDON.

1. A pardon of a person convicted of forgery and sentenced to the state prison for life, contained a *proviso* that nothing in the pardon "shall be construed so as to relieve the said A. of and from the legal disabilities to him from the conviction, sentence and imprisonment, other than the said imprisonment;" this *proviso* is repugnant to the pardon itself, and must be rejected, and the party is freed from all legal disabilities. *The People v. Pease*, in error, 3 J. C. 333.

2. If a prisoner, who has been pardoned on condition of his leaving the *United States* within a limited time, do not depart, and is afterwards taken up for not so doing, he may, on its appearing to the Court that he was deranged in his intellects, be discharged, on condition of departing within the same period from the day of discharge. *The People v. James*, 2 C. R. 57.

3. A person sentenced to the state prison for life, and afterwards pardoned, is restored to his rights and duties as a parent, and becomes entitled to the custody of his infant children, who had been placed under the care of a guardian, appointed during his civil death. *In the matter of Deming*, 10 J. R. 232. S. C. *id.* 483.

4. The effect of the pardon is to acquit the offender of the penalties annexed to the conviction, and to give him a new credit and capacity, but it does not affect or annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate, in consequence of his civil death. *Ibid.*

See CHANCERY, XXII. *Evidence*, C. 555.

PARENT AND CHILD.

1. A parent is bound to provide his infant children with necessaries; and if he neglect to do so, a third person may supply them, and charge the parent with the amount. *Van Valkinburgh v. Watson*, 13 J. R. 480.

2. But such third person must take notice of what is necessary for the infant according to his situation in life; and where the infant lives with his parent, and is provided for by him, a third person, furnishing the infant with necessaries, cannot charge the parent for them. *Ibid.*

3. There is no obligation, at common law, by which a child can be made liable to support an infirm and indigent parent, but the obligation is created solely by statute; and therefore, a promise from the child to pay for necessaries furnished, without his request, to his indigent parent, is not implied by law. *Edwards v. Davis*, 16 J. R. 281.

4. The natural and moral obligation of a child to support an indigent *parent
[*161] can be enforced only in the mode pointed out by the act for the relief

and settlement of the poor. (Sess. 36. c. 78. s. 21.) *Ibid.*

See tit. CHANCERY, XLVIII.

PARTITION.

- I. *How it may be made, and the effect of it.*
- II. *Proceedings under the statute.*

I. *How it may be made, and the effect of it.*

1. A partition deed operates as an estoppel to the parties, and all claiming under them; so that where a partition was made in 1747, and possession taken by the parties according to the survey and map, then made, it was *held* conclusive; though, by a second survey, in 1801, it was found that there was a mistake in the first survey, on which the partition was founded. *Jackson*, ex dem. *Ostrander*, v. *Hasbrouck*, 3 J. R. 331.

2. A *parol* partition between tenants in common, carried into effect by each party taking possession of his respective share, when the only object is to ascertain the separate possession of each, is binding on the parties. *Jackson*, ex dem. *Duncan*, v. *Harder*, 4 J. R. 202.

3. Where the whole right and title of the party setting up such tenancy in common is denied, or the source from whence he derived his title is abandoned, a *parol* partition will not operate as a transfer of title. *Jackson*, ex dem. *Vanbeuren*, v. *Vosburgh*, 9 J. R. 270.

4. A partition made by commissioners appointed extra-judicially by the parties, will not prejudice third persons. *Brandt*, ex dem. *Walton*, v. *Ogden*, 3 C. R. 6.

5. Where partition was made in 1764, under the colonial act of 1762, and on the trial, in 1813, the map and field book which had been filed pursuant to the direction of that act were produced in evidence, but the balloting book could not be found; *held*, that after such a lapse of time, and the act of the parties recognizing the partition, it would not be invalidated by the want of the balloting book. *Jackson*, ex dem. *Klock*, v. *Richtmyer*, 13 J. R. 367.

6. An agreement relative to a partition executed by a third person in the name of one of the parties, who, it did not appear, had any authority to execute it, was *held* to be ratified by the subsequent acts of the party in whose name it was made. *Ibid.*

7. Where land was conveyed, and the grantee entered into possession, and, afterwards, proceedings were had in partition in relation to the same premises, to which the grantee was not a party, and the premises were sold by the commissioners appointed by the Court, and conveyed by *them to a purchaser; *held*, that [*162] the first grantee was not precluded by the proceedings in partition, from controverting the right of the subsequent purchaser, and that, his possession being adverse, the deed from the commissioners was void. *Jackson*, ex dem. *Smith*, v. *Vrooman*, 13 J. R. 438.

8. Where a special verdict stated that A. and others, being some of the proprietors of a patent, in 1763, released part of the patent to certain *Indians*, in trust; in which release K., another of the proprietors, refused to join; and that in 1764, K. and the other proprietors were seized of the patent, and made partition of the whole, including the part released to the *Indians*; held, that the jury having found the fact of seisin, without explaining how the proprietors became re-seised, it was to be presumed that they were lawfully re-seised, and that any intendment might be made that the fact might require; and that K., with knowledge of the release, having united in the partition, and having afterwards made a subdivision of the lot drawn by him, with another proprietor, he could not question the validity of the partition. *Jackson*, ex dem. *Klock*, v. *Richmyer*, in error, 16 J. R. 314.

II. Proceedings under the statute.

9. If a party named in the petition be stated to be seized of a certain portion, the Court will intend it to be a seisin in fee. *Lucet* v. *Beckman*, 2 C. R. 385.

10. A general guardian cannot act for an infant party, but an appointment of a guardian *ad litem* must be made by the Court under the act. *Matter of Stratton*, 1 J. R. 509. *In the matter of Sharp*, 10 J. R. 486.

11. Where one of the parties applying to make a partition under the act of 1785, sec. 15. is an adult, the proceedings are valid, though the others are infants. *Jackson*, ex dem. *Gillespy*, v. *Woodsey*, 11 J. R. 446.

12. A guardian *ad litem* in partition may be a purchaser at the sale made by the commissioners pursuant to an order of the Court. *Ibid.*

13. A person claiming only a right of dower does not come within the act, and cannot be made a party to the proceedings, or be affected by the judgment, and cannot be made liable for the costs. *Bradshaw* v. *Callaghan*, 5 J. R. 80. In error, 8 J. R. 558. But a partition among the other tenants is good, though the dower of the widow is excepted and left undivided. *Ibid.*

14. Where one of several tenants in common had aliened his share before presenting the petition, and the plaintiff proceeded as if no such alienation had been made, by giving notice to the original co-tenant, without taking notice of the grantee, the judgment was held to be void. *Jackson*, ex dem. *Antell*, v. *Brown*, 3 J. R. 459.

15. In the petition, it is not necessary to set forth the rights and titles of the several tenants, at large; nor is it necessary to allege the seisin of the ancestor or person from whom the parties derive title; but it is sufficient to state in general terms, that each [*163] tenant was *seised of his part or share in fee, or as the case may be, whether such seisin be acquired by descent or purchase. *Bradshaw* v. *Callaghan*, 8 J. R. 558.

16. A tenant in common of the inheritance may maintain partition, notwithstanding a particular estate is outstanding. *Ibid.*

17. So, where a partition was made among several heirs, assigning to each his portion of lands, by metes and bounds, but excepting from each portion one third thereof, as the dower of the widow of the ancestor, it was held valid. *Ibid.*

18. A rule to appear and answer is not of course, but must be moved for. *Seaman* v. *Davenport*, 1 C. R. 7.

19. Where the defendants do not appear, the Court, on motion, will make an order for partition. *Neilson* v. *Cox*, 1 C. R. 121. (This form of the rule in partition is given in this case.)

20. The commissioners are named by the party to the Court, and, if approved of, appointed according to the nomination. *Ibid.*

21. Where no opposition is made to a motion, it is sufficient to read the notice and affidavit of service. *Codd* v. *Harrison*, 3 C. R. 82. *Bell* v. *Rhineland*, 1 C. R. 20.

22. The petition of the plaintiffs, after setting forth their rights, stated that F., one of the defendants, was seized in fee of a moiety, subject to two mortgages to A. and C., and to P., the other defendant. F. and P. pleaded in bar, that before presenting the petition of the plaintiffs, A. and C. assigned their mortgage to P.; A. and C. pleaded *non tenent insimul*; the plaintiff replied, confessing all the facts in the pleas, and praying judgment of partition; and then gave notice of a motion for judgment on the pleadings. The defendants afterwards put in general demurrers to the replication; but the Court, upon the pleadings, gave judgment as prayed for by the plaintiffs. *Murray* v. *Fitzsimmons*, 2 J. R. 482.

23. A tenant entering under a person claiming the whole in severalty, is not entitled to the value of his improvements, from persons recovering as co-tenants under the acts of the 16th of March, 1785, and 10th of February, 1791. *Jackson*, ex dem. *Van Denberg*, v. *Bradt*, 2 C. R. 303.

24. Where the plaintiff's lessor in ejectment claims title, under a partition, made by virtue of the act, (Sess. 24. c. 176.) of the lands of which the defendant, or those from whom he derives title, were in possession prior to the passing of that act, it is no defence, that the plaintiff had not paid for the improvements pursuant to the act of 1785. *Jackson*, ex dem. *Van Dan Bergh*, v. *Trusdell*, 12 J. R. 246.

25. Where a person entered upon an improved land by a permission of a tenant in common of the land, and a partition was afterwards made in 1793, (see the acts of the 16th of March, 1785, and 3d of April, 1792;) held, that the person to whose share the land had fallen on the division, could not maintain ejectment for it, without first tendering to the tenant the value of the improvements made before and since the partition, deducting for the use and occupation of the land. *Jackson*, ex dem. *Fisher*, v. *Creal*, 13 J. R. 116.

26. Where the husband is seized of land in severalty, his widow cannot proceed under the act for the partition of lands, (Sess. 36. c. *100.) in order to obtain her dower; nor can she be [*164]

made a party to a partition among the heirs, devisees or grantees of the husband. *Coles v. Coles*, 15 J. R. 319.

27. But, it seems, that where the husband was seised as a joint tenant, or tenant in common, the widow, as her right of dower extends only to the undivided part, is a proper party to a partition among the several joint-owners. *Ibid.*

28. Where the defendants in partition pleaded *non tenent insimul*, on which issue was joined; and it appeared that A., one of the defendants, had, before the service of the petition and notice, conveyed all his right in the premises to one of his co-defendants, who was, before, a tenant in common with him; the Court, after the rights of the parties had been ascertained; refused to turn the plaintiffs round to a new action, on account of a variance between the petition and proofs, as to the quantity of interest in the respective tenants in common; but gave judgment, that as to A., the plaintiff should go without day, and pay his costs; but as to the other defendants, the plaintiffs should have judgment according to the proofs in the cause. *Ferri v. Smith*, 17 J. R. 221.

29. In partition under the act, (Sess. 8. ch. 39. s. 15. 1 *Greenl. ed. L.* 170.) all the parties must be tenants in common of all the lands intended to be divided; and if some of the parties had an interest in the same part of the land, but not in another part, the partition is void. *Jackson, ex dem. Wynkoop, v. Myres*, 14. J. R. 354.

See tit. CHANCERY, XLIX.



PARTNERSHIP.

- I. (a) *What constitutes a partnership*; (b) *Evidence of the existence of a partnership*; (c) *Special or limited partnership*.
- II. *How far the acts of one partner bind the other.*
- III. *Dissolution of a partnership.*
- IV. *Actions by or against partners*; (a) *Actions between partners*; (b) *Actions between partners and third persons.*

- I. (a) *What constitutes a partnership*; (b) *Evidence of the existence of a partnership*; (c) *Special or limited partnership.*

(a) *What constitutes a partnership.*

1. Where A. and four others were owners in distinct proportions, of a cargo purchased with the proceeds of an outward cargo also belonging to the same persons, but A. was not connected in trade with the others, and made insurance on his part of the cargo on his own account, and there was no agreement between the parties, to share in the future sale of the cargo; held, that they were not partners. *Holmes v. United Insurance Company*, 2 J. C. 329.

2. Underwriters on the same policy, by accepting an abandonment, and appointing a

common agent to take care of the property, do not thereby constitute themselves partners. *United Insurance Company v. Scott*, 1 J. R. 106.

3. A. and B. having entered into a contract with a turnpike corporation, "to make and complete a certain [*165] road, afterwards made an agreement with C., "to let him have a share of the profits, if any, in making the second ten miles of the road, in proportion to the help he afforded in completing the same; the one half to be taken from A.'s part, and the other from B.'s part;" held, that this agreement did not create a partnership between A., B. and C., but was a mode only of paying C. for his help and labor. *Muzzy v. Whitney*, 10 J. R. 226.

4. Where A. owned three fourths of a vessel, and B. one fourth, and they agreed to fit her out on a voyage to L., and three fourths of the cargo were purchased by A., and the other fourth by B., but the part of B. was not distinguished from the rest of the cargo by any particular marks, and the whole cargo was to be sold at L., for the joint account and benefit of A. and B., and the cargo was sold at L. accordingly; held, that there was no agreement constituting a partnership in the purchase of the outward cargo, or to share jointly in the ultimate profit and loss of the adventure; and even if there was a partnership as far as respected transportation and selling of the outward cargo, yet it terminated with the sale of the outward cargo, and the interest of A. and B. in the return cargo was separate and distinct, each being entitled to his respective proportion of it, without any concern in the profit or loss which might ultimately arise. *Post & Russell v. Kimberly & Brace*, 9 J. R. 470.

5. A. and B., citizens of the United States, having been partners together in France, in September, 1806, agreed to dissolve their partnership, and that B. should establish himself in New-York, and A. remain in France; that they should exert themselves to procure consignments from the United States; that A. should ship goods to B., the amount of which and such sum as B. would procure by association, loan or credit, were to be converted into reasonable advances on goods consigned to A.; that on shipments made by A. to the United States, by order of B., the latter should receive one third of the profits, and on shipments by B. to France, A. should receive one third of the profits, and that B. should have one third of the commissions on consignments from the United States to A.; that a statement of their respective accounts should be made at the end of each year, and if one of the parties had incurred losses, the other was not to be answerable for them, beyond a forfeiture of the profits of the year. According to this agreement B. established himself as a merchant in New-York, and contracted debts in relation to his business; held, in an action against A. & B. as partners, that by this agreement between them, they were partners, there being a community of profit and loss; that as the debt for which the plaintiff sued, being principally for money lent, had relation to the

partnership concerns, he was entitled to recover against both; and that it was not necessary for the plaintiff to show, that the money lent, or credit given, was used for the benefit of the copartnership; and that the stipulation limiting the extent of the liability of each partner for losses incurred by the other, though valid as between themselves, did not affect third persons. *Walden & Walden v. Sherburne & Eakin*, 15 J. R. 409.

6. Where real estate is held by persons who are partners in trade, *for the purpose of their partnership, they hold as tenants in common, and the rules relative to partnership property do not apply in regard to it: therefore, one partner can sell no more than his individual interest in the land, and when both join in a sale and conveyance of the land, and one only receives the purchase money, the other may maintain an action against him for his proportion. *Coles v. Coles*, 15 J. R. 159.

7. Where one person advances funds for carrying on trade, and another gives his personal services, for which he is to receive a proportion of the profits, there is a partnership existing between them, both as regards the parties, and third persons. *Dob v. Halsey*, 16 J. R. 34.

8. H. and S. made a joint purchase of a quantity of goods, each paying one half of the price. They sold to A. one package of the goods at a credit of five months, and divided the residue of the goods between them, and H. paid S. for one half of the price of the package sold. A., the purchaser of it, having become insolvent, H. brought an action of *assumpsit* against S., to recover one half of the loss arising from the sale of the package; held, that it was a partnership transaction, therefore an action *at law* could not be maintained without proving an express promise to pay. *Halsted v. Schmeltzel*, 17 J. R. 80. *Sed quare*.

(b) Evidence of the existence of a partnership.

9. The existence of a partnership, the firm of the partnership, and whether a note was given on a partnership transaction, are facts which may be left to the jury to infer from the evidence. *Drake v. Elwyn*, 1 C. R. 184.

10. A. and B. are partners in one concern, under the firm of A. & Co., and A. is also a partner with C. in a distinct concern: A. & Co. draw a bill of exchange on C., who refuses to accept it; in an action against A. & Co. as drawers of the bill, a promise by C., after he had been arrested, to pay it, is not evidence that he was a partner with A. in the firm of A. & Co. *Bogert v. Lingo*, 3 C. R. 92.

11. In an action against A., B. and C., as secret partners, the declarations and acts of A., though evidence to show that he considered himself a secret partner with B. and C., are not admissible directly to charge or implicate B. as a partner. *Whitney v. Ferris*, 10 J. R. 66.

12. In an action of *assumpsit* against A.

and B., as partners, they pleaded that the promise, if any, was made by A. and B. jointly, with one C., and not by A. and B., &c.; held, that the declarations of A. and B., or of C., were not admissible evidence in support of the plea. *Sweeting v. Turner*, 10 J. R. 216.

13. Two persons signing a joint note is no evidence of a partnership between them. *Hopkins v. Smith*, 11 J. R. 161.

14. General reputation connected with corroborating circumstances, will be sufficient at least, *prima facie*, to establish the fact that A. was a partner of B. & C. *Whitney v. Sterling*, 14 J. R. 215.

15. And if B. and C. have acknowledged the existence of articles of copartnership between them and A., which, upon due notice, they *refuse to produce at the trial, the jury may reasonably infer that, if produced, they would have shown the fact of partnership. *Ibid*.

16. But the mere acknowledgment of B. and C. that A. was their partner, is not sufficient to bind him. *Ibid*.

17. A witness, a commission merchant in New-York, testified, that he had become acquainted with, and did much business for a merchant in Antigua, and understood, in the course of his business and from general report, that he was a partner in a house or firm in London, on whom he had drawn a bill of exchange, though the witness had not known or heard of the drawer or drawee, until more than six months after the bill was drawn; held, that this was sufficient evidence, *prima facie*, to show that the drawer of the bill was a partner in such firm. *Gowan v. Jackson*, 20 J. R. 176.

(c) Special or limited partnership.

18. Where there is a special and limited partnership, and persons deal with it, knowing it to be such, they are bound by the terms of the partnership, and cannot make the other partners liable beyond them. *Ensign v. Wands*, 1 J. C. 171.

19. One partner cannot bind his copartner by any contract not connected with the trade or business; and a knowledge in third persons, of the limited nature of the partnership, will be inferred from circumstances. *Litlington v. Roosevelt*, 4 J. R. 251.

20. It seems, that a publication in the gazette, of the nature of the partnership, at the time of its commencement, is constructive notice to all those who may afterwards take the partnership security. *Ibid*.

II. How far the acts of one partner bind the other.

21. One partner cannot bind his copartner by seal. *Clement v. Brush*, 3 J. C. 180. *Green v. Bards*, 2 C. R. 254. *S. P. Tom v. Goodrich*, 2 J. R. 213. *S. P. Ludlow v. Simond*, 2 C. C. E. 1.

22. And a release by the obligee to the other partner, of the partnership debt, will not af-

fect the specialty. *Clement v. Brush*, 3 J. C. 180.

23. If one of two partners give a bond and warrant of attorney, on behalf of himself and his partner, they are void as to the partner who did not sign them; but, if judgment has been entered thereon, it will not be vacated on application of the partner who did execute them. *Green v. Beale*, 2 C. R. 254.

24. If, in such case, the application had been made by the other partner, the Court would not have vacated the judgment, but would have directed the execution not to be served on him, and that only the interest in the joint property of the partner should be liable under the judgment. *Ibid.*

25. A security given by one partner, in the name of the partnership, for a debt known by the person taking the security to be his individual debt, and without the consent of the other partner, is not "binding upon

[*168] them. *Livingston v. Hastie*, 2 C. R. 246. *S. P. Livingston v. Roosevelt*, 4 J. R. 251. *S. P. Dubois v. Roosevelt*, 4 J. R. 262. n. *S. P. Lansing v. Gaine*, 2 J. R. 300.

26. Neither will a person who has become surety under such circumstances, and supposing that he has undertaken for a debt of the partnership, be liable. *Livingston v. Hastie*, 2 C. R. 246.

27. But in the case of a note in the hands of a bona fide endorsee, the law is otherwise. Per *Livingston, J. Ibid. S. P. Per Kent, Ch. J. Livingston v. Roosevelt*, 4 J. R. 251.

28. Where one of the partners signs the name of the firm to a deed, and acknowledges the seal, which is also acknowledged by the other partner, it seems, that both will be bound. *Ludlow v. Simond*, 2 C. C. E. 1.

29. A release, under seal, by one partner, in the name of the firm, of a debt due the partnership, is binding on all the partners. *Piereson v. Hooker*, 3 J. R. 68. *S. P. Bulkley v. Dayton*, 14 J. R. 387.

30. Where one of two partners executes a bond, to which he subscribes the name of the firm, and affixes one seal, the other partner having previously read and approved the bond, and consenting that his copartner should execute it for both, and being in the room at the time of the execution, though not actually signed and sealed in his immediate presence; this is a good execution of the bond, so as to make it the deed of both. *Mackay v. Bloodgood*, 9 J. R. 285.

31. One partner of a firm may sign a deed of composition, and release a debt due to the copartnership. *Bruen v. Marquand*, 17 J. R. 58.

32. Though one partner, as such, cannot bind his copartner by a bond or writing under seal, to comply with an award; yet where an award is made pursuant to a submission so executed by one partner, who afterwards accepts the amount awarded in favor of the partnership, and endorses upon the award a receipt in full, it is sufficient to bar the copartnership claim; for it operates as a release by one partner, or as an accord

and satisfaction. *Buchanan v. Curry*, 19 J. R. 137.

33. Where one of two partners subscribes the name of the copartnership to a note as sureties for a third person, without the authority or consent of the other partner, the latter is not bound; and the burden of proving the authority or consent of the other partner, lies on the creditor or holder of the note. *Foot v. Sabin*, 19 J. R. 154.

34. A note made by one partner, in which he says, *I promise to pay, &c.*, but subscribes the partnership name, "*A. B. & Co.*," is binding on the firm, and not on the partner alone who executed it. *Doty v. Bates*, 11 J. R. 544.

35. A note made by one partner, in the name of the firm, will be intended to have been made in the course of partnership dealings; and that it was given for the individual debt of one of the partners is matter of defence, which must be proved by the party taking advantage of it. *Ibid.*

36. Evidence that a note was made or endorsed by one partner, will support an averment that it was made or endorsed by the firm. *Manhattan Company v. Ledyard*, 1 C. R. 192.

37. One partner cannot, without the consent of the others, introduce "a third person or a partner into the [*169] concern. *Murray v. Bogert*, 14 J. R. 318.

38. Where one of two partners executes a bond for duties on goods imported by the partnership, with surety, and the surety advances his co-obligor money, with which he pays off the bond, the surety may maintain an action against both partners, this being a partnership transaction; though if the surety himself had taken up the bond, he could only have brought an action for money paid, against the partner who executed it with him. *Walden v. Sherburne*, 15 J. R. 409.

39. Entries made by one partner, during the existence of the partnership, in the books of accounts, are evidence against both. *Ibid.*

How far the acts of one partner, after the dissolution of the partnership, are binding on the other. *See post*, III.

And see EXTINGUISHMENT, I.

III. Dissolution of a partnership.

40. The death, insanity, or bankruptcy of a partner, works a dissolution of the partnership. *Griswold v. Waddington*, 15 J. R. 57. *S. C.* 16 J. R. 438, in error.

41. Either party may, by his own act, dissolve the partnership, unless restrained by the compact between them to continue it for a definite period. *Ibid.*

42. A commercial partnership existing between a citizen of the *United States*, and the citizen or subject of a foreign country, is dissolved by the breaking out of war between the two countries; for as soon as war is commenced, all trading, negotiation, communication, or intercourse with the enemy, without the direct permission of government, is un-

lawful; and no valid contract can exist, nor any promise arise, by implication of law, from any transaction with an enemy. *S. C.* 15 J. R. 57. *S. C.* in error, 16 J. R. 438. *S. P. Seaman v. Waddington*, 16 J. R. 510.

43. If such partnership expire by its own limitation during the war, the existence of the war dispenses with the necessity of giving public notice of the dissolution. *Ibid.*

44. The power of one partner to bind the other, ceases with the dissolution of the partnership. *Lansing v. Gaine & Ten Eyck*, 2 J. R. 300.

45. If one partner, after the dissolution of the copartnership, issue notes, signed with the name of the partnership, the other partner is not liable. *Ibid.*

46. A notice of the dissolution of a partnership in the gazette, is sufficient to all persons who had no previous dealings with the partnership. *Ibid.*

47. One partner cannot endorse notes or bills given to the firm before their dissolution, although authorized to settle partnership concerns. *Sanford v. Mickles*, 4 J. R. 224.

*48. So, his acknowledgment of
[*170] a debt after a dissolution will not bind the other partners. *Hackley v. Patrick*, 3 J. R. 536. *S. P. Walden v. Sherburne*, 15 J. R. 409.

49. But his acknowledgment of a debt due from the partnership before the dissolution of it, will preclude the other partners from availing themselves of the statute of limitations. *Smith v. Ludlow*, 6 J. R. 267.

50. If neither public notice of the dissolution has been given, nor special notice to persons dealing with the firm, an acceptance of a bill by one partner, in the partnership name, will bind the others. *Ketcham v. Clark*, 6 J. R. 144.

51. A. and B., partners in trade, having dissolved their partnership, B. took the property, and engaged to pay off all the debts due by the partnership, among which was a judgment against A. and B. at the suit of C.; B. having become insolvent, C. threatened to take out execution against A., who paid the amount of the judgment, and C. agreed that A. might have the benefit of the judgment, to recover the amount, out of the property of B., in the name of C.; A. sued out execution against the land of B., which was bound by the judgment; B. assigned all his property to D., and others, for the benefit of his creditors; held, that A. was to be considered merely as a surety of B., and entitled to an equitable lien on the property of B.; and that D., and others, to whom it was assigned, took it, subject to such equitable lien; and the Court could not, therefore, relieve them by an *audita querela*. *Waddington v. Vredenberg*, 2 J. C. 227.

IV. Actions by or against partners; (a) Actions between partners; (b) Actions between partners and third persons.

(a) Actions between partners.

52. One partner, in a particular transaction, is not liable to the others, except on an express promise to pay. *Casey v. Brush* 2 C. R. 293.

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53. No action lies by one partner against another, unless there has been a settlement of accounts, and a promise to pay the balance. *Murray v. Bogert*, 14 J. R. 318.

54. A., and B. and C., and D. and E., agreed to run a line of stages from *Albany to Utica*; each of the three parties was to run a separate portion of the road, and to furnish his own horses and carriages at his own expense and risk, but extra expenses for extra carriages were to be paid jointly. An adjustment of the accounts between the parties took place, which was made by F. at their request, who found a balance due from D. and E. to B. and C. It appearing that D. and E., being jointly concerned in running their part of the line, and generally understood to be partners; held, that E. was jointly chargeable for the money received by D., and for his acts; and that B. and C. might maintain an action for money had and received against D. and E., to recover the balance so stated to be due, by the agent employed to adjust the accounts, there being no such partnership existing [*171] between the five persons concerned, as would prevent such a suit. *Wetmore v. Baker*, 9 J. R. 307.

55. Covenant does not lie on a partnership agreement, to compel the payment of a balance due to the partnership from one of the partners. *Niven v. Spickerman*, 12 J. R. 401.

56. Where partners hold land together, they are tenants in common merely, and if on a sale and conveyance of the land by them, one receives the purchase money, the other may maintain an action against him for his proportion. *Coles v. Coles*, 15 J. R. 159.

57. Where H. and S. made a joint purchase of goods, and after selling one package to A. at a credit of 5 months, for which he gave a note to H., they divided the residue of the goods, and H. paid S. for one half the price of them; and A. having failed to pay his note, H. brought an action of assumpsit to recover of S. one half of the amount so lost; held, that an action at law would not lie on an implied assumpsit of S., as it was a partnership transaction; but even if an action would lie in such a case, yet as H. had taken the note of A. and treated it as his own, and extended the time of credit without the consent of S., and finally made a compromise of the claim, he had no right to call on S. to share in the loss. *Halsted v. Schmiedel*, 17 J. R. 80.

58. After a verdict for the plaintiff, it is too late for the defendant to object that the subject matter of the suit was a copartnership contract between him and the plaintiff. The objection should be made at the trial. *Smith v. Allen*, 18 J. R. 245.

(b) Actions between partners and third persons.

59. A surviving partner may maintain an action in his own name, for a debt incurred to the partnership, either before or after the death of the other partner. *Bernard v. Wilcox*, 2 J. C. 374.

60. It is the same where the other partner has withdrawn himself from the partnership. *Ibid.*

61. In an action by a partnership for a debt contracted with the plaintiffs and a partner since deceased, his death, and the survivorship of the others, should be alleged. *Holmes and Drake v. D'Camp*, 1 J. R. 34.

62. But where an account is stated, afterwards, by the defendant, between him and the copartnership, admitting a balance due by him for goods sold in the lifetime of the deceased partner, the surviving partner may recover such balance, or an *insimul computassent*, without stating the death of the other partner, and the survivorship; for the stating the account is in the nature of a new promise to the survivor. *Ibid.*

63. Where several persons are engaged in a joint transaction, the proceeds of which are received by a third person, who promises to pay each partner his respective proportion, in an action against him by one of the partners for his proportion, he cannot object that there are others jointly concerned. *Bunn v. Morris*, 3 C. R. 54.

64. If one of two partners in trade purchase goods for both, and one of them dies, an action of *indebitatus assumpsit* may be brought against the survivor, without taking notice of the partnership, or the death of one and the survivorship of the other. *Golet v. McKinstrey*, 1 J. C. 405.

65. In an action for money paid, &c. to the use of a partnership, one of the partners having died previously to the time that the plaintiff's right of action accrued, the promise must be stated to have been made by the partners living at the time alone; if stated to be by the deceased partner and his survivors, it will be fatal. *Tom v. Goodrich*, 2 J. R. 213.

66. If one partner, for the benefit of the partnership, give a bond with a surety, which bond the surety is compelled to pay, he can maintain no action against the other partners. *Ibid.*

67. Where one partner makes a warranty on the sale of goods, an action may be maintained on the warranty against that partner, without joining the other. *Clark v. Holmes*, 3 J. R. 148.

68. On an application to the equity of the Supreme Court, they will take notice of the rule in Chancery, that partnership property, taken in execution for the separate debt of one of the partners, cannot be held against the joint creditors; nor can the share of such partner be applied to the separate debt, until after the partnership accounts have been taken and settled. *Wilson v. Conine*, 2 J. R. 280. (See EXECUTION, 26. *TIT. CHANCERY, L.*)

69. Where a promissory note is given by a partnership, and the payee afterwards takes the individual note of one of the partners for the amount, and gives up the partnership note, it is a payment of it. *Arnold v. Camp*, 12 J. R. 409.

70. And, if the payee, afterwards, gets back the partnership note, from the individual partner, on re-delivering him his note, and brings an action on the partnership note, the other partner may avail himself of these circumstances in bar of the action. *Ibid.*

71. An attachment under the act for relief

against absent and absconding debtors, may issue against the property of one of several partners, who absconds, for a debt due by the copartnership, although his copartners are resident within the state, and may be arrested. *Matter of Chipman*, 14 J. R. 217.

72. Where one partner delivers partnership property to a third person, who receives it, knowing that it is partnership property, in payment of his individual debt, in an action by the partners against the creditor of the individual partner for the price of the goods, the debt of the one partner is not a defence or set-off against all the partners. *Deb v. Halsey*, 16 J. R. 34.

73. In an action for the breach of a contract relative to partnership concerns, if all the partners do not join as plaintiffs in the suit, the non-joinder of the other partners is a ground for a nonsuit at the trial. *Ibid.*

74. Where a note in the name of the firm, is given by one of the partners for his private debt, and known to be so by the person taking the note, the other partners are not bound by such note, unless they have been previously consulted, or consent to the transaction. *Ibid.*

75. And the burden of proving such assent of the other partners, lies upon the separate creditor who obtained the note. *Ibid.*

*76. Under an attachment against [*173] one of several partners, who absconds for a copartnership debt, the sheriff can seize only the property of the absconding partner; he cannot seize the partnership effects; for the other partner has a right to retain them for the payment of the partnership debts. *Matter of Smith*, 16 J. R. 102.

77. The trustees appointed under the act relative to absconding and absent debtors become vested only with the interest of the absconding partner, or his proportion of the surplus of the joint property remaining after payment of the partnership debts.

78. Where the plaintiff brought an action of *assumpsit* against S. and S. as partners, under the firm of S. and S. and Co., makers of a promissory note, and recovered a judgment against them, which was unsatisfied; and, afterwards, discovering that P. and W. were also partners in the firm, at the time the note was given, he brought an action against the four, as makers of the same note; held, that the judgment recovered against the two defendants, on the note, was a bar to the subsequent suit against the four defendants, for the same cause of action. *Robertson v. Smith*, 18 J. R. 459. (And see *Penny v. Martin*, 4 J. C. R. 566.)

See *tit. CHANCERY, L. Partnership.*

PATENT.

- I. *Patents and grants from the state; when they are valid, and the construction and effect of them.*
- II. *Location of patents and grants.*
- III. *Construction of particular patents.*

I. Patents and grants from the state; when they are valid, and the construction and effect of them.

1. The possession of a tract of land by the native *Indians*, does not affect the validity of a patent from the state, granting the land to white persons without the consent of the *Indians*. *Jackson, ex dem. Klock, v. Hudson*, 3 J. R. 375.

2. The right of the state to grant the lands of *Indians* without their consent, is a political question which cannot be discussed in a contest between two of our own citizens, neither of whom deduce any title from the *Indians*. *Ibid.*

3. Government is never presumed to grant land twice. *Jackson, ex dem. Stoutenburgh, v. Murray*, 7 J. R. 5.

4. Where K., who purchased, in 1689, land granted to S. in 1667, took out a patent in 1671, which included land said to be covered by the first patent, the persons deriving title under K. were estopped to say that the location of the first grant extended so as to include any part covered by the second patent. *Ibid.*

*5. A patent was granted in [*174] 1761, which included also lands granted by a patent dated in 1737, and the second patent recited the first, and the proprietors of the second patent, who had made purchases under the first, made a partition of the lands held under the second, excepting two lots which were included within the boundaries of the first patent. In an action of ejectment, the plaintiff claimed the two lots under the patent of 1761, and the defendant claimed to hold under A., who claimed under B., one of the patentees named in the patent; *held*, that the recital of the former patent, being of a particular fact directly affirmed, estopped the plaintiff from denying the existence of such prior patent; that the mere fact that B. was a patentee in the patent of 1761, was not sufficient to prove that he held the two lots under that patent; the omission to divide the two lots, being evidence of the sense of the proprietors of the second patent, that they did not claim those lots under it. *Jackson, ex dem. Banyar, v. Willson*, 9 J. R. 92.

6. Where a patent for a tract of land is granted, reserving a certain number of acres for public uses, *it seems*, that the patentee has the right to elect in what part of the tract the land reserved shall be located. *Jackson, ex dem. Newcomb, v. Smith*, 9 J. R. 100.

7. Where two patents are granted for the same thing, the second patent is inoperative, until the first is set aside. *Jackson, ex dem. Mancius, v. Lawton*, 10 J. R. 23.

8. The remedy for the second patentee, in such case, is, by *scire facias*, or a bill or information, in the Court of Chancery, which is the only mode of vacating letters patent, which are matter of record. *Ibid.*

9. Letters patent issued to A. for a lot of land, dated the 28th of October, 1811, and afterwards a patent was issued for the same lot to B., dated the 5th of March, 1812, reciting and alleging a mistake in issuing the first

patent to A. In an action of ejectment, on the demise of A., the first patentee; *held*, that the first patent was conclusive, as to the title of the lessor, and the second patent was inoperative and void. *Ibid.*

10. If a patent has been issued by fraud, or on false suggestion, unless the fraud or mistake appear on the face of the patent itself, it is not void, but voidable only by suit for that purpose. *Ibid.*

11. A patent not void, but which has been issued by mistake, or on an insufficient suggestion, can only be avoided by *scire facias*, or other proceeding for that purpose in Chancery. *Jackson, ex dem. Houseman, v. Hart*, 12 J. R. 77.

12. It cannot be impeached in a collateral action; as by showing that the patentee intended was a different person, and of a different name, from the one mentioned in the patent. *Ibid.*

13. A patent for a military lot was granted to *David Hungerford*, a soldier, without any words of description to identify the patentee. In an action of ejectment, the lessors claimed the land as heirs of *Daniel Hungerford*, a deceased soldier, alleged to be the patentee intended, and the defendant claimed under the heir of a person of the name of *David Hungerford*. An act of the legislature was passed declaring that *Daniel Hungerford*, the ancestor of the lessors, was the patentee intended, and that the land should be vested in him in the same manner as if he had been named in the patent; *held*, that if a *title had legally vested under the patent, it [*175] could not be divested by the legislature; but the patent being held void by reason of the misnomer, so that the heirs of *Daniel Hungerford* could not take under it, the land remained in the state; and it being proved that the ancestor of the lessors was the real patentee intended, the act was to be deemed a legislative grant to him, supplying the place of a patent. *Jackson, ex dem. Dickson, v. Stanley*, 10 J. R. 133.

14. The Court will not take notice of a title to land in this state not derived from our own government. *Jackson, ex dem. Wintthrop, v. Waters*, 12 J. R. 365.

15. Therefore, a possession taken of land in this state under a grant or patent from the *French Canadian* government, prior to the conquest of *Canada* by the *British*, is not such an adverse possession as will prevent or defeat the operation of a subsequent grant or patent for the same land, under the provincial government of *New-York*; but will be considered as held in subordination to the title granted by the *New-York* government. *Ibid.*

16. Where two contiguous patents had become forfeited to the state, and the commissioners of forfeitures granted a lot in one patent to A., and an adjoining lot in the other patent to B., without reference in the deeds to the boundaries of the patent; *held*, that whatever difficulty there might be as to the true boundary between the patents, yet, as the title to both was in the state, and the commissioners might grant without reference to the

boundary, A., who had the prior grant of the premises in question, as part of one patent, was entitled to hold them, though, according to the true location, they might be comprehended within the other patent. *Jackson, ex dem. Helmer, v. Harter*, 14 J. R. 226.

17. Where an island in the Hudson river, commonly called the Green Flatts, was granted by patent, the grant was held good, although the Green Flatts were usually covered with water, and, therefore, strictly speaking, not an island; there being no other land answering to the description. *Brink v. Richtmyer*, 14 J. R. 255.

18. And this is a grant not of a right of fishery, but of the land; subject, however, to be used as a common highway, and public fishery, until otherwise appropriated by the private owner. *Ibid.*

19. A patent for land, though it does not pass the great seal until after its date, takes effect, as between the parties, by relation, from its date. *Heath v. Ross*, 12 J. R. 140.

II. Location of patents and grants.

20. Where the boundary of a patent is described to run northerly, &c., the line must be run due north, &c. *Jackson, ex dem. Woodsorth, v. Lindsey*, 3 J. C. 86. *S. P. Jackson, ex dem. Clark, v. Reeves*, 3 C. R. 293. *S. P. Brandt, ex dem. Wallon, v. Ogden*, 1 J. R. 156.

21. Where one of the boundaries described in a deed is a line to be run up a creek, the line must be run through the middle of the creek, according to its turnings and windings. *Jackson, ex dem. Trustees of Kingston, v. Louw*, 12 J. R. 252.

[*176] *22. Where the description of boundaries in a patent are somewhat vague and indefinite, the acts of the parties ought to have great weight in controlling the construction. *Jackson, ex dem. Van Slyck, v. Vedder*, 2 C. R. 210.

23. In ancient patents, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. *Jackson, ex dem. Schenck, v. Wood*, 13 J. R. 346.

24. Where parties claiming lands under different patents, nineteen years before the trial, caused a new survey, and agreed that the line so run on that survey was the true boundary line, and had afterwards repeatedly acquiesced in such line, it cannot be questioned or disturbed, although it might be shown to have been at first incorrectly settled. *Jackson, ex dem. Van Cortlandt, v. Van Corlaer*, 11 J. R. 123.

25. A mistake of a deputy surveyor, under the surveyor-general, not appointed by the parties, in running the boundary lines of certain lots of land in the township of Aurelius, was allowed to be rectified so as to give to each party the quantity of land, corresponding with their respective patents, and the map of the township on file in the office of the secretary of state. *Jackson, ex dem. Crossell, v. Hunter*, 1 J. R. 495.

26. After a partition made by the proprietors of a patent, possession taken by the several proprietors according to a survey and map, and a lapse of 40 years, they are concluded from contesting with each other the correctness of the actual locations. *Jackson, ex dem. Schuyler, v. Vedder*, 3 J. R. 8.

27. Where a location is made under a deed and survey, and an undisturbed possession held according to such location for 38 years, it shall prevail, though by a subsequent survey it should appear that such location was not accurately made. *Jackson, ex dem. Wright, v. Dieffendorf*, 3 J. R. 269.

28. So, after a lapse of forty-one years, a boundary, according to which the parties have occupied the land, will not be disturbed. *Jackson, ex dem. M'Donald, v. M'Call*, 10 J. R. 377.

29. An old patent or grant, after the lapse of one hundred and sixty years, will not be allowed to be located, or extended beyond the actual and notorious possession and location of the party, especially where there is the slightest evidence of an adverse possession for above twenty years. *Jackson, ex dem. Stoutenburgh, v. Murray*, 7 J. R. 5.

30. In all cases of any uncertainty in the location of patents and deeds, Courts hold the party to his actual location. *Ibid.*

31. Where a grant of land made in 1717 mentioned a running stream of water as one of the boundaries, and no actual location of the premises was made by the grantee or his heirs, the Court refused, after the lapse of near a century, to extend a description vague and uncertain, from a running stream which would take in the least, to a running stream which would include the greatest, portion of land, so as to disturb ancient possessions between the two streams. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 7 J. R. 12.

32. Every presumption, after such a lapse of time, is to be taken against a party who neglects to have his land [*177] surveyed, and its boundaries accurately defined, or to reduce them into actual location at the time; and the description in his deed will be construed, so as to reduce his grant to the narrowest limits. *Ibid.*

33. By a map of the survey of a certain tract of land for which patents were issued, lots No. 15 and No. 16 were made to join each other, and, by the mistake or fraud of the surveyor, according to the courses and distances of his survey, the line of lot No. 15 would not extend to lot No. 16, but left a vacant piece of land between them; held, that after various mesne conveyances, during a lapse of near eighteen years, the parties should be bound by their actual location, under their deeds, according to the metes and bounds given in the original survey, without reference to the map and patents. *Jackson, ex dem. Goodrich, v. Ogden*, 7 J. R. 238.

34. Where there was no uncertainty as to the true location of two adjoining lots of land, as originally made near forty years ago, the single fact that one of the lessors in ejectment had, about eight years ago, shown to the defend-

ant a mistaken line as the true line, was not sufficient of itself to conclude the lessors, or to set aside a verdict for the plaintiff. *Jackson, ex dem. Whitman, v. Douglas*, 8 J. R. 367.

35. A. gave a lease of part of a lot of land to B., for 60 years, and executed a deed, for part also of the same lot, to C., in fee; C. took immediate possession under his deed, and continued in possession near 16 years; after such a lapse of time, B. will not be permitted to set up any new location, not absolutely necessary to give him his quantity of land, and which invades the possession of C. *Jackson, ex dem. Butler, v. Gardner*, 8 J. R. 394.

36. Where a survey of land was made by the direction, and under the observation of the grantee; held, that he could not, afterwards, especially after the lapse of 26 years, vary the location, but he must be deemed to have assented to the survey as made. *Jackson, ex dem. Newcomb, v. Smith*, 9 J. R. 100.

37. A lease in fee, reserving rent, was made in 1763, and a map of the survey of the land on which the lease was founded, was also made at the same time; and 8 or 10 years afterwards, it was discovered and made known to the lessor, that one of the courses of the survey was omitted in the lease; but possession having been taken and held, according to the survey, for more than 50 years, after such a lapse of time, and the acquiescence of the lessor, the possession cannot be disturbed. *Jackson, ex dem. Van Rensselaer, v. Hogeboom*, 11 J. R. 163.

38. It seems, that a Court of equity would in such case rectify the mistake in the lease, so as to make it conform to the survey. *Ibid.*

39. And the same principle will apply to land held by the lessee not included within the survey. *Ibid.*

40. Where a large tract of land was granted by the commissioners of the land office to L. and others, describing the tract by its exterior lines alone, and directing a survey of it to be made by the surveyor-general, and patents to be issued for the several lots, according to the return and map of such survey, and the patents, afterwards issued, described the several lots

by reference to the map of the survey on file in the office of the secretary of state; held, that the patents were to be understood as referring to the field book of the actual survey, as well as to the map on file. *Jackson, ex dem. Livingston, v. Freer*, 17 J. R. 29.

41. The owners of the several lots so surveyed, patented, and described, are bound by their actual locations, according to the lines on the ground, without regard to the circumstance, that some of the lots would exceed and some fall short of the quantity of acres mentioned in the patents. *Ibid.*

III. Construction of particular patents.

Baker & Flodder's patent. See *Frier v. Jackson, ex dem. Van Allen*, 8 J. R. 495.

Braine's patent. See *Jackson, ex dem. Vought, v. Wood*, 3 C. R. 118.

Catskill patent. See *Jackson, ex dem. Clark*, 424

v. Reeves, 3 C. R. 293. *Van Gorden v. Jackson, ex dem. Bogardus*, 5 J. R. 440.

Cambridge patent. See *Jackson, ex dem. Schermerhorn, v. Much*, 9 J. R. 318.

Coryman's patent. See *Jackson, ex dem. Salisbury, v. Huyck*, 2 J. C. 64.

De Bruyn's patent. See *Frier v. Jackson, ex dem. Van Allen*, 8 J. R. 495.

Gravesend patent. See *Emans v. Turnbull*, 2 J. R. 313.

Gregory's plantation. See *Jackson, ex dem. Stoutenburgh, v. Murry*, 7 J. R. 5.

Hardenburgh patent. See *Jackson, ex dem. Beekman, v. France*, 10 J. R. 428.

Hosick patent. See *Jackson, ex dem. Quackenbush, v. Dennis*, 2 C. R. 177. *Jackson, ex dem. Gifford, v. Sherwood*, 2 J. C. 37.

Jackson, ex dem. Tibbits, v. Williams, 2 J. R. 297. *Jackson, ex dem. Jadwin, v. Joy*, 9 J. R. 162.

Kayaderoseras's patent. See *Jackson, ex dem. Woodworth, v. Lindsey*, 3 J. C. 86. *Brandt, ex dem. Wallon, v. Ogden*, 3 C. R. 6. S. C. 1 J. R. 156.

Neu-Utrecht patent. See *Cortleyou v. Van Brundt*, 2 J. R. 357.

Nine Partners's patent. See *Jackson, ex dem. Ludlow, v. Soole*, 13 J. R. 336.

Minisink patent. See *Jackson, ex dem. Bel-den, v. Thomas*, 16 J. R. 293.

Platt's (Zephaniah) patent, in 1784. *The People v. Platt*, 17 J. R. 195.

Rochester, (town of.) See *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 2 J. R. 230.

Rumboul & Phillips's patents. See *Jackson, ex dem. Schenck, v. Wood*, 13 J. R. 346.

Sanders & Heermance's patent. See *Jackson, ex dem. Ludlow, v. Soole*, 13 J. R. 336.

Springfield patent. See *Jackson, ex dem. Staats, v. Carey*, 2 J. C. 350.

**Staats's* patent. See *Jackson, ex dem. Donaldson, v. Lucett*, 2 C. R. 363.

Stonerabia patent. See *Jackson, ex dem. Casselman, v. Lepper*, 3 J. R. 12.

Van Slyck's patent. See *Jackson, ex dem. Van Slyck, v. Vedder*, 2 C. R. 210.

PAYMENT.

1. Where a person pays money to a creditor, who has demands against him on two accounts, the creditor may place it to which account he pleases, unless the debtor directs its application. *Mann v. Marsh*, 2 C. R. 99.

2. Where a creditor has two demands against his debtor, and the debtor pays a sum of money without directing to which it shall be applied, if the amount paid exceed one of the demands, and is exactly equal to what remains due on the other, it will be considered as having been paid in discharge of that other. *Robert v. Garnie*, 3 C. R. 14.

3. Where A. and B. agreed to sell and convey land to C., and the payment was made to A., who, in fact, had no legal title to the land; held, that B. could not, afterwards, object to such payment, but it was to be considered, in

effect, the same as if paid to B. *Waters v. Travis*, 9 J. R. 450.

4. Where a promissory note was given, payable in produce, to be delivered by a certain day at the maker's house; in an action on the note, the defendant pleaded payment, and proved that he had hay in his barn, ready to be delivered on the day to the plaintiff, but did not show the quantity or value; held, that there was no proof of a tender or payment. *Newton v. Galbraith*, 5 J. R. 119.

5. If the plaintiff has given a bond for the debt of the defendant, it is not a payment, and an action for money paid will not lie. *Cumming v. Huckle*, 8 J. R. 202.

6. But the giving of a negotiable note may, in some cases, be equivalent to the payment of money. *Ibid*.

7. A bill of exchange or promissory note, either of a debtor or any other person, is not payment of a precurrent debt, unless it be so expressly agreed. *Tobey v. Barber*, 5 J. R. 68. *S. P. Murray v. Gouverneur*, 2 J. C. 438. *S. P. Herring v. Sanger*, 3 J. C. 71. *Schermerhorn v. Loines*, 7 J. R. 311. *Johnson v. Weed*, 9 J. R. 310.

8. Nor is an order for the payment of money not negotiable, and which has not been paid or accepted by the drawer, in payment of a precurrent debt. *Hoar v. Chute*, 15 J. R. 224.

9. Neither is a receipt for a note, as cash, conclusive evidence that it was taken as an absolute payment. *Tobey v. Barber*, 5 J. R. 68.

10. It is merely a suspension of the right of action during the time allowed for payment by the note. *Putnam v. Lewis*, 8 J. R. 389.

*11. And whether a note was [*180] taken absolutely as payment, or not, is a question of fact for the jury. *Johnson v. Weed*, 9 J. R. 310.

12. But the acceptance of a negotiable note, on account of a prior debt, is *prima facie* evidence of satisfaction; and the plaintiff cannot recover upon the old debt, without showing the note to have been lost, or producing and cancelling it at the trial. *Holmes & Drake v. D'Camp*, 1 J. R. 34. *Pintard v. Tackington*, 10 J. R. 104. *S. P. Burdick v. Green*, 15 J. R. 247.

13. The taking the note does not extinguish the original debt, or consideration, except *sub modo*. 15 J. R. 247.

14. Where a promissory note is given for a book debt, on non-payment of the note, the plaintiff may recover the amount of the book debt, on the original consideration, with interest from the time of settlement. *Putnam v. Lewis*, 8 J. R. 389.

15. Unless a check be paid by the drawee, it is not payment of a pre-existent debt to the holder. *The People v. Howell*, 4 J. R. 296.

16. Upon an agreement to accept notes in payment of goods sold, if, before the delivery of the articles purchased, the notes turn out not to be good, a tender of them is not to be considered as payment, unless it was part of the agreement to take them as such, and run

the risk of their being paid. *Rogel v. Merritt*, 2 C. R. 117.

17. If a party receives, in payment for goods sold, counterfeit bank notes, or other bills or notes, which prove to be of no value, it is not a payment, and he may resort to the original contract. *Markle v. Hatfield*, 2 J. R. 455.

18. And although the debtor paid them *bona fide*, supposing them to be valid. *Ibid*.

19. Where, on the sale of goods, the vendor takes the note of a third person, payable at a future day, in payment, at his own risk; and there is a fraudulent representation on the part of the vendee, as to the note, the vendor may bring his action immediately for goods sold and delivered. *Wilson v. Force*, 6 J. R. 110.

20. So, where A. gave his notes to B., for money lent by him to B., and afterwards executed a deed for the amount of the debt to B., who gave the deed to A., to get it recorded, on A.'s promise to have it duly recorded, and also gave up the notes to A.; and A. kept the deed without having it recorded, and sold the land to another person, whose deed was recorded; held, that A. having got possession of the notes by fraud, there was no payment or extinguishment of the original debt, and B. might recover the money lent to A. on the usual money counts. *Arnold v. Crane*, 8 J. R. 79.

21. If a vendor of goods receive from the vendee the note of a third person, without such note being endorsed by the vendee, (such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser, as to the note, or the solvency of the maker,) such note will be deemed to have been accepted by the vendor in payment and satisfaction, unless the contrary be expressly proved. *Whitbeck v. Van Ness*, 11 J. R. 409. *S. P. Breed v. Cook*, 15 J. R. 241.

22. And if the vendor has been induced to take the note in payment, by the fraudulent representation of the vendee of the solvency of the maker, the note is no payment, and he may maintain an action against the vendee for the price of the goods [*181] sold. *Pierce v. Drake*, 15 J. R. 475.

23. If the payee of a note given by a partnership, takes the note of one of the partners for the same amount, and gives up to him the partnership note, it is a payment of such note; and though the payee afterwards gets back the partnership note, on re-delivering the note of the individual partner, yet the other partner may avail himself of the transaction, in bar of a suit on the partnership note. *Arnold v. Camp*, 12 J. R. 409.

24. R. and B., partners in trade, being indebted to the plaintiffs, for goods sold and delivered, B., on the 22d of April, 1822, informed the plaintiffs, that they had dissolved their partnership, and that B. had assumed the debt due to the plaintiffs, of the payment of which they might rest assured; to which the plaintiffs replied, "we observe your partnership is dissolved, and that you have assumed our debt, which we are satisfied with." B. afterwards paid part of

the debt, and on the 13th August, 1816, liquidated the account, and gave the plaintiffs his promissory note for the balance, payable on demand, and the plaintiffs gave him a receipt for the note, "when paid, to be placed to the credit of R. & B.'s account with us." B. continued in business until November, 1817, when he became insolvent; and the plaintiffs, who had not sued B., nor made any demand of R., brought an action against both, on the original contract, for goods sold and delivered; *held*, that neither the acceptance by the plaintiffs of the note of B., nor the indulgence shown to him, amounted to payment, or discharged R., but that the plaintiffs were entitled to recover the balance due, on the original contract, on delivering up the note to be cancelled. *Smith & M. v. Rogers & Bement*, 17 J. R. 340.

25. C. gave his bond to B. for a certain sum of money, on the payment of which B. agreed to convey a certain quantity of land to C.; B. delivered the bond to F., with an authority to receive the money; and C., with G. as his surety, gave a joint and several note to F. for the amount of the bond, which was given up to C.; *held*, that the note was a payment of the bond, and that, in an action against one of the makers, he could not set up, as a defence, an agreement by F., that, in case B. should refuse to consider the note as a payment on the bond, it should be returned, nor a want of consideration by reason of the failure of B. to convey the land to C. *Parsons v. Administrators of Gaylord*, 3 J. R. 463.

. See EXTINGUISHMENT. PLEADING. TENDER.
When a bond will be presumed to have been paid. See BOND.

Payment of legacies. See LEGACY, II.

Payment of money into Court. See PRACTICE, XXII.

PERJURY.

1. On an oath administered out of this state, although by a judge of this state, no indictment for perjury will lie. *Jackson, ex dem. Wyckoff, v. Humphrey*, 1 J. R. 498.

2. Perjury may be assigned in an [*182] oath erroneously taken, especially while the proceedings in which it was taken remain unreversed. *Van Steenberg v. Kortz*, 10 J. R. 167.

3. So, if a justice issue an attachment on the oath of the creditor, the proceeding is erroneous, but the party, nevertheless, may be indicted for perjury. *Ibid*.

PHYSIC AND SURGERY.

1. In an action against a person for practising physic contrary to the act, (Sess. 24. c. 137. 2 N. R. L. 219.) it is incumbent on the defendant to show himself within some of the provisions, and the plaintiff is not bound in his decla-

ration to negative the provisos. *Sheldon v. Clark*, 1 J. R. 513.

2. The true construction of the 12th and 20th sections of the act to incorporate Medical Societies, for the purpose of regulating the practice of Physic and Surgery, &c. (Sess. 36. c. 94.) taken in connection, is, that no persons commencing to practise without license, shall be capable of suing for services rendered, or medicines furnished; and that every person so practising, without license, is subject to a penalty of 25 dollars, unless he proves that he practised gratuitously, or that he administered only roots, bark, or herbs, the growth or produce of the United States. *Timmerman v. Morrison*, 14 J. R. 369.

PILOT.

1. A pilot, while on board the vessel, is to be considered as master, *pro hac vice*. *Snell v. Rich*, 1 J. R. 305.

2. The situation of the ship at the time the pilot takes charge of her, is a matter of fact, and may be proved by parol; and the pilot, on sufficient proof, is entitled to his pilotage, though he did not cause an entry to be made in the log-book, according to the rules of the master and wardens of the port of New-York, for the regulation of pilots, though he may be subject to a fine for not making such entry. *Shepherd v. Mitchell*, 10 J. R. 112.

3. And the fact that the pilot left the vessel, without permission of the captain, as required by the rules of the master and wardens, will not deprive him of his right of action against the owner, for pilotage, provided he left a competent substitute on board, by reason of his being unable to perform his duty himself. *Ibid*.

4. But such substitute must be a regular branch or deputy pilot, otherwise he is not entitled to the fees under the act; though, perhaps, the substitute or his principal might have an action against the ship owner, on a quantum meruit, for the service performed. *Ibid*.

*PLEADING. [*183]

I. Parties to the action.

II. Declaration; (a) The declaration must pursue the process; (b) Must be sufficient in substance; (c) And must be certain; (d) Title of the declaration; (e) Venire; (f) Commencement of the declaration, and statement of the parties to the action; (g) Statement of the cause of action; (h) Averments; (i) Variance between the declaration and proof; (j) Protest and oyer; (k) Request; (l) Breach; (m) Conclusion and pledges.

III. Pleas in abatement; (a) To the jurisdiction; (b) To the person of the plaintiff; (c) To the person in the defendant; (d) To the writ;

other proceedings pending for the same cause; (e) Misnomer; (f) Joinder of improper, and omission of proper parties; (g) When the defendant is sued in a wrong character; (h) How and when pleaded, verification and judgment.

IV. General requisites of pleas in bar; (a) Each subsequent pleading must be an answer to the previous pleading of the opposite party; (b) Must not be double; (c) Nor a departure from the previous pleadings.

V. Plea in bar; (a) What must be pleaded in bar, and what in abatement; (b) General issue; (c) Notice with the general issue; (d) Formal requisites of a special plea; (e) Statement of the defence; (f) Variance between the plea or notice and the evidence; (g) Conclusion of a plea, and when the signature of counsel is requisite.

VI. Plea puis darrein continuance.

VII. Particular pleas; (a) Payment; (b) Release; (c) A former action or recovery for the same cause; (d) Want or failure of consideration; (e) No award; (f) Null tiel corporation.

VIII. Replication.

IX. Rejoinder and surrejoinder.

X. Demurrer.

XI. Repleader.

XII. Verdict.

XIII. Judgment.

XIV. Pleadings in assumpsit; (a) Declaration; (b) Plea.

XV. Pleadings in covenant.

XVI. Pleadings in debt; (a) Declaration; (b) Plea; (c) Replication; (d) Assignment of breaches on a bond conditioned for the performance of covenants, and proceedings and judgment thereon.

XVII. Pleadings in replevin.

XVIII. Pleadings in slander and actions for libel.

XIX. Pleadings in trespass; (a) Declaration; (b) Plea; (c) Replication; (d) Rejoinder.

[*184] *I. Parties to the action.

1. A mere agent or attorney, not having any beneficial interest in a contract, cannot maintain any action upon it in his own name. *Gunn v. Cantine*, 10 J. R. 387.

2. So, where A., having a general power of attorney to collect debts, &c. for the use and in the name of B., delivered a contract to an attorney to collect, who gave him a receipt for it generally, as for collection; A. cannot maintain an action in his own name, against the attorney for the money collected by him on the contract so put into his hands. *Ibid.*

3. On the agreement made by an attorney, and executed as attorney, the action must be in the name of the principal, and not of the attorney. *Bogart v. De Bussy*, 6 J. R. 84.

4. Where A., for his own account and risk, carries on trade in the name of B., an action for goods sold in the course of such trade, is

properly brought in the name of B. *Alsop and others v. Caines*, 10 J. R. 396.

5. And if A. assign the debt to a third person, the action should be in the name of B. *Ibid.*

6. So, if he become insolvent, after an assignment of his estate, the action should be in the name of B. *Ibid.*

7. An action brought in this state by the assignees of an insolvent in another state, must be in the name of the insolvent, and not of his assignees. *Raymond v. Johnson*, 11 J. R. 488.

8. And if the insolvent obtained his discharge, pending the suit, it will not abate, but will continue in the insolvent's name, for the benefit of his assignees. *Ibid.*

9. Where three assignees have been appointed under the insolvent act of the 3d of April, 1811, (since repealed), one of whom refuses to act, and no other is appointed in his stead, the two who enter upon the execution of the trust may maintain actions for debts due the insolvent in their own names, without joining the other assignee. *Van Valkenburgh v. Elmen-dorf*, 13 J. R. 314.

10. A suit may be brought in this state in the name of a foreign bankrupt, and he may be joined with the assignees of a copartner who is bankrupt in this country. *Bird et al. v. Carlat*, 2 J. R. 342. *Dublatier* in *Bird et al. v. Pierpont*, 1 J. R. 118, in which the Court were equally divided. [And see *Holmes v. Remsen*, 4 J. C. R. 460.]

11. A suit cannot be brought at common law here, in the name of the foreign assignees, but it must be in the name of the bankrupt. *Ibid.*

12. Where goods are purchased from a factor, scienter, with intent by the purchaser to set off against the purchase a demand which he may have against the factor, the principal may, as on a sale made immediately by himself, have a suit against the purchaser, at any time before payment to the factor. *Browne v. Robinson*, 2 C. C. E. 341.

13. The endorsee of a promissory note given in Connecticut, where promissory notes are not negotiable, may, in this state, maintain an action in his own name against the maker. *Lodge v. Phelps*, 1 J. C. 139. S. C. 2 C. C. E. 321.

14. It seems, that if a plaintiff, on a process of attachment, direct *or [*185] cause an officer so to act as to misbehave in the execution of his office, and produce the loss or destruction of the goods in his custody, the party injured has his election, to bring his action either against the principal or the officer. *Jenner v. Jolliffe*, 9 J. R. 381.

15. Where money is deposited with a stakeholder on the event of a wager, by a person who acts as agent for several others, but the stakeholder is ignorant of the principals on whose account the money is deposited, actions to recover back the deposit are properly brought in the name of the principals, (each of whom separately may sue for his respective proportion,) and not of the agent. *Vischer v. Yates*, 11 J. R. 23. *Yates v. Foot*, in error, 12 J. R. 1.

16. An action to recover back a wager laid on the event of a horse-race, is properly brought by the person who laid the bet, al-

though he acted as the agent or depositary of other persons. *Haywood v. Sheldon*, 13 J. R. 88.

17. In actions *ex contractu*, the plaintiff is bound to prove a joint liability on the part of all the defendants. *Livingston's Executors v. Tremper*, 11 J. R. 101.

18. In an action of debt on a bond, against the heirs and devisees of the obligor, the plaintiff is bound to show a joint liability of all the defendants; and if it appears, on the trial, that one of the defendants is neither heir nor devisee, the plaintiff must be nonsuited. *Ibid.*

19. Tenants in common may join in an action of trespass *quart clausum fragit*. *Austin v. Hall*, 13 J. R. 286.

20. In an action of trespass brought by tenants in common, in relation to their land, or in debt for rent arising out of land, or in any other action merely *personal*, they must all join as plaintiffs. *Decker v. Livingston*, 15 J. R. 479.

21. But in a distress and avowry for rent, which savor of the realty, they ought not to join. *Ibid.*

22. Where husband and wife execute a conveyance, in which they both covenant to the grantee, as the wife is not bound by the covenant, she cannot be joined with the husband in an action for a breach of it. *Whitbeck v. Cook*, 15 J. R. 483.

23. Where husband and wife are improperly joined as defendants, it seems, that if the plaintiff has a cause of action against the husband, he will be allowed to enter a *moti prosequi* as to the wife. *Ibid.*

24. In an action for rent, or any other cause, accruing before marriage, in regard to the real estate of the wife, she must be joined with her husband; but for rent of land, arising after marriage, she need not be joined. *Decker v. Livingston*, 15 J. R. 479.

25. And where the husband distrains and avows for rent arising from the wife's land, without joining her in the proceedings, he must show, affirmatively, that the rent accrued after the marriage, for such fact cannot be intended; and if it is not shown, the objection may be taken at the trial. *Ibid.*

26. A husband cannot be sued for a debt contracted by his wife, *dum sola*, without her being joined as a defendant; the cause of action surviving against her; and the non-joinder of the wife is a sufficient ground for arresting and reversing the judgment. *Gage v. Reed*, 15 J. R. 408.

*27. In an action for the breach of a contract relative to the partnership concerns, if all the partners are not joined as plaintiffs in the suit, it is ground for a nonsuit at the trial. *Dob v. Halsey*, 16 J. R. 34.

28. Declaration in case against five defendants for turning the water of a river so as to overflow the plaintiff's land, and one of the defendants was not brought into Court; held, that the declaration was bad, on a special demurrer, though it might be good after verdict. *Mumford v. Fitzhugh*, 18 J. R. 457.

29. To support a joint action by several persons to recover back money paid to the use

of the defendant, it must appear that the money was paid by the plaintiffs out of a joint fund. *Doremus v. Selden*, 19 J. R. 213.

30. As, where D. and W., partners in trade, endorsed a note, which was protested for non-payment. One of them became insolvent, and was discharged under the act. They, afterwards, took up the note so jointly endorsed by them, by giving their separate notes to the holder, and then brought an action of *assumpsit* against the prior endorser of the note for so much money paid; held, that as the payment of the original note was not made by D. and W. jointly, as partners, nor out of a joint fund, they could not maintain the action as joint plaintiffs. *Ibid.*

31. An unincorporated company cannot sue in the name of the trustees. *Niven v. Spickerman*, 12 J. R. 401.

32. An action, for a breach of covenant running with the land, must be brought by the assignee of the land, or part of it, *pro tanto*, if the breach was subsequent to the assignment, unless the grantor conveyed with warranty. *Kane v. Sanger*, 14 J. R. 89.

33. An assignee of part of the estate may maintain an action of covenant *pro tanto*. *Ibid.*

34. In an action, in form *ex delicto*, for a tort committed by several persons, the plaintiff may, in general, sue any of those who committed the tort; and the non-joinder of the others cannot be pleaded in abatement. *Lowe v. Mumford*, 14 J. R. 426.

35. But, where the parties committing the tort are the joint owners of the land, and the tort consisted in the omission of some act which, as such owners, they were bound to perform, they all must be joined in the action, as, in such cases, the title to realty will come in question; that is, whether the defendants, by reason of their ownership, were bound to perform the act, for the omission of which the action is brought. *Ibid.*

36. If, however, the act complained of consists in a *malfeasance*, as if the defendants have erected a nuisance on their land, no advantage can be taken of the non-joinder; for, in such case, their title cannot come in question; and they are equally liable, whether they have a right to the land or not. *Ibid.*

37. In an action for a nuisance to land, all the co-tenants must join as plaintiffs. *Ibid.*

38. In case for an escape on a *ca. se.*, the attorney who has a lien for his costs, or an assignee, or a party beneficially interested, may maintain an action against the sheriff for the escape, in the name of the plaintiff in the original suit. *Martin v. Hawks*, 15 J. R. 405.

*39. Where a promisee is made to [*187] the overseers of the poor, their successors cannot maintain an action upon it, they not being a corporation. *Shear v. Overseers of Hillsdale*, 13 J. R. 466. But see 18 J. R. 407.

40. Whether the overseers of the poor can sue or be sued in their private capacity, for their own official acts or those of their predecessors in office? *Overseers of Plattsburgh v. Overseers of Plattsburgh*, 15 J. R. 436. S. C. 18 J. R. 407; held, that being public agents and trustees, they have a capacity to sue co-

extensive with their trusts and duties; and are to be considered as corporations, *sub modo*.

41. An auctioneer, who sells goods for a third person, may maintain an action in his own name, for the price. - *Hulse v. Young*, 16 J. R. 1.

[*And see ACTIONS, II. BANKRUPT, 10, 11, 12. CONSIGNOR AND CONSIGNEE, 1, 2, 3. COVENANT, VI. EXECUTORS AND ADMINISTRATORS, V. 26-36. HUSBAND AND WIFE, VI. INFANT, III. LIBEL, IV.*]

II. Declaration; (a) *The declaration must pursue the process*; (b) *Must be sufficient in substance*; (c) *And must be certain*; (d) *Title of the declaration*; (e) *Venue*; (f) *Commencement of the declaration, and statement of the parties to the action*; (g) *Statement of the cause of action*; (h) *Averments*; (i) *Variance between the declaration and proof*; (j) *Profert and oyer*; (k) *Request*; (l) *Breach*; (m) *Conclusion and pledges*.

(a) *The declaration must pursue the process.*

42. When the defendant is held to bail on a *caapias*, by an *ad etiam* clause, the plaintiff is bound to pursue it and declare accordingly. *Rogers v. Rogers*, 4 J. R. 485.

43. If the plaintiff, in such case, in his declaration, varies the nature of the action, it is an irregularity of which the defendant may take advantage, on motion; and an *exoneretur* has often in such cases been ordered to be entered on the bail-piece. *Ibid.*

44. Relief on motion seems only to be denied, when such variance exists between the declaration and original writ, where the suit is commenced by original. *Ibid.*

45. After plea pleaded, it is too late to take advantage of the variance between the declaration and the writ. *Garland v. Chattle*, 12 J. R. 430.

(b) *Must be sufficient in substance.*

46. A declaration, insufficient in substance, cannot be made good by the plea. *Patton v. Ward*, 3 C. R. 73.

47. So, in slander, where the words, as charged, are insufficient to support the action, a plea of justification will not render them clear and certain. *Ibid.*

(c) *And must be certain.*

48. Certainty to a common intent is sufficient; as where the declaration *commenced thus: *James Hildreth complains of Peter B. and James Harvey, the said James being in custody, &c., and the said Peter being returned not found, of a plea, &c.* This shows with sufficient certainty, that process did issue in the suit, and that by virtue thereof one of the defendants was returned not found, and that *James Harvey* is the defendant in custody. *Hildreth v. Becker & Harvey*, 2 J. C. 339.

49. A material fact must be alleged with precision and certainty, and not be left to inference and deduction. *Carpenter v. Alexander* 9 J. R. 291.

50. In covenant, the plaintiff declared that

the defendant covenanted to pay the plaintiff 250 dollars, in manner following, to wit: 125 dollars on the 20th of May ensuing, and 125 dollars on the 20th of May, 1811, &c.; and the breach assigned was in the non-payment of the said sum of 125 dollars. On demurrer, held, that the breach was not well assigned, as it did not appear with sufficient certainty which of the two sums of 125 dollars had not been paid. *Ibid.*

(d) *Title of the declaration.*

51. The cause of action must be stated to have accrued before the commencement of the suit; or, if it appear otherwise from the record, the defect is fatal, and is not cured by verdict. *Cheatham v. Lewis*, 3 J. R. 42.

52. So, where the declaration in a suit for a libel was entitled of November term generally, but the memorandum was of the second Monday, or the 14th day of November, being the first day of the term, and the libel was alleged to have been published on the 18th day of the same November, it was held bad. *Ibid.*

53. And the defect may be taken advantage of on general demurrer, motion in arrest of judgment, or writ of error. *Ibid.*

54. Where a declaration is entitled generally of a preceding term, and the promise or cause of action is laid on a day subsequent, it is bad on general demurrer. *Waring v. Yates*, 10 J. R. 119.

55. There should be a special memorandum in such case, entitling the declaration of the day on which it is filed. *Ibid.*

(e) *Venue.*

56. Where no venue is laid in the body of the declaration, reference may be made to the venue in the margin, and that is sufficient. *Slate v. Post*, 9 J. R. 81.

(f) *Commencement of the declaration, and statement of the parties to the action.*

57. A corporation plaintiff may declare by its name of incorporation, and without setting forth the act of incorporation, notwithstanding it may be a private law. *The United States Bank v. Haskins*, 1 J. C. 132.

58. In debt on bond, to the committee or trustees of a corporation, **solvendum* to the corporation by its true [*189] name, the corporation may declare in their own name, and may allege that the bond was made to them, by the description of the committee, &c. *New-York African Society v. Varick*, 13 J. R. 38.

59. A declaration commencing thus, *A, B, C. and Co. complain, &c.* is bad on general demurrer; for it appears on the face of the declaration that there are other persons who ought to be joined as plaintiffs. *Bentley v. Smith*, 3 C. R. 170.

60. In *indebitatus assumpsit* against the survivor of a partnership, for goods purchased before the death of the other partner, it is unnecessary to take notice of the partnership, and that the other is dead, and that the defendant has survived. *Goebel v. M'Kinstry*, 1 J. C. 405.

61. In an action, by a partnership, for a debt

contracted with the plaintiffs and a partner since deceased, his death and the survivorship of the others should be alleged. *Holmes & Drake v. D'Camp*, 1 J. R. 34.

62. But where an account is stated afterwards by the defendant between him and the copartnership, admitting a balance due by him for goods sold in the lifetime of the deceased partner, the surviving partners may recover such balance, or an *instimul computassent*, without stating the death of the other partner and the survivorship; for the stating the account is in the nature of a new promise to the survivors. *Ibid*.

(g) *Statement of the cause of action.*

63. Where the *gist* of the action is a recovery by a third person against the plaintiff, it is unnecessary for him to show in what manner that third person commenced his suit. *Allaire v. Ouland*, 2 J. C. 52.

64. The statute of frauds has not altered the form of declaring; therefore it need not be stated that an agreement was in writing. *Miller v. Drake*, 1 C. R. 45. *S. P. Elting v. Vanderlyn*, 4 J. R. 237.

65. That is a matter of evidence only, and if the contract is within the statute, it will be intended to have been in writing. *Elting v. Vanderlyn*, 4 J. R. 237.

66. On an agreement that the defendant should deliver certain goods to the plaintiff, in payment for which the plaintiff was to deliver to the defendant a note of A. to a larger amount; and the defendant agreed to pay the plaintiff the difference; the agreement to pay the difference is a material part of the contract, and must be set forth. *Roget v. Merritt*, 2 C. R. 117.

67. In an action on an award, the plaintiff need not set forth more than is in his favor, and sufficient to support his demand; he need not show the award on both sides; and if there be any thing by way of condition precedent to the payment of the money, the defendant must set it forth in pleading. *M'Kinstry v. Solomons*, 2 J. R. 57. *S. P. Diblee v. Best*, 11 J. R. 103.

68. But in an action on the arbitration bond, he must, in his replication to the plea of no award, set out the whole award, though it is not necessary to set it out, in such case, in *hæc verba*, but such parts as are void or immaterial may be omitted. *Ibid*.

[*190] *69. In *assumpsit* against an administrator, the declaration stated that the promise was made by the intestate in his lifetime, and by the defendant, administrator *as aforesaid*, since the death of the intestate: this was held sufficient, especially after verdict, it being tantamount to alleging that the promise was made by the defendant *as administrator*. *Carter v. Phelps's Administrator*, 8 J. R. 440.

70. Where one of several heirs is sued on his promise to pay the debt of the ancestor, the plaintiff need not allege that the defendant or the heirs had assets. *Elting v. Vanderlyn*, 4 J. R. 237.

71. A declaration in *assumpsit* against executors, contained three counts, in the two first

the promises were laid to have been made by the testator in his lifetime, and the last stated that the defendants, as executors *aforesaid*, being indebted, &c. for work and labor, &c., about the funeral of the testator, done and performed, at their request, &c., and that, in consideration thereof, the defendants, as executors *aforesaid*, undertook, &c. The declaration was held bad on a general demurrer. *Myer's Executors v. Cole*, 12 J. R. 349.

72. In an action against the surety on an administration bond, it is sufficient for the plaintiff to state that goods, chattels, and sums of money, of the deceased, to a large amount, to wit, the amount of, &c. had come into the hands of the administratrix, which she had converted and disposed of to her own use, &c., the creditor not being presumed to know precisely what goods, &c. the administratrix had, and the fact lying more properly in the knowledge of the defendant. *The People v. Dunlap*, 13 J. R. 437.

73. In a declaration in trespass on the case, it was alleged that the defendant, by false representations, procured certain cattle belonging to the plaintiff to be seized by a custom-house officer, under a pretence that they were about to be smuggled into Canada, and then proceeded to state, that, in consequence of these representations, the cattle were converted and disposed of to the use of the United States; held, that after a verdict for the plaintiff, it could not be intended from the statement, that the cattle were condemned as forfeited to the United States. *Hastings v. Wood*, 13 J. R. 482.

74. In an action on the case for falsely affirming that a chattel belonged to the defendant, whereby the plaintiff was induced to buy it, and was afterwards evicted by the rightful owner, it is unnecessary to set forth the contract between the parties, or any consideration moving from the plaintiff to the defendant, or the price paid, as that is only a matter relating to the liquidation of damages. *Barney v. Dewey*, 13 J. R. 224.

75. If the declaration state that the vendor gave evidence at the trial, of the action in which there was a recovery in favor of the true owner of the chattel, this is tantamount to an averment of notice of the pendency of that suit, to the defendant. *Ibid*.

76. Where a debt has been barred by the defendant's discharge under an insolvent act, and he afterwards promises to pay it, it is proper for the plaintiff to declare upon the original cause of action, without noticing the subsequent promise. *Shippey v. Henderson*, 14 J. R. 178.

77. If a penal statute gives no general form of declaring to a common informer, the plaintiff must state the special matter upon which his cause of action [*191] arises. *Cole v. Smith*, 4 J. R. 193. *S. P. Bigelow v. Johnson*, 13 J. R. 428.

78. Where a statute, giving a penal action, contains, either in the same section, or a subsequent one, a proviso or exception which forms no part of the plaintiff's title, but is mere matter of excuse or justification to the defendant, the plaintiff need not negative it, but the

defendant, to take advantage of it, must plead it. *Teel v. Fonda*, 4 J. R. 304. *Bennet v. Hurd*, 3 J. R. 438. Contra, *Blasdel v. Hewit*, 3 C. R. 137. Overruled.

79. Where matter stated in the declaration is merely surplusage, which might have been struck out on motion, the plaintiff need not prove it. *Allaire v. Ouland*, 2 J. C. 52.

(h) *Averments.*

80. "That the plaintiff attended at the place and time appointed, ready prepared, and offered to execute a conveyance according to the said agreement, and that the defendant did not attend, and that he has refused to accept the same, and perform the agreement on his part," is a sufficient averment of an offer to perform. *Müller v. Drake*, 1 C. R. 45.

81. Where the power to perform the covenant, on the part of the plaintiff, depends on acts previously to be done on the part of the defendant, it is unnecessary for the plaintiff to aver a tender and refusal, but an averment of a readiness to perform is sufficient. *West v. Emmons*, 5 J. R. 179.

82. So, where A. covenants to convey, and B. covenants to execute a bond and mortgage for the land, in an action by B. against A., it is sufficient for the plaintiff to aver his readiness to perform. *Ibid.*

83. If the defendant promise the plaintiff to pay money, when collected, that is a condition precedent, and must be averred. *Dodge v. Codrington*, 3 J. R. 146.

84. When the promise was founded upon several considerations, all must be averred and proved. *Lansing v. McKillip*, 3 C. R. 286.

85. In declaring on a note not within the statute, and expressed to be for value received, it is sufficient to state that it was given for value received, without averring a special consideration. *Jerome v. Whitney*, 7 J. R. 321. Contra, *Lansing v. McKillip*, 3 C. R. 286.

86. But if the plaintiff undertakes to set forth the consideration specially, he is bound to prove it as laid. *Jerome v. Whitney*, 7 J. R. 321.

87. If A. agree to sell and deliver B. a vessel, and to execute and deliver a bill of sale, and B. promises to pay A. 200 dollars in cash, and 100 dollars on the 1st of October thereafter, and B. accordingly pays 200 dollars, and delivers his note for 100 dollars, A. may maintain an action on the note without averring a delivery of the vessel, &c.; the promises being mutual. *Close v. Miller*, 10 J. R. 90.

88. In covenant for rent against the assignee of a lessee, an averment that the rent, accrued subsequent to the assignment, was due and owing to the plaintiff, and in arrear and unpaid, is sufficient, without stating that the lessee had not paid it; for that is [*192] implied in the averment "that the defendant owed it. *Executors of Dubois v. Van Orden*, 6 J. R. 105.

89. If the defendant aver that prior to the suing out of the writ, he settled and discharged the debt of the plaintiff, it is sufficient as to the time; for the suing out of the writ is con-

sidered as the commencement of the suit. *Bird v. Caritat*, 2 J. R. 342.

90. In an action on the case for a deceit in a sale, the declaration, after stating the affirmation of the defendant, and that the plaintiff, giving faith to the affirmation, made the purchase, whereas the fact was the reverse of the affirmation, concluded thus: "And so the said plaintiff saith, that he, by reason of the said affirmation of the said defendant, was falsely and fraudulently deceived, to wit, the day and year aforesaid, at," &c., with an allegation of damage, to the value of, &c.: this is a sufficient averment of the fraud or deceit, at least, after verdict. *Bayard v. Malcolm*, in error, 2 J. R. 550. S. C. contra, 1 J. R. 453.

91. In a declaration on a bill of exchange, a general averment of notice to the defendant, of all the premises, is sufficient. *Boot v. Franklin*, 3 J. R. 207.

92. In an action against executors for a legacy, the plaintiff must aver that the executors, at the time of bringing the action, had sufficient assets to pay the debts and legacies. *Dewitt v. Schoonmaker*, 2 J. R. 243.

93. Where an act incorporating a turnpike company requires every subscriber to the stock to pay, at the time of subscribing, to one of the commissioners, the sum of five dollars; in an action by the corporation against a subscriber, to recover the amount of the shares subscribed by him, the declaration must aver the payment of the five dollars, on each share subscribed. *Highland Turnpike Company v. McKean*, 11 J. R. 98.

94. But an averment that the defendant was a commissioner under the act, and held the open, and in his hands, ~~the book~~ the shares, is equivalent to an averment of payment of five dollars on each share subscribed. *Ibid.*

95. In an action against a justice of the peace for a false return to a *certiorari*, an averment in the declaration, after stating the falsity of the return, that "by pretext thereof the plaintiff was not only prevented from obtaining any redress or reversal of the judgment and proceedings aforesaid; but was also compelled to suffer imprisonment, and endure great pain both of body and mind, and to pay and expend divers large sums of money," &c. is, after verdict, a sufficient averment of the affirmance of the judgment, and the loss or damage consequent thereon. *Pangburn v. Ramsay*, 11 J. R. 141.

96. In an action for the non-delivery of goods pursuant to an agreement, by which the defendant agreed to deliver whiskey to the plaintiff or his agent at B., to be paid for on the delivery thereof; it is sufficient for the plaintiff to aver that he has at all times been ready to receive the whiskey, and to pay for the same, at the place aforesaid, to wit, at B., without saying he was ready to pay at the particular time stipulated for the delivery. *Porter v. Rose*, 12 J. R. 209.

97. Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other [*193]

agrees to receive and pay, in an action for the non-delivery, it is necessary for the plaintiff to aver a readiness to pay on his part, whether the other party was at the place ready to deliver or not. *Ibid.*

98. And where the agreement was to deliver to the plaintiff, or his agent at B., and the plaintiff was to pay the price, on the defendant presenting the receipts for the goods; *held*, that a payment on delivery was not dispensed with, if the plaintiff himself was at the place; the provision for payment, on the production of the receipts, extending only to the case of a delivery of the goods to the agent of the plaintiff. *Ibid.*

99. In declaring on a specialty, it must be averred, that it was sealed by the defendant. *Van Santwood v. Sandford*, 12 J. R. 197.

100. It is not sufficient to state that the defendant made a writing "in the words and figures following, to wit:" setting it forth *verbatim*, and concluding "In witness whereof, I have set my hand and seal," with the name and a scrawl of (L. S.) *Ibid.* *S. P. Macomb v. Thompson*, 14 J. R. 207.

101. In an action by an assignee of a mortgagee against the purchaser from the mortgagor, subsequent to the execution of the mortgage, for removing buildings from the premises, after they had been advertised for sale under the power contained in the mortgage, and before the sale, whereby the premises were rendered inadequate to pay the money due, and were sold for a less sum than they would otherwise have brought, it must be averred in the declaration, that the mortgagor was insolvent, and had no other property than the mortgaged premises. *Butcock*, 14 J. R. 213.

102. In an action on the case for a false return, the declaration must aver the falsity of the return, and the materiality of the matter alleged to be falsely returned. *Kidzie v. Sackrider*, 14 J. R. 195.

103. The want of an averment is cured by verdict. *Duffie v. Hayes*, 15 J. R. 327. *Owens v. Morehouse*, 1 J. R. 276.

104. After verdict, it will be intended, that an omission in the declaration was supplied by proof. *Bartlett v. Crozier*, 15 J. R. 250.

105. In an action against overseers of highways for neglect to repair a bridge, &c., the declaration should allege, that the commissioners of the town had provided materials, and that the defendant had the means of making the repairs: though the omission is cured after verdict by the common law intendment. *Ibid.*

106. An averment in a declaration, in an action of covenant, that a deed was given, implies that it was accepted by the grantee. *Gasley v. Price*, 16 J. R. 267.

107. In assumpsit against husband and wife, if the declaration alleges a request and promise by the husband and wife, during coverture, it is bad; for the wife cannot be sued on a merely personal contract made during coverture. *Edwards v. Davis*, 16 J. R. 281.

108. Averments, by way of inducement, in the first count of a declaration, will aid a sub-

sequent count, which would, otherwise, be defective, when it clearly refers to the first count which is good. *Crookshank v. Gray*, 20 J. R. 344.

*(i) *Variance between the declaration and proof.* [*194]

109. A variance between the declaration and proof must be objected to at the trial, and if not objected to at that time, the party cannot afterwards avail himself of it. *Pike v. Evans*, 15 J. R. 210.

110. A defendant cannot, at the trial, allege that there is a variance between the copy of the declaration as served, and the *nisi prius* record: the judge must be governed by the record alone, and if there is any material variance, the party must apply to set aside the verdict. *Wood v. Bulkley*, 13 J. R. 486.

111. A contract must be proved as laid in the declaration. *Crawford v. Morrell*, 8 J. R. 253.

112. The plaintiff cannot give in evidence an entire contract relating to two distinct subjects, when he declares only as to one of them. *Ibid.*

113. Where the contract declared upon was, that the defendant should pay for half of the land, and the contract proved was that he should pay for all the land, the variance was *held fatal*. *Ibid.*

114. Evidence that the contract was enlarged by a *parol* agreement, will not support a declaration on the contract as originally made. *Phillips v. Rose*, 8 J. R. 392.

115. So, where the plaintiff covenanted to build a mill by a certain time, and in an action of covenant, averred that he erected the mill at the place and by the time mentioned in the agreement; *held*, that *parol* evidence that the mill was erected at a different place and after the time, by the consent and agreement of the defendant, did not support the declaration. *Ibid.*

116. In an action against two or more persons on a promissory note, with a joint name or firm, if the declaration contains no averments that the defendants were partners, or acted under the firm, but that the defendants "made the note, their own proper hands and names being thereunto subscribed," proof that one of the defendants subscribed the note with the joint name or firm, is not sufficient to prove the contract as laid. *Pease v. Morgan*, 7 J. R. 468.

117. The words, *for value received*, in setting forth a promissory note in a declaration, are words of description, and not an averment; and, if the note produced in evidence want those words, it is a variance. *Saxton v. Johnson*, 10 J. R. 418.

118. An allegation of fraud or warranty in a sale must be proved precisely as laid. *Snell v. Moses*, 1 J. R. 96. *Perry v. Aaron*, 1 J. R. 129.

119. If, in an action for a libel, the libellous matter set forth in the declaration, contains the words *U. States*, and, in the paper produced in evidence, it is written *United States*, the variance is immaterial. *Lewis v. Peo*, 5 J. R. 1

120. The Court will look to the context, in order to decide whether the variance be material or not. *Ibid.*

121. Where a declaration for a libel stated the libel to have been published in a newspaper called *The Ontario Messenger*, and the paper produced was headed *Ontario Messenger*; held, that this was not a variance, as the article was no part of the description of "the title of the paper, but only introductory to it. *Southwick v. Stevens*, 10 J. R. 443.

122. Where the plaintiff declared by the name of *William F. Robinson*, and gave in evidence a deed to *William Robinson*, the omission of the middle letter was held an immaterial variance, for the law knows of but one Christian name. *Franklin v. Talmadge*, 5 J. R. 84.

123. In an action for an escape, the plaintiff stated the substance of the execution in his declaration, without setting it out in *hæc verba*, but in the execution produced in evidence there was a variance of one cent in the amount of damages and costs; held, that it was immaterial. *Bissell v. Kip*, 5 J. R. 89.

124. In an action of debt against a sheriff, for the escape of a prisoner in his custody on execution, the declaration alleged a judgment recovered in the Court of Common Pleas, of the term of, &c. held at *Salem*, in the county of *Washington*, &c.; and in the record of the judgment produced at the trial, the place or town where the Court was held was not mentioned; held, that the variance was immaterial. *Page v. Woods*, 9 J. R. 82.

125. In debt on recognizance of bail, the declaration laid the venue in *Greene* county, and stated that S. F. came into the Supreme Court, and by the name of S. F., of K., in said county, farmer, became bail, &c., and the bail-piece offered in evidence was written *Delaware, ss. I. H. is delivered to bail to S. F., of the town of K., in said county, farmer, &c., and was taken before a judge of Delaware Common Pleas, and the recognizance roll stated that S. F., of the town of K., and county of D., farmer, came into Court and became bail, &c.*; held, that there was no material variance between the declaration and the bail-piece and recognizance roll, the description in the declaration being set out according to the sense, and not according to the tenor. *Rodman v. Forman*, 8 J. R. 26.

126. A variance in the name of a corporation, which does not render it materially different in substance from the true name, will not injure, especially in proceedings in which the corporation is not a party to the record. *The People v. Runkle*, 9 J. R. 147.

127. If the day laid under a *scilicet* be material, the time must be proved according to the fact. *Vail v. Lewis and Livingston*, 4 J. R. 450.

128. So, in an action for executing process after the return day, the time is material, and although stated under a *scilicet*, no other day can be proved. *Ibid.*

129. A *scilicet* repugnant to the preceding matter is void, and may be rejected as surplusage. *Ibid.*

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130. But when it is not repugnant to the preceding matter, but will agree with it, then it is a direct affirmation, and shall be taken positively. *Ibid.*

131. Where, in a declaration upon an instrument in writing, no venue is stated in the body of the declaration, but only in the margin, and no place is alleged at which the instrument was executed, it is no variance, if the instrument produced [*196] in evidence bears date at a different place from that in which the venue is laid. *Alder v. Griner*, 13 J. R. 449.

132. But, it seems, that it would be otherwise, if a place be stated in the body of the declaration. *Ibid.*

133. The declaration alleged that a promissory note was made by the defendant by the name of "*Christopher Bulkley*," and the note produced in evidence was signed "*Christ. Bulkley*," it being proved, that this was the usual mode of signing his name; held, that there was no variance. *Wood v. Bulkley*, 13 J. R. 486.

134. Where a contract stated in the declaration, is on a *past* consideration, for the delivery of goods, without mentioning the place of delivery, and in the alternative, as to the time, and the contract proved was on an *executory* consideration, to deliver goods at a particular time and place mentioned, the variance was held fatal, and the verdict set aside. *Robertson v. Lynch*, 18 J. R. 451.

135. Where there is a count on a special agreement, and a general count for goods sold and delivered, the plaintiff may, if he fails to prove the special agreement, abandon the special count, and resort to the general count. *Ibid.*

136. But this cannot be done, if the goods were in fact sold under the special agreement, and the plaintiff might, if he had framed the special count properly, have recovered upon it. *Ibid.*

137. In an action for *slander*, the declaration alleged, that the words were spoken of and concerning the evidence given by the plaintiff, on a *complaint* made by him before a justice of the peace, on the 20th *March*, 1820; and the proof was, that the complaint was made before the justice on the 8th of *March*, 1820; held, that the variance was immaterial. *McKinly v. Rob*, 20 J. R. 351.

(j) *Profert and oyer.*

138. In an action on an arbitration bond, *profert* need not be made of an award. *Weed v. Ellis*, 3 C. R. 253.

139. In debt on award, if there is a variance between the award as set forth in the declaration, and the *oyer*, the defendant must demur specially, and cannot take advantage of it by pleading no award. *James v. Walruth*, 8 J. R. 410.

140. Where the award is incorrectly set forth in the declaration, but the *oyer* served is correct, and the defendant pleads no award and goes to trial, and the award given in evidence agrees with the *nisi prius* record, the

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defendant is too late to take advantage of the variance; nor will the verdict be set aside on the ground of surprise, as the *oyer* contained a true copy of the award. *Ibid.*

141. A small variance between the *oyer* of a bond and the declaration is not regarded; as where, in the *oyer*, the words were "or delay," and in the declaration they were "or other delay," the variance was held to be immaterial. *Henry v. Brown*, 19 J. R. 49.

[*197] *(k) Request.

142. It is unnecessary to lay a special request in the declaration, in all cases where the consideration for the defendant's promise was executed. *Doty v. Wilson*, 14 J. R. 378.

143. In an action on a bill or note, a demand of payment in the general terms, *although often requested, &c.*, is good, especially after verdict. *Leffingwell v. White*, 1 J. C. 99.

144. Where there is a precedent debt or duty, it is not necessary for the plaintiff to state a special request or demand in the declaration; but the bringing the action is itself a legal demand. *Ernst v. Bartle*, 1 J. C. 319.

(l) Breach.

145. Any defect or inaccuracy in assigning the breach is aided after verdict, for the Court will intend that damages could not have been given, if a good breach had not been shown. *Thomas v. Roosa*, 7 J. R. 461.

(m) Conclusion and pledges.

146. If, in an action sounding in damages, the plaintiff claims more damages than on the face of his declaration appear to be due, it will not vitiate, especially after verdict; for the amount of the damages being ascertained by the jury, it is to be presumed that they were assessed according to the proof. Per *Radcliffe, J. Executors of Van Rensselaer v. Executors of Platner*, 2 J. C. 17.

147. Pledges of prosecution are mere form, and may be inserted at any time before judgment. *Baker v. Philips*, 4 J. R. 190.

148. The want of these cannot be taken advantage of on special demurrer. *Ibid.*

And see CONDITION, I. ESTOPPEL. EXECUTORS AND ADMINISTRATORS, V. 34—37. LIBEL, IV. 34—39.

Joinder of counts. See ACTION IN GENERAL, II.

Declaration in a penal action. See ACTION ON STATUTE AND POPULAR ACTIONS, 6, 7.

Amending declaration. See AMENDMENT, III. 12—32.

Declaration on a bill or note. See BILLS OF EXCHANGE AND PROMISSORY NOTES, VIII.

_____ in ejectment. See EJECTMENT, VI.

[*198] *III. Pleas in abatement; (a) To the jurisdiction; (b) To the person of the plaintiff; (c) To the person of the

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defendant; (d) To the writ; other proceedings pending for the same cause; (e) Misnomer; (f) Joinder of improper or omission of proper parties; (g) Where the defendant is sued in a wrong character; (h) How and when to be pleaded; verification and judgment.

(a) Plea to the jurisdiction.

149. After pleading in bar, it is too late to object to the jurisdiction. *Smith v. Elder*, 3 J. R. 105.

See JURISDICTION.

(b) To the person of the plaintiff.

150. Infancy of the plaintiff must be pleaded in abatement, and is not a ground for nonsuit at the trial. *Schemerhorn v. Jenkins*, 7 J. R. 373.

151. By pleading in chief, the defendant admits the due appearance of the plaintiff. *Ibid.*

152. The death of a lessor in ejectment does not abate the suit. *Frier v. Jackson*, ex dem. *Van Allen*, 8 J. R. 495.

153. It is a good plea in abatement, that the plaintiff is a fictitious person. *Doe v. Penfield*, 19 J. R. 308.

154. As, where an action of *assumpsit* was brought on a judgment, in an action of ejectment in *Canada*, to recover the costs in the name of the nominal plaintiff; held, that the action could not be maintained. *Ibid.*

And see INFANT.

(c) To the person of the defendant.

155. The civil death of the defendant abates the suit; as, where he is sentenced to the state prison for life. *Graham v. Adams*, 2 J. C. 408.

Plea of alien enemy. See ALIEN, II.

Plea of privilege. See post, (k) 186, 187, 188, 189.

(d) To the writ; other proceedings pending for the same cause.

156. To an action on a judgment, a writ of error pending may be pleaded in abatement, but not in bar. *Jenkins v. Pepoon*, 2 J. C. 312.

157. And the plea must state, that the writ of error was brought prior to the commencement of the action; and that the requisite steps were taken to render it a *superpedes* to the execution. *Ibid.*

*158. A foreign attachment pending in another state, is pleadable in abatement. *Embree v. Hanna*, 5 J. R. 101.

159. A plea of another cause action pending is not an issuable plea, though pleaded in the form of a plea in bar; for it is still a plea in abatement. *Davis v. Grainger*, 3 J. R. 259.

160. And where a rule has been granted on condition of pleading issuably, such a plea, connected with the general issue, vitiates the latter, so as not to be a fulfilment of the condition of the rule. *Ibid.*

161. The pendency of a suit in the Circuit Court of the *United States*, in another state, is not pleadable in abatement. *Walsh v. Durkin*, 12 J. R. 99.

162. The pendency of another suit for the same cause, and between the same parties, though pleadable in abatement, cannot be given in evidence under the general issue. *Percival v. Hickey*, 18 J. R. 257.

163. Where the defendant pleads another action pending, the plaintiff may enter a *nil capiat per breve*, in the first suit, before a replication to the plea in abatement; and that without leave of the Court, or payment of costs. *Marston v. Lawrence*, 1 J. C. 397. S. C. C. C. 94.

(e) *Misnomer*.

164. A defendant cannot plead in abatement because an *alias dictus* is subjoined to his name; and the true name is that which precedes the *alias dictus*. *Reid v. Lord*, 4 J. R. 118.

165. If the surname of the obligor, in the body of a bond, varies by a slight misspelling, producing any change in the pronunciation from that in the subscription, he may be sued by the name subscribed alone, without an *alias dictus*. *McCreath v. Hinsdale*, 2 C. R. 362.

166. The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial; and it is competent for the party to show that he is known as well without as with the middle name. *Franklin v. Talmadge*, 5 J. R. 84.

167. Where a name appears to be a foreign one; a variance of a letter, which, according to the pronunciation of that language, does not vary the sound, is not a misnomer, as *Petrie* for *Petrie*. *Petrie v. Woodworth*, 3 C. R. 219.

168. To a plea of *misnomer*, a replication, that the defendant is known as well by one name as the other, is good. *Ibid*.

(f) *Joinder of improper, and omission of proper parties*.

169. In an action for a *tort*, the non-joinder of persons interested with the plaintiff, must be pleaded in abatement, and cannot be taken advantage of at the trial, otherwise than in mitigation of damages. *Wheelwright v. Depeyster*, 1 J. R. 471. [And see *Low v. Mumford*, 14 J. R. 426.]

170. So, where there are several tenants in common, who do not all join in trespass, the non-joinder must be pleaded, and cannot be taken advantage of at the trial. *Brotherton v. Hodges*, 6 J. R. 108. *S. P. Bradish v. Schenck*, 8 J. R. 151.

*171. That the *assumpsit* was [*200] made by the defendant and one of the plaintiffs, jointly, must be pleaded in abatement. *Robinson v. Fisher*, 3 C. R. 99.

172. That other persons jointly indebted, or jointly responsible, have not been made defendants, must be pleaded in abatement, and cannot be taken advantage of on the trial. *Ziele v. Executors of Campbell*, 2 J. C. 382.

173. Where the defendant promised to pay each of several partners his specific proportion of the debt; in an action by one of the partners for his proportion, the defendant cannot object to the non-joinder of the others. *Bunn v. Morris*, 3 C. R. 54.

174. In *assumpsit*, the joinder, as defendants, of parties who did not join in the promise, need not be pleaded in abatement; but may be taken advantage of under the general issue. *Tom v. Goodrich*, 2 J. R. 213.

175. Joint debtors must be sued jointly; and if all of them are not sued, it must be pleaded in abatement. *Robertson v. Smith*, 18 J. R. 459. [See ante I. 34, 35, 36, 37.]

176. Where a suit has been commenced by an insolvent before the assignment of his estate, the suit will not abate by his discharge, but may be continued in the insolvent's name for the benefit of his assignees. *Raymond v. Johnson*, 11 J. R. 488.

When husband and wife must join in an action. See HUSBAND AND WIFE, IV.

And see ante, I. TRESPASS.

(g) *When the defendant is sued in a wrong character*.

177. To a declaration against A., as executor of B., the defendant pleaded in abatement, that B. died intestate, and letters of administration were afterwards granted to the defendant, &c. The plaintiff replied, that previous to granting the letters of administration, the defendant made himself executor *de son tort*, &c. On demurrer, the replication was held to be bad, and the bill was quashed. *Ratloon v. Overacker*, 8 J. R. 126.

(h) *How and when to be pleaded; verification and judgment*.

178. After a verdict, matter which abates the writ cannot be pleaded, for the defendant has no day in Court. *Alexander v. Fink*, 12 J. R. 218.

179. So, the marriage of a woman plaintiff, after verdict, and before the day in Court, cannot be pleaded in abatement, *puis darrein continuance*. *Ibid*.

180. So, the marriage of the plaintiff, after a report of referees, and before it has been filed, in a cause referred under the statute, cannot be pleaded in abatement. *Ibid*.

181. Whether a plea is in abatement or in bar is to be known by its conclusion. *Jenkins v. Pepoon*, 2 J. C. 312. *Executors of Schoonmaker v. Elmendorf*, 10 J. R. 49.

182. So a plea ending thus: "Wherefore he prays judgment," &c., *is bad: for it is impossible to tell whether it [*201] is a plea in abatement or in bar. But, whether it can be taken advantage of any other way than on a special demurrer? *Quere*. *Jenkins v. Pepoon*, 2 J. C. 312.

183. When a plea begins in abatement, and concludes in bar, it may be considered a plea in bar: and if a demurrer to such a plea concludes in bar, the judgment will be final. *Executors of Schoonmaker v. Elmendorf*, 10 J. R. 49.

184. A plea in abatement after a plea in chief, is a nullity. *Palmer v. Green*, 1 J. C. 101.

185. If matter, which must be pleaded in abatement, be contained in a plea in bar, without being verified by affidavit, the plaintiff may treat it as a nullity, and enter a default. *Robinson v. Fisher*, 3 C. R. 99.

186. If a dilatory plea be filed without an affidavit, the plaintiff may treat it as a nullity, or move the Court to set it aside; but if he proceeds in the cause, he waives the irregularity. *Richmond v. Tallmadge*, 16 J. R. 307.

187. A plea of privilege, by an attorney, in abatement, concluding his plea to the jurisdiction of the Court, ought not to be treated as a nullity, but must be demurred to. *Brooks v. Patterson*, 1 J. C. 328.

188. Such a plea does not require an affidavit. *Ibid.*

189. And it may be put in after special bail has been entered. *Ibid.*

190. The defendant must verify his whole plea; or, if he does not, he must answer over. *Marston v. Lawrence*, 1 J. C. 397. S. C. C. C. 94.

191. The judgment, on a plea of a former recovery found against the defendant, is *quod respondeat ouster*. *Ibid.*

IV. General requisites of pleas in bar; (a) *Each subsequent pleading must be an answer to the previous pleading of the opposite party*; (b) *It must not be double*; (c) *Nor a departure from the previous pleadings*.

(a) *Each subsequent pleading must be an answer to the previous pleading of the opposite party*.

192. The plea must answer the whole matter contained in the count, as in a plea of justification to an action for a libel, each particular charge in the libel must be justified. *Riggs v. Denniston*, 3 J. C. 198.

193. In replevin, if, to a plea of property in a stranger, the defendant reply, that the plaintiff entered the house in the night time, it is bad. *Harrison v. McIntosh*, 1 J. R. 380.

194. A replication in replevin, stating that the goods were delivered to the plaintiff by B., for safe keeping, and that the plaintiff has a special property in them, without stating that B. had any property, or authority to make the deposit, is bad. *Ibid.*

195. Debt for an escape, against the sheriff; plea, that the prisoner, inadvertently, and without any intention to escape, [*202] went into an *office, sixteen feet beyond the liberties, and returned in one hour, and that such office was commonly reputed to be within the liberties; the plea is bad, in not stating a return before suit brought, and thereby avoiding the previous admission of an escape. *Bissell v. Kip*, 5 J. R. 69.

196. Where a plea begins as an answer to the whole declaration, but answers only part, it is bad. *Nevins v. Keeler*, 6 J. R. 63. S. P. *Hallett v. Holmes*, 18 J. R. 28. *Van Ness v. Hamilton*, 19 J. R. 349.

(b) *It must not be double*.

197. In an action of debt, on a judgment obtained in the state of Georgia, the defendant pleaded, *nul tiel record* and *nil debet*; the Court ordered the defendant to elect, within four days after notice, or, on his default, the plaintiff to elect, which of the two pleas should stand. *Le Conte v. Pendleton*, 1 J. C. 104. S. C. C. C. 72. S. P. Where payment and *nul tiel record* were pleaded; for *nul tiel record* cannot be joined with any other plea. *Carnes v. Duncan*, C. C. 35.

198. So, where, in a debt on bond, the defendant pleaded payment before the day, and payment at the day, the Court ordered the former plea to be struck out. *Thayer v. Rogers*, 1 J. C. 152.

199. But where the defence is complicated, and the propriety of the pleas demands a close investigation, the Court will not interfere. *Ibid.*

200. After the plaintiff has demurred, the defendant will not be compelled to elect his plea. *Doyle v. Moulton*, 1 J. C. 246. S. C. C. C. 87.

201. A plea may contain as many facts as are necessary to constitute one defence, and it is not, on that account, double. *Patcher v. Sprague*, 2 J. R. 462.

202. In trespass; a plea, that the goods taken were seized by a deputy sheriff, by virtue of a warrant, as the property of an absconding debtor, (setting forth the proceedings under the act, and that the plaintiff held the goods by a fraudulent conveyance from the debtor,) and that the defendant acted in aid of, and by command of the deputy sheriff, &c., is good. *Ibid.*

203. To a declaration in debt, against a sheriff, for an escape, a plea of an involuntary escape, and the return of the prisoner into custody, before any action brought, and also, that the prisoner was discharged by the Court of Common Pleas, pursuant to the act for the relief of debtors, with respect to the imprisonment of their persons, is good; for both facts are necessarily blended, and the discharge by the Court of Common Pleas is equivalent to an allegation that the prisoner was in custody at the time of plea pleaded, which may be stated in connection with the escape and return before action brought. *Currie v. Henry*, 2 J. R. 433.

204. To a plea of a discharge under the insolvent act, a replication, setting forth all the grounds on which the discharge is made void by the act, in the words of the act, is bad; the plaintiff must specify the particular fraud on which he means to rely, in order to set aside the discharge. *Service v. Heermance*, 2 J. R. 96.

*205. A plea in trover, stating that the goods were sold by order [*203] of the plaintiff, on commission, and that the defendant was discharged under the insolvent act, is bad for duplicity. *Kennedy v. Strong*, 10 J. R. 289.

206. To a plea for a discharge under the insolvent act, the plaintiff replied that the defendant had procured a creditor to sign his petition, and make affidavit for a larger sum

than was due to him; that he had concealed the plaintiff's debt, and had also concealed a debt due to him, (the insolvent.) The replication is bad, as containing three distinct and independent grounds for avoiding the discharge, which would require several distinct points to be put in issue. *Cooper v. Heermance*, 3 J. R. 315.

207. In replevin, the plaintiff may plead *non cepit* and property in himself or a stranger, and will not be compelled to elect by which plea he will abide. *Skuter v. Page*, 11 J. R. 196.

(c) *Nor a departure from the previous pleadings.*

208. After a plea of no award, a rejoinder, confessing and avoiding the award, is a departure. *Munro v. Alaire*, 2 C. R. 320.

209. So, if the defendant plead no award, and the plaintiff reply, setting forth an award, a rejoinder, that the award was not final, is a departure. *Barlow v. Todd*, 3 J. R. 367.

210. To a declaration for a libel, charging that, by hypocritical cant, &c., the plaintiff and his associates affected the incorporation of the *Manhattan Bank*, in which the plaintiff's share of the profits was several thousand dollars; and that the plaintiff, as a member of the senate advocated the bill, entitled, "An act for supplying the city of *New-York* with pure and wholesome water," knowing that it contained a clause authorizing the company to carry on banking business, and when he knew that the other members of the legislature were ignorant of that fact, &c. The defendant pleaded in justification, that the plaintiff was a senator on the 2d April, 1798; that such a law was passed, and averred that at the time of passing the said law, to wit, on the 1st April, 1798, the plaintiff, as senator, advocated and supported the bill, knowing at the time that it contained such clause, &c.; and that a large majority of the members of the legislature were ignorant of that fact, &c.; and that, at the time and place first above mentioned, the plaintiff held, and was owner of a large portion of the stock created by the said law, to wit, 5,000 dollars; all which acts of the plaintiff were hypocritical and deceptive, and contrary to his duty as a senator, &c. The plaintiff replied, that at the time he advocated the said law as a senator, he did not hold and was not owner of any stock created by it; nor had he any interest whatever in the stock, &c. On a general demurrer, the plea was held to be bad, as not being an answer to the declaration; and the defendant having committed the first fault in pleading, the plaintiff was entitled to judgment. *Spencer v. Southwick*, in error, 11 J. R. 573. *Contra*, S. C. 10 J. R. 259. Where the replication was held to be bad.

[*204] *V. Plea in bar; (a) *What must be pleaded in bar, and what in abatement*; (b) *General issue*; (c) *Notice with the general issue*; (d) *Formal requisites of a special plea*; (e) *Statement of the defence*; (f) *Variance between the plea or notice, and the*

evidence; (g) *Conclusion of a plea, and when the signature of counsel is requisite.*

(a) *What must be pleaded in bar, and what in abatement.*

211. In replevin, property in a stranger may be pleaded in bar, or in abatement. *Harrison v. McIntosh*, 1 J. R. 380.

212. Another action pending for the same cause cannot be pleaded in bar, but must be pleaded in abatement. *Davis v. Grainger*, 3 J. R. 259.

213. Alien enemy may be pleaded, either in abatement or in bar. *Bell v. Chapman*, 10 J. R. 183.

214. The most proper way to plead it, it would seem, is in abatement; but whether pleaded in one way or the other, it is not material, for the judgment thereon would not be a bar to a new action on the return of peace. *Ibid.* [And see ante, III.]

(b) *General issue.*

215. Wherever, in pleading, there is an affirmative on one side and a negative on the other, the plea must conclude to the country. *Gazley v. Price*, 16 J. R. 267.

216. The defendant, by pleading the general issue, admits the character in which the plaintiff sues. *Overseers of Stephentown v. Whitman*, 15 J. R. 208.

217. Any matter of defence which denies what the plaintiff is bound to prove in the first instance, on the general issue, or be non-suited, ought not to be pleaded specially, but should be given in evidence under the general issue. *Bank of Auburn v. Weed*, 19 J. R. 300.

218. Therefore a plea of *nil tiel corporation*, though anciently allowed, is bad, on a special demurrer, as amounting to the general issue: *Ibid. Contra*, S. C. 18 J. R. 137.

219. To a declaration containing a count on a warranty on a sale, and a count in *assumpsit*, the deceit or misfeasance being the gist of the action in both, the defendant may plead *not guilty*. *Hallock v. Powell*, 2 C. R. 216.

220. *Non est factum* merely puts the deed in issue, and the plaintiff need not prove other averments in his declaration. *Gardner v. Gardner*, 10 J. R. 47.

221. Where, to an action of debt on a judgment, the defendant pleaded *nil debet*, and the plaintiff went to trial thereon; held, that by going to trial, he admitted the validity of the plea, as a general issue, and could not set aside the verdict, because the judge admitted special matter to be given in evidence, under a notice annexed to the plea. *Myer v. M'Lean*, 1 J. R. 509.

222. Neither can the defendant, after going to trial on such plea, arrest the judgment, on the ground that it is a [*205] nullity. S. C. 2 J. R. 183.

223. But *nil debet*, in debt on judgment, is, notwithstanding, not a good plea, with which the defendant can give notice of special matter under the statute. *Bullis v. Giddens*, 8 J. R. 82.

224. If the defendant, in an action of trea-

pass, before a justice of the peace, justify under a plea of title, he cannot, afterwards, deny the trespass, and plead the general issue; and if pleaded, the Court will order it to be struck out. *Strong v. Smith*, 2 C. R. 28.

225. The Court will not permit the general issue to be withdrawn, to let in a plea in abatement delivered in time, although the general issue was pleaded without the knowledge, and contrary to the intention of the defendant. *Anonymous*, 3 C. R. 102.

226. In an action on the case, under the general issue, the plaintiff is bound to prove the whole charge in his declaration. *Green v. Ferguson*, 14 J. R. 389.

(c) *Notice with the general issue.*

227. A notice of special matter can only be given with the general issue. *Beadle v. Hopkins*, 3 C. R. 150.

228. It cannot be given in covenant, under a plea of performance. *Ibid.*

229. In trespass, under the general issue, the defendant gives notice, in justification, "that having a warrant issued by A. B., a justice of the peace, &c. against C. D., at the suit of E., and being duly deputed to execute the warrant, he entered," &c.; the notice is sufficient, without stating the cause of action for which the warrant issued, and under it the warrant may be given in evidence. *Linsley v. Keys*, 5 J. R. 123.

230. In assault and battery, the defendant gives notice, with the general issue, that he will give *son assault demesne* in evidence; at the trial, the plaintiff gives evidence of *molliter manus imposuit*; the defendant may rebut this evidence, or show, in mitigation of damages, matter which, if the pleadings had been special, must have been pleaded. *Collier v. Moulton*, 7 J. R. 109.

231. A notice, with the general issue, forms no part of the record: an admission in it does not excuse the plaintiff from proving the matters charged in his declaration, and it will not help a defect in the declaration. *Vaughan v. Havens*, 8 J. R. 109.

232. Under the plea of *nul tiel record*, the defendant cannot give evidence of special matter to be offered in evidence at the trial. *Raymond v. Smith*, 13 J. R. 329. 1 *Wendell*, 70.

233. The statute has reference to such issues only as are to be tried by a jury. *Ibid.*

234. A notice of special matter to be given in evidence under the general issue, though not required to be in the strict technical form of a plea, must contain all the facts necessary to be stated in a special plea. *Shepard v. Merrill*, 13 J. R. 475. See 10 J. R. 142.

235. It need not be as precise and particular as a special plea. *Chamberlain v. Gorham*, in error, 20 J. R. 746. And see *Brooks v. Bemiss*, 8 J. R. 455.

[*206] 236. It is sufficient, if it contain such a statement of the special matter as may prevent the plaintiff from being taken by surprise. *Chamberlain v. Gorham*, 20 J. R. 144. The Supreme Court said that the notice ought to be so particular as to enable the plaintiff to come

prepared to meet the facts stated in the notice.

237. A notice must state truly the facts intended to be given in evidence; but if a variance be not material to the right of the cause, it will be overlooked. *Kane v. Sanger*, 14 J. R. 189.

(d) *Formal requisites of a special plea.*

238. A venue is not necessary, even in point of form, except where the defendant justifies at a different place; the venue in the declaration drawing to itself the trial of every thing that is transitory. *Thomas v. Rumsey*, 6 J. R. 26. *Furman v. Haskin*, 2 C. R. 369.

239. Where a plea is put in, which the plaintiff considers as frivolous, or a nullity, he may either enter a default, for want of a plea, or demur; but must not apply to the Court for judgment by default. *Falls v. Stickney*, 3 J. R. 541.

240. If the pleas are not palpably bad, and void upon the face of them, the opposite parties cannot treat them as nullities, but must resort to his demurrer. *Platt v. Robbins*, C. C. 81.

241. A plea of another action pending for the same cause, although pleaded in the form of a plea in bar, is a plea in abatement, and not an issuable plea, within the meaning of a rule to plead issuably. *Davis v. Grainger*, 3 J. R. 259.

242. And if joined with the general issue, it so far vitiates the latter as to prevent its being a fulfilment of the rule. *Ibid.*

243. Where a favor is granted to a party, on the terms of pleading issuably, the condition must be strictly performed. *Ibid.*

244. An argumentative plea is good, on a general demurrer. *Spencer v. Southwick*, 9 J. R. 314.

245. An averment, that the defendant "had good reason to believe that the plaintiff well knew" a certain fact, is argumentatively to charge the plaintiff with knowledge. *Ibid.*

246. Certainty to common intent, is sufficient in a special plea. *Ibid.*

247. And this certainty, it seems, is what, on a fair and reasonable construction, may be called certain, without recurring to possible facts. *Ibid.* But it must be direct and positive in the facts set forth, stating them with all necessary certainty. *Van Ness v. Hamilton*, 19 J. R. 349.

248. Where a plea begins in abatement, and concludes in bar, it may be considered as a plea in bar; and if a demurrer to such a plea conclude in bar, the judgment will be final. *Executors of Schoonmaker v. Elmendorf*, 10 J. R. 49.

249. A special plea, amounting to the general issue, is bad. *Kennedy v. Strong*, 10 J. R. 289.

250. So, in trover, a plea, that the goods were sold pursuant to the order of the plaintiff, is bad. *Ibid.*

(e) *Statement of the defence.* [*207]

251. No matter of defence, arising after action brought, can be pleaded in bar, or as a set-off. *Cobb v. Curtis*, 8 J. R. 470.

252. A material and traversable fact must be expressly stated, and cannot be inferred from other parts of the pleading. *Frery v. Dakin*, 7 J. R. 75.

253. In setting forth the proceedings in an inferior Court, after giving it jurisdiction, it is sufficient to say, that such proceedings were thereupon had, that such an act was done by the Court, without setting forth the proceedings specially. *Service v. Heermance*, 1 J. R. 91. *S. P. Peebles v. Kille*, 2 J. R. 363.

254. So, if a plea of a discharge under an insolvent act state enough to give the magistrate who granted it jurisdiction, and set forth the discharge itself, it will be sufficient, without stating all the proceedings. *Service v. Heermance*, 1 J. R. 91. *S. P. Hines v. Ballard*, 11 J. R. 491. *Roosevelt v. Kellogg*, 20 J. R. 208.

255. But if he undertakes to state all the proceedings in relation to his discharge, he must state a conformity in every respect to the directions of the act; and if he does not state the facts correctly, and, especially, if he omits to state that at least three fourths of his creditors, in amount, subscribed to his petition, &c., so as to give the judge jurisdiction, the plea is bad. *Frery v. Dakin*, 7 J. R. 75.

256. If the plea state that the defendant was in custody on an execution for less than 2,500 dollars, and was discharged by the Court of Common Pleas, pursuant to the act for the relief of debtors with respect to the imprisonment of their persons, it will be intended, unless denied by the plaintiff's replication, that the Common Pleas had jurisdiction. *Currie v. Henry*, 2 J. R. 433.

257. But a plea, alleging, generally, that the prisoner was discharged out of custody, by due course of law, is bad, on special demurrer. *Ibid.*

258. Plea of a discharge under the insolvent act, stating, generally, that the defendant, being an insolvent debtor, and having in all things conformed to the directions of the act, and, in pursuance thereof, obtained a discharge, as by relation to the discharge will more fully appear, is bad. *Cruger v. Cropsey*, 3 J. R. 242.

259. In an action for an escape on execution, the sheriff pleaded, that the defendant presented his petition to the Court of Common Pleas, &c., and was discharged out of custody on the said execution by order of the Court of Common Pleas, having full power and authority for that purpose, pursuant to the act, &c.; it was held, on general demurrer, that this was sufficient to show that the Court of Common Pleas had jurisdiction in the case. *Cantillon v. Graves*, 8 J. R. 472.

260. A plea of a discharge under the insolvent act of 1811, must state that the defendant had been an inhabitant of the county for three months preceding the presenting of the petition, or that he was in prison in the county; that being necessary to give the judge who granted it jurisdiction. *Morgan v. Dyer*, 10 J. R. 161.

261. If the plea states that the insolvent was a resident of the county in which the application for a discharge was made by
[*208] him, it is tantamount to saying

that he was an inhabitant of that county. *Roosevelt v. Kellogg*, 20 J. R. 208.

262. If the plea states that the judge was satisfied that the insolvent had conformed in all things required of him by the act, before the assignment was directed, it is sufficient, without alleging particularly that an advertisement was published, &c. *Ibid.*

263. In *assumpsit* for goods sold, the defendant pleaded, that the suit, though brought in the name of A., was, in truth, brought by C., who was the person really and ultimately beneficially interested in the suit; and that before the commencement of the suit, the demand against the defendant had been assigned to D., by C., in the name of A., to satisfy a debt due from C. to A.; and that this suit was brought in the name of A., merely to enable D. to obtain payment of such debt; and that, at the time of the commencement of the suit, and long before, C. was indebted to the defendant in a larger sum, &c. It was held, that the plea was bad, in not averring that the debt alleged to be due from C. to B. was contracted prior to the assignment to D., for whose benefit the suit was brought. *Brisban v. Caines*, 10 J. R. 45.

264. If a matter which should be pleaded, is admitted, by consent, to be given in evidence, it will have the same effect as if it had been duly pleaded. *Jackson, ex dem. Lathrop, v. Demont*, 9 J. R. 55.

265. A plea by an executor, stating that he had not, on the day of exhibiting the plaintiff's bill, nor at any time since, any goods or chattels which were of the testator at the time of his death, in his hands to be administered, without alleging that he had fully administered the goods and chattels which were of the testator at the time of his death, and had come into the hands of the defendant to be administered; and without alleging that he never had any goods or chattels of the testator in his hands to be administered, is good in form and substance. *Fowler v. Sharp*, 15 J. R. 323.

266. And the exhibiting the bill, is tantamount to saying the commencement of the suit, or issuing out the writ; and will be so regarded, unless the plea is specially demurred to on that ground. *Ibid.*

267. The parties agreed to submit to three persons to determine the sum which the defendant should pay to the plaintiff, for land, of which the plaintiff had the legal title, but which was occupied or claimed by the defendant, and that the plaintiff should convey the same to the defendant. The arbitrators awarded that the plaintiff should convey to the defendant certain land, describing it by metes and bounds, and that the defendant should pay a certain sum to the plaintiff. In an action of covenant, on the agreement, for non-performance of the award, the defendant pleaded, that he did not occupy or claim the land awarded to be conveyed to, and paid for by him, and on the trial, a verdict was found for the defendant; held, that the plea, though informal, and amounting only to a plea of no award, involved the merits of the case, and showed that the arbitrators had awarded upon

a matter not alleged in the plea; that the issue was not immaterial, and the verdict having found the fact alleged in the plea, the plaintiffs were not entitled to judgment, *non obstante veredicto*, which can only be on the merits, and not on the form or manner of pleading. *Macomb v. Wilber*, 16 J. R. 227.

*268. Under a plea of *no award*, [***209**] the defendant may show that the arbitrators awarded on a matter not submitted to them. *Ibid.*

269. Though matter of defence arising after the commencement of the suit cannot be pleaded in bar of the action generally, yet it may be pleaded in bar of the further maintenance of the suit. *Covell v. Weston*, 20 J. R. 414.

270. As where a judgment is recovered since the action was brought against executors, they may plead such judgment in bar of the further maintenance of the action against them. *Ibid.*

(f) *Variance between the plea or notice, and the evidence.*

271. In an action for a libel, the plaintiff gave notice of justification with the general issue, stating that he would give in evidence, at the trial, a record of a trial before the sessions, of the term of *June*, 1810; the record produced was of *June*, 1809; but the variance was immaterial. *Brooks v. Bemiss*, 8 J. R. 455.

272. And, *it seems*, that it would have been the same even in a case of special pleading. *Ibid.*

273. If the evidence, on a plea of usury, vary either in the sum or the consideration, from the sum or consideration stated in the plea, the variance will be fatal. *Smith v. Brush*, 8 J. R. 84.

274. So, in debt on bond, the defendant pleaded usury, which was alleged to consist in including in the bond 183 dollars 72 cents, for forbearance of payment, and it appeared that the plaintiff was to deliver to the defendant a horse of the value of 100 dollars, and which made part of the sum of 183 dollars 72 cents; this was held a variance from the plea. *Ibid.*

275. A variance between a contract set forth in the plea, and that given in evidence, is as fatal as in a declaration; and more especially in a plea of usury. *Lawrence v. Knies*, 10 J. R. 140.

276. As, where the defendant, in the notice subjoined to his plea, stated the usurious contract as arising on the sale of cattle, as well as the loan of money, and that the cattle were sold and delivered at the time of the contract, and the proof was, that the cattle were to be kept by the plaintiff for one month before delivery, the variance was held material and fatal; but, *it seems*, that an omission to state in the notice or plea, that the defendant gave a mortgage, by way of collateral security, is not so material as to vitiate it. *Ibid.*

277. In a notice, as well as in a plea, the contract must be correctly and truly stated, and proved as laid. *Ibid.*

(g) *Conclusion of a plea, and when the signature of counsel is requisite.*

278. Where there is an affirmative on one side, and a negative on the other, the plea must conclude to the country. *Gazley v. Price*, 16 J. R. 267.

279. So, where it is averred in the declaration, that the plaintiff gave the defendant a good and sufficient deed, and the defendant denies that the plaintiff gave such a deed, concluding with a verification, it is bad, on special demurrer. *Ibid.*

*280. A plea merely negating [***210**] facts, is not special, and may conclude to the country. *Manhattan Company v. Miller*, 2 C. R. 60.

281. A plea introducing new matter, must conclude with a verification. *Service v. Heermance*, 1 J. R. 91.

282. Pleas of *solvit ad diem*, and *solvit post diem*, must conclude with a verification. *Coan v. Whitmore*, 12 J. R. 353.

283. A plea containing both matter of fact and matter of record, must conclude to the country. *Lytle v. Lee*, 5 J. R. 112. *S. P. Thomas v. Rumsey*, 6 J. R. 26.

284. Double pleas must be signed by counsel. *Dubois v. Philips*, 5 J. R. 235. *Satterlee v. Satterlee*, 8 J. R. 327.

285. If the attorney in the cause be also a counsellor, he may sign as counsel, or sign his name without any addition, and it will be sufficient; but if he signs as attorney alone, it will not be considered as signed by counsel. *Ibid.*

286. *Plene administravit*, singly pleaded, need not be signed by counsel; but if joined with the general issue, the plea is double, and must be signed by counsel. *Satterlee v. Satterlee*, 8 J. C. 327.

287. Where a plea concludes with a *similiter*, instead of a *verification*, and the plaintiff, without replying, goes to trial, the mispleading is cured by verdict. *Coan v. Whitmore*, 12 J. R. 353.

Plea in abatement. See *ante*, III.

Amending plea. See *AMENDMENT*, IV. 33.

VI. *Plea puis darrein continuance.*

288. Matter arising after issue joined, and which may be pleaded by way of plea *puis darrein continuance*, must be so pleaded without delay. *Jackson, ex dem. Colden, v. Rich*, 7 J. R. 194.

289. It cannot be given in evidence without being pleaded. *Ibid.*

290. The judge at *nihi prius* is bound to receive a plea *puis darrein continuance* when properly pleaded. *Broom v. Beardsley*, 3 C. R. 172.

291. It may be pleaded after the jury are called. *Ibid.*

292. A plea in bar, as of a discharge under the insolvent act, pleaded *puis darrein continuance*, need not be verified by affidavit, unless tendered at the Circuit or Sittings; nor then, if probable cause of its truth be shown to

the judge, who may receive it without oath or not, in his discretion. *Bancker v. Ash*, 9 J. R. 250.

293. When such plea is pleaded in bank, without an affidavit, it cannot be treated as a nullity, but the plaintiff must either reply to it, or apply to the Court to have it set aside. *Ibid.*

294. If the plea were not pleaded in due time, the plaintiff cannot treat it as a nullity, but must take an issue to it, or move to have it set aside. *Morgan v. Dyer*, 9 J. R. 255. S. C. 10 J. R. 161. He cannot demur to it. *Ibid.*

295. The Court will permit a defendant, on payment of costs, to plead a discharge under the insolvent act, after a term has intervened. *Ibid.* *S. P. Merchants' Bank v. Moore*, 2 J. R. 294.

296. Whether it shall be received after a continuance has intervened, *is in [*211] the discretion of the Court. *Morgan v. Dyer*, 10 J. R. 161.

297. Where two actions are brought for the same cause, satisfaction of the judgment in one suit, (if not the recovery alone,) may be pleaded *puis darrein continuance* to the other suit. *Botome v. Joy*, 9 J. R. 221.

298. *Coverture* cannot be pleaded after verdict, or after a report of referees. *Alexander v. Fink*, 12 J. R. 218.

299. Where a plea *puis darrein continuance* is filed in term time, a copy of it must be served; but where the matter of the plea arises in vacation, so that it can only be offered at the Circuit, to prevent a trial, no copy is necessary. *Jackson, ex dem. Barhydt, v. Clow*, 13 J. R. 157.

VII. Particular pleas; (a) Payment; (b) Release; (c) A former action or recovery for the same cause; (d) Want of failure of consideration; (e) No award; (f) Multiel corporation.

(a) Payment.

300. If the defendant has an imparlance, during which he pays the plaintiff's demand, after the imparlance, he may plead a regular plea of payment, and is not put to plead it *puis darrein continuance*. *Tillotson v. Preston*, 3 J. R. 229.

301. Plea of payment of the principal is sufficient, without stating that the defendant had paid the interest and costs. *Ibid.*

302. A plea to an action of debt on a bond, conditioned to pay 77*l.*, that the defendant paid the plaintiff 3*l.* 9*s.* 10*d.*, which the plaintiff accepted, and received in full payment of the sum mentioned in the condition of the bond, and in full of all demands whatsoever, is bad, either as a plea of payment, or of accord and satisfaction. *Dederick v. Leman*, 9 J. R. 333.

303. Where a declaration on promissory notes alleged that the defendant did not pay the sums of money in the notes mentioned, &c., and the defendant pleaded *puis darrein continuance*, that he "paid the plaintiff the several sums of money mentioned in the plaintiff's declara-

tion;" on demurrer, the plea was held good, being as broad as the declaration, and the meaning of it being that the defendant had paid the amount of the notes, and, if they were notes carrying interest, that he paid the interest also; and that there was no necessity of stating that the plaintiff accepted the money in satisfaction. *Chew v. Woolley*, 7 J. R. 399.

304. In an action on a recognizance of bail, under a plea of payment, evidence of payment of a less sum than the amount of the judgment is inadmissible. *Mechanics' Bank v. Hazard*, 13 J. R. 353.

305. Nor could a payment of a less sum be pleaded, though accepted in full satisfaction. *Ibid.*

(b) Release.

306. A release by the obligee on a joint, or a joint and several obligation, to one obligor, is a release to all, and may be pleaded in bar. *Rowley v. Stoddard*, 7 J. R. 267.

*307. But it must be a technical [*212] release under seal; a covenant not to sue, or a receipt, are not sufficient. *Ibid.* *Harrison v. Close*, 2 J. R. 448.

308. Where several plaintiffs must join in bringing a personal action, a release by one joint plaintiff, is a bar to the action. *Austin v. Hall*, 13 J. R. 286.

309. So, in an action by tenants in common for a trespass on land of which they are co-heirs, a release by one of the plaintiffs is a bar to the action. *Ibid.*

(c) A former action or recovery for the same cause.

310. The same cause of action is where the same evidence will support both actions. *Rice v. King*, 7 J. R. 20. *S. P. Johnson v. Smith*, 8 J. R. 383.

311. A recovery in a former action apparently for the same cause, is only *prima facie* evidence, that the subsequent demand has been tried, but it is not conclusive. *Snider v. Croy*, 2 J. R. 227.

312. Where matters have been once submitted to a jury, their verdict is a bar to another action, and the plaintiff will not be permitted to show that they separated his demand, passing upon part of it, and giving no verdict upon other parts. *Brockway v. Kinney*, 2 J. R. 210.

313. A judgment for the defendant in trespass *de bonis asportatis*, is a bar to an action of *assumpsit* to recover the price of the same goods. *Rice v. King*, 7 J. R. 20.

314. In an action for a libel, the defendant pleaded *puis darrein continuance*, that he was a partner with C. in the printing and publishing of the newspaper which contained the libel, and that the plaintiff brought a separate action against C. for the same identical publication, and recovered judgment, which had been satisfied; held, to be a good plea. *Thomas v. Rumsey*, 6 J. R. 26.

315. Where, by virtue of a foreign attachment prosecuted according to the laws of another state, a debt due from the defendant

to the plaintiff, is attached by a creditor of the plaintiff, to whom the defendant is compelled to pay the debt, in an action brought against him in this state for the same debt, he may plead the recovery by the attaching creditor in bar. *Embree v. Hanna*, 5 J. R. 101.

316. So, the pendency of the proceedings under the attachment may be pleaded in abatement. *Ibid.* See 17 J. R. 284.

317. A recovery against one joint trespasser is not alone a bar to an action against another; there must at least have been an execution thereon. *Livingston v. Bishop*, 1 J. R. 290.

318. If the plaintiff, in a former action joined two trespasses in the same count, and the Court, on motion of the defendant, compelled him to elect for which trespass he would proceed, and that he should not go for both, and the jury found damages accordingly, it will not be a bar to a subsequent action, brought for the trespass which he was obliged to abandon. *Snider v. Croy*, 2 J. R. 227.

319. In trespass against two defendants, they severed in their pleas; to the plea of one defendant, the plaintiff demurred generally, and judgment was given against the demurrer; the other defendant pleaded *the [*213] judgment in favor of the first defendant, in bar, averring that the action against him was for the same trespass; held, that the demurrer to the plea of the first defendant did not estop the plaintiff from replying to the plea of the second defendant, going to trial, and recovering judgment. *Lanning v. Montgomery*, 2 J. R. 382.

320. The pendency of a suit in another state, or in a foreign Court, by the same plaintiff against the same defendant, for the same cause of action, is no stay or bar to a new suit brought here. *Bowne v. Joy*, 9 J. R. 221.

321. The exception, *rei judicatae*, applies only to final or definitive sentences abroad, upon the merits of the case. *Ibid.*

322. And the same rule applies to the pendency of a cause in an inferior Court in the same state. *Ibid.*

323. So, another action pending between the same parties, for the same cause, in the Circuit Court of the United States, of another district, is not pleadable in bar, nor in abatement. *Walsh v. Durkin*, 12 J. R. 99. *Aliter*, as to a foreign attachment in another state, by a third person; for there the attachment is a *lien*, and if the defendant is not allowed to plead it in abatement, he may be compelled to pay the money twice. See *ante*, III. 158. VII. 314, 115.

324. In an action of assumpsit against the maker of a promissory note, (not negotiable,) it is a good plea in bar, that a judgment was recovered in the Supreme Court of the state of Vermont, (where the note was made and the parties resided,) at the suit of the creditors of the plaintiff on a foreign attachment against the plaintiff, as an absconding debtor, to recover the amount of the same note of and against the credits and effects in the hands of the defendant, (the maker of the note,) as the trustee and debtor of the plaintiff. *Prescott v. Hull*, 17 J. R. 284. See *ante*, 314, 315.

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325. Where an action has been brought, and judgment given, but part of the plaintiff's demand omitted by mistake, if he afterwards bring another action to recover the demand so omitted, the former action is a good bar. *Platner v. Best*, 11 J. R. 530.

326. A plea of a former recovery and satisfaction, necessarily contains matter of fact and record, and may conclude to the country. *Thomas v. Rumsey*, 6 J. R. 26.

Plea of accord and satisfaction. See *tit.* ACCORD AND SATISFACTION.

— *tout temps prist.* See DOWER, V.

(d) *Want or failure of consideration.*

327. The want of consideration cannot be pleaded in avoidance of a deed. *Dorr v. Munsell*, 13 J. R. 430.

328. In an action of debt on a bond, the defendant cannot plead a failure of consideration, or that he was induced to give the bond by a fraudulent representation of the value of a thing, which, afterwards, turned out to be of no value, as where the consideration of a bond was the transfer of a patent right, to which the plaintiff was not entitled as the original inventor. *Ibid.*

* (e) *No award.* [*214]

329. In pleading an award in bar of an action, it is, in general, unnecessary to aver performance of the thing awarded. *Armstrong v. Masten*, 11 J. R. 189.

330. Under a plea of *no award*, the defendant may show that the arbitrators awarded on a matter not submitted to them. *Macomb v. Wulber*, 16 J. R. 227.

(f) *Nul tiel corporation.*

331. *Nul tiel corporation* is a good plea in bar, where the plaintiffs, as a corporation, sue by a particular name; and the plaintiffs must reply specially how they were made a corporation, where the act incorporating them required certain things to be done on their part before they could become a corporation. *Bank of Auburn v. Aikin*, 18 J. R. 137. But, in the same case, (19 J. R. 300.) *Spencer, Ch. J.*, who delivered the opinion of the Court, said, that though *anciently* such a plea was admissible, and there were many precedents of such a plea, yet it was opposed to the principles of good pleading in modern times, and ought not to be allowed, but the fact should be given in evidence under the general issue. *Ibid.*

VIII. *Replication.*

332. A plaintiff in his replication may introduce new matter to explain and fortify his declaration, without its being a departure. *Hallett v. Sidel*, 11 J. R. 56.

333. And where such new matter is introduced, he may conclude with a verification. *Ibid.*

334. The general replication, *de injuria sua propria*, is bad, when the defendant insists on a right; it is good only, when he pleads matter of excuse. *Lytle v. Lee*, 5 J. R. 112. S. P. *Plumb v. McCrea*, 12 J. R. 491.

335. So, in trespass, to a plea of *liberum tenementum*, a replication of *de injuria*, &c. is bad. *Hyatt v. Wood*, 4 J. R. 150.

336. So, in replevin, to an avowry. *Hopkins v. Hopkins*, 10 J. R. 369.

337. But it can only be taken advantage of on special demurrer. *Lytle v. Lee*, 5 J. R. 112. *S. P. Hopkins v. Hopkins*, 10 J. R. 369.

338. If the defence set up the matter of excuse, as contradistinguished from matter of justification, a replication *de injuria*, &c. puts the excuse in issue. *Hyatt v. Wood*, 4 J. R. 150.

339. To a plea of the statute of usury, the plaintiff may reply, that it was not corruptly agreed in manner and form, &c. without a traverse, and with a conclusion to the country. *Waterman v. Haskin*, 7 J. R. 283.

340. Although a traverse can be taken to a single point only, yet, as that point may consist of a number of facts, the [*215] traverse need not *be confined to a single fact, but may deny them all. *Strong v. Smith*, 3 C. R. 160.

341. So, in trespass, where the defendant pleads that a third person was seized in fee of the *locus in quo*, and demised to him for a year, the plaintiff may reply, traversing both the seisin and the demise. *Ibid.*

342. To a plea of a former recovery, the defendant replied, *protestando*, that in a former action brought by him against the defendant, he had joined two trespasses in the same count, and that the Court, on motion of the defendant, compelled him to elect for which he would proceed, and that he should not go for both, and the jury found damages accordingly; the replication is bad, being argumentative, instead of traversing and denying the former recovery, and as taking, by way of *protestando*, what should have formed the substance of the replication. *Snyder v. Croy*, 2 J. R. 227.

343. In an action of covenant, on an agreement to put up the frame of a house, and enclose the same on or before the 1st October; the defendant pleaded, that he did put up the frame, &c. on or before the first October, to wit, on the first June, and was ready and willing, and tendered and offered the plaintiff to enclose the same, &c.; but that the plaintiff did not furnish the necessary materials, &c., according to his agreement, &c. The plaintiff replied, that he did furnish the materials, &c., and did and performed all things on his part, &c.; (as before stated in his declaration;) yet the defendant, at the time and place mentioned in his plea, did not put up and raise the frame of the house, &c.; nor did he, &c. tender or offer to enclose, &c. On special demurrer, this replication was held to be bad, for traversing the time and place mentioned in the plea, which were immaterial, and introducing averments of performance before made in the declaration, thereby loading the replication with multifarious and unnecessary matter, and putting in issue several and distinct matters of fact. *Rogers v. Burk*, 10 J. R. 400.

344. A traverse, comprising the whole matter of the plea, may conclude to the country. *Snyder v. Croy*, 2 J. R. 428.

345. So, in trespass; plea of a former recovery

for the same trespass; replication, that the trespass mentioned in the plea, and the trespass alleged in the declaration, were different; without this, that the trespass mentioned in the plea, and that stated in the declaration, were one and the same, &c., and concluding to the country, is good. *Ibid.*

346. A replication stating no new matter, but pursuing the words of the declaration, must not conclude with a verification, but to the country. *Bindon v. Robinson*, 1 J. R. 516.

347. A replication denying the substance of the plea, may conclude to the country. *Snyder v. Croy*, 2 J. R. 428.

348. Where the defendant cannot take any new or other issue in his rejoinder, than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, the replication may conclude to the country. *Paict v. Sprague*, 2 J. R. 462.

349. In trespass *de bonis asportatis*, a replication of *de injuria*, &c. *to a plea stating that the goods were seized [*216] as forfeited to the United States, and were condemned in the District Court, is bad. *Ibid.*

350. In an action of *assumpsit* for goods sold, the defendant pleaded that one A. carried on business under the name of the plaintiff; that the plaintiff as agent of A. sold the goods, and, as such agent, assigned the debt of the defendant to a creditor of A., and then pleaded a set-off against A.; the plaintiff replied, that A. did not, by the plaintiff, sell the goods; held, that the replication tendered a material issue, and was good. *Caines v. Brisbane*, in error, 13 J. R. 9.

351. To a declaration in *assumpsit*, the defendant pleaded his discharge under an insolvent act; the plaintiff replied, that subsequently to the defendant's discharge, and before the commencement of the suit, the defendant assented to; ratified, renewed and confirmed the promises mentioned in the declaration; held, that the new promise was sufficiently laid, and that the replication was not a departure from the declaration. *Shippey v. Henderson*, 14 J. R. 178.

352. Where, in an action of trespass, the defendant under the act for the more easy pleading in certain suits, pleads that the supposed trespass was done by authority of a statute of this state, without expressing any other matter or circumstance contained in such statute, the plaintiff must reply *de injuria*, &c., and conclude to the country. A special replication, concluding with a verification, is bad. *Conly v. Lockwood*, 15 J. R. 188.

353. Where an obligation or covenant for the payment of money having been assigned, and notice thereof given to the obligor, or covenantor, an action is brought by the assignee in the name of the assignor, to which the defendant pleads a former recovery of satisfaction, the plaintiff may reply the assignment, with notice thereof to the defendant, and notice to him that the former action was not prosecuted by the authority, or for the benefit of the assignee. *Dawson v. Cole*, 16 J. R. 51.

354. A replication of *nul tiel record* to a plea of judgment recovered for the same cause of action in the *Circuit Court of the United States*, &c., must conclude to the country, and not within a verification. *Baldwin v. Hale*, 17 J. R. 272.

355. To an action on a promissory note, (not negotiable,) the defendant pleaded a former recovery for the same cause of action, in the Supreme Court in *Vermont*, (where the note was made, and the parties resided,) on a *foreign attachment*, &c. The plaintiff replied, that before the commencement of the proceedings on the foreign attachment in *V.*, the plaintiff assigned and transferred the note, &c. to A.; held, that the replication was good, the suit here being prosecuted for the benefit of the assignee, who was not before the Court in *V.*, nor a party to the proceedings there, and it was to be presumed that the Court in *V.* would have recognized the assignee, and protected his rights, had they known of the assignment; and, therefore, the proceedings there were *res inter alios acta*, and it was not drawing them into question, to say that the assignee here was not concluded by them. But such a replication ought to aver that the debt was assigned for a full and valuable consideration, and that the suit was prosecuting for *the [*217] benefit of the assignee, otherwise it is bad on demurrer. *Prescott v. Hull*, 17 J. R. 284.

356. Though a replication must not depart from any material allegation in the declaration, yet where the plea is evasive, the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, and thus meet and thwart the particular defence set up. *Troup v. Executors of Smith*, 20 J. R. 33.

357. To a declaration in *assumpsit* on a promissory note, the defendant pleaded, that before the note was given, the plaintiffs falsely and fraudulently represented themselves to the defendant, as owners of 400 acres of land, which they offered to sell to him for 2000 dollars; and the defendant, confiding in these representations, purchased the land at that price, and paid half of it and gave a bond and mortgage, and the note, on which the suit was brought for the residue; and averring that the plaintiffs were not the owners of the land, nor had any title to it, nor any authority to convey, &c. The plaintiffs replied, "that they did not, nor did either of them, at or before the making of the note, falsely and fraudulently represent themselves as owners of the land," concluding to the country; held, that the several matters alleged in the plea constituting one entire defence, and forming one connected proposition, the replication, as it denied the substantial and material allegation in the plea, to wit, the fraudulent representations of the plaintiffs, was good on demurrer, as none of the other allegations in the plea furnished any ground of defence. *Bradner v. Demick*, 20 J. R. 404.

358. If the plaintiff add the *similiter* to his replication, the defendant may demur to the replication without striking out the *similiter*. *Bank of Auburn v. Aikin*, 18 J. R. 137.

359. A general replication to a special plea need not be signed by counsel. *Pumpelly v. Crosby*, 8 J. R. 322.

Replication to a plea of misnomer. See *ante*, III.

IX. Rejoinder and surrejoinder.

360. In action of debt on a bond, conditioned that C., a clerk in a bank, should "well and faithfully perform the duties assigned to, and trusts reposed in him, as first teller," &c., the plaintiffs in their replication assigned breaches, that C., as first teller, intentionally and fraudulently deceived and defrauded the plaintiffs, by making false entries and statements in the books of the plaintiffs, of moneys received and paid by him, &c., by reason whereof, the plaintiffs lost, &c., and that C., knowingly and fraudulently, concealed and kept secret, deficiencies of sums of money, of which he was in arrears to the plaintiffs for moneys received, &c. The defendants rejoined, that the false entries, &c., if any, and arrearages, if any, took place and accrued by means of over payments made by C., by mistake, and not otherwise. On demurrer, the rejoinders were held bad, for not answering, the "breaches as to the [*218] fraudulent concealment, &c. and not taking issue on the points tendered in the replication. *Union Bank v. Clossey*, 11 J. R. 182.

361. In an action of *assumpsit*, for goods sold and delivered, the defendant pleaded that the goods were exported from the *United States*, during the war with *Great Britain*, into *Lower Canada*, and there sold and delivered to the defendant; the plaintiff replied, that they were exported from the *United States* before the commencement of the war. The defendant rejoined; that they were exported in violation of an act of Congress, laying an embargo and prohibiting exportation; held, that the rejoinder was a departure from the plea, and, therefore, bad. *Sterns v. Patterson*, 14 J. R. 132.

362. Where, in an action on an arbitration bond, the defendant pleads no award, and the plaintiff replies setting forth an award, a rejoinder, that the defendant, previous to making the award, had, by writing under his hand and seal, revoked the power of the arbitrators, is good; for it shows that the instrument purporting to be an award, is in fact no award, and it is not inconsistent with, but fortifies the plea, and is no departure from it. *Allen v. Watson*, 16 J. R. 205.

363. But where the rejoinder impeaches the award, it is a departure; for that is an admission of its existence, and, therefore, inconsistent with the plea of no award. *Ibid*.

364. It seems, that it is not necessary to state in the rejoinder, that notice of the revocation of the power of the arbitrators was given, as that is implied in the fact that the submission was revoked; but at all events, the objection cannot be taken on general demurrer. *Ibid*.

365. A *protestation*, in effect, admits the allegation protested against in the suit in which it is made. *Briggs v. Dorr*, 19 J. R. 95. For

what is traversable in pleading, and is not traversed by the adverse party, is admitted. *Ibid.*

366. To a declaration in debt on the penalty of a bond, executed to the plaintiff, as sheriff, conditioned that W. shall well and truly perform the office of deputy sheriff, and render a just and true account of all business that shall come to his hands, &c., though *non damnificatus* be not a good plea, yet after the pleading such a plea, the defendant cannot rejoin, confessing and avoiding the action, for that would be a departure, and the rejoinder, therefore, bad on demurrer. *Andrus v. Waring*, 20 J. R. 153.

367. A rejoinder, in answer to a breach assigned in the replication, of negligence in W. as a deputy, in the execution of process, &c., that he was removed by the plaintiff from his office of deputy, without alleging that such discharge was under seal, is bad. *Ibid.*

368. So, where the breach assigned in the replication was, that the deputy, on the arrest of a defendant on mesne process, took a bail bond, that no appearance was entered, or special bail filed, and the bail to the arrest was insolvent and wholly insufficient, whereby the plaintiff was obliged to pay, &c.; a rejoinder that the bail to the arrest had, at the time, sufficient property in the county to answer, and was good and responsible, is bad. *Ibid.*

369. And if, instead of demurring to such a rejoinder, the plaintiff *surrejoins*, that the bail taken was insolvent and insufficient, and through the negligence of the defendant, no special bail was filed, &c., taking issue thereon, this is not a departure, but the surrejoinder is good. *Ibid.*

370. Where, in such action, the breach assigned in the replication was, that after the bond was given, and while W. was deputy, a writ of *fi. fa.*, &c. was delivered to him, and by his negligence and default, in not returning it, &c., the plaintiff, as sheriff, was compelled to pay a large sum of money, &c., and the rejoinder alleged that, before the issuing the *fi. fa.*, W. was removed by the plaintiff from his office of deputy, and that the writ did not come to his hand, until after he was removed; and the plaintiff *surrejoined*, that the writ was delivered to W. as deputy, while he continued to exercise the office of deputy sheriff, and was a deputy of the plaintiff, tendering issue thereon; *held*, on special demurrer, that the surrejoinder was good. *Ibid.*

371. Where, to a similar breach assigned in the replication, the defendant rejoined, that the writ was delivered to W., previous to the execution of the bond to the plaintiff, and while W. was acting as a deputy by virtue of a previous appointment; and the plaintiff *surrejoined*, that the writ was delivered to W., while he was acting as deputy sheriff under the plaintiff; *held*, on special demurrer, that the surrejoinder was bad, being evasive, and not answering the material allegations of the rejoinder, and tendering issue on an immaterial fact. *Ibid.*

X. Demurrer.

372. A formal objection, not noticed in the

special demurrer, will not be regarded by the Court. *Snyder v. Croy*, 2 J. R. 428.

373. A demurrer for duplicity must point out wherein the duplicity consists. *Currie v. Henry*, 2 J. R. 433.

374. Where the demurrer is not frivolous, the Court will allow it to be withdrawn, on payment of costs, after they have given their opinion against it, if application be made the same term, before the rule for judgment is entered. *Andrews v. Beecker*, 1 J. C. 411. *Seaman v. Haskins*, 2 J. C. 284. *Hildreth v. Harvey*, 3 J. C. 300. *Furman v. Haskin*, 2 C. R. 369. *Currie v. Henry*, 3 J. R. 140.

375. The Court will not allow a frivolous demurrer to be withdrawn on an affidavit of merits. *Griswold v. Haskins*, 1 J. C. 135. *S. C. C. C. 75.*

376. Where there is an issue in fact, as well as a joinder in demurrer, the plaintiff may elect to carry the cause down to trial, in order to have the damages assessed, either before or after the demurrer is determined. *Munro v. Alaire*, 2 C. R. 320.

377. Where there is a demurrer to the whole declaration, but one count is good, the plaintiff must have judgment. *Whitney v. Crosby*, 3 C. R. 89. *S. P. Mumford v. Fitzhugh*, 18 J. R. 457. *S. P. Gidney v. Blake*, 11 J. R. 54. *Martin v. Williams*, 13 J. R. 264. *Monell v. Colden*, 13 J. R. 395.

*378. If the declaration contains two counts, one good and one bad, and the defendant pleads a plea which goes to the whole cause of action, and to which the plaintiff demurs, the latter is, notwithstanding his having committed the first fault in pleading, entitled to judgment on the count which is good. *Ward v. Sackrider*, 3 C. R. 263.

379. In covenant, where some of the breaches are well assigned, and some not, on a demurrer to the whole declaration, the plaintiff shall have judgment for the breaches which are well assigned. *Adams v. Willoughby*, 6 J. R. 65. *S. P. Martin v. Williams*, 13 J. R. 264.

380. So, where the plaintiff assigns breaches in his replication, some of which are well assigned, and some not, on a general demurrer, judgment will be given for the plaintiff. *Martin v. Williams*, 13 J. R. 264.

381. Where a plea contains distinct matters divisible in their nature, as separate and distinct demands, the plaintiff cannot demur generally to the whole, because a part is bad; but should demur as to the matters badly pleaded, and traverse the residue. *Douglass v. Saterlee*, 11 J. R. 16.

382. So, where an executor or administrator defendant pleads outstanding judgments, some of which are well pleaded, and others badly pleaded, the plaintiff should not demur to the whole plea, but only to such of the judgments as are not well pleaded, and should traverse the residue of the plea. *Ibid.*

383. Where a party demurs to a defective pleading, if the previous pleadings, to which the pleading demurred to is an answer, be also defective, judgment will be given against the demurrer. *Gelston v. Burr*, 11 J. R. 482.

384. Where the day of making a contract is immaterial, it is not ground of demurrer, that the contract is illegal by reason of its having been made on the day laid in the declaration. *Amory v. M'Gregor*, 12 J. R. 287.

385. If there is a demurrer to the whole declaration, and one of the counts is bad, the count cannot be referred to for the purpose of helping out and aiding another count. *Nelson v. Sloan*, 13 J. R. 483.

386. Where, on a demurrer to a subsequent pleading, a party goes back to take advantage of a defect in a previous pleading, he can object only to such defects as are grounds of general demurrer. Per *Thompson*, Ch. J. *Comly v. Lockwood*, 15 J. R. 188—191.

387. A demurrer is a plea; and the *relator*, or party prosecuting a writ of *mandamus*, may demur to the return of the writ. *People*, ex *relat. Shaul*, v. *Champion*, 16 J. R. 61.

388. A misjoinder of counts is a fatal defect on demurrer, arrest of judgment, or error. *Cooper v. Bissell*, 16 J. R. 146.

389. Declaration in *case* against five defendants, and one of them not brought into Court, the declaration was *held* bad on special demurrer, though it would be good after verdict. *Mumford v. Fitzhugh*, 18 J. R. 457.

390. If the plaintiff adds the *similiter* to his replication, the defendant may demur without striking it out. *Bank of Auburn v. Aikin*, 18 J. R. 137.

391. Where the general issue is pleaded, and also, a special plea, to *which there [*221] is a replication, and a demurrer to the replication, and contingent damages are assessed at the trial of the general issue, and the demurrer is afterwards argued, the Court will not allow the defendant to amend his special plea; *aliter*, if the demurrer had been argued before the trial of the issue. *Hallett v. Holmes*, 18 J. R. 28.

392. Where a sheriff was sued for taking insufficient pledges in an action of *replevin*, and for taking no pledges, and there was a demurrer to one of the counts in the declaration and issue joined on the other counts; and a judgment was given for the defendant on the demurrer, and a verdict found for him on the issue, on which judgment was rendered; *held*, that the defendant was not entitled to a writ of inquiry of damages, as he had sustained no damages in defence of his suit, except the costs. *Gibbs v. Bull*, 20 J. R. 212.

Amendment after demurrer. See AMENDMENT, IV. 36—40.

XI. Repleader.

393. If an immaterial issue has been taken to the country, after verdict, it may be helped by the statute of jeofails; but on an immaterial issue, a repleader must be awarded. *Stafford v. The Corporation of Albany*, 6 J. R. 1.

394. In *assumpsit* against the corporation of Albany, to recover the amount assessed by a jury, for grounds taken to widen a street, pursuant to the act of the 4th of April, 1801; (24 *sess. c.* 153.) the declaration set forth the proceedings of the Mayor's Court, and the judg-

ment of the Court, confirming the assessment; the defendants pleaded *nul tiel record*, on which issue was joined; and, after a trial by record, *held*, that the plaintiff not having counted on the proceedings as on a record, but as facts which gave him a right to the sum assessed against the corporation, the issue was immaterial, and a repleader should be awarded. *Ibid*.

XII. Verdict.

395. A jury must pass upon all the matters submitted, and cannot find a verdict on one part of the plaintiff's demand, without deciding on the other. *Brockway v. Kinney*, 2 J. R. 210.

396. So, the jury must pass upon all the issues joined in the cause; and a judgment entered on a verdict on one issue, without regarding the others, is erroneous. *Van Benthuysen v. De Witt*, 4 J. R. 213.

397. A verdict for one *mill* is a nullity, on which no judgment can be entered. *Brown v. Smith*, 3 C. R. 81.

398. The jury need not find costs, to entitle the plaintiff to them. *Ibid*.

399. On a special verdict, the Court can intend nothing but what is found by the jury. *Jenks v. Hallett*, 1 C. R. 60.

400. If, on the trial of an action on a policy of insurance, no objection was made to the want of preliminary proofs, but the parties proceeded on the merits, it is proper to state in the special verdict, *that the usual proofs were made to the insurer. [*222] *Sleight v. Hartshorne*, 1 J. R. 149.

401. Where a fact was not controverted before the jury, the Court will not order a *renire de novo*, to ascertain it, unless the opposite party will consent to amend the special verdict by inserting it; it appearing to have been omitted by the counsel at the time, from a belief that it might be inserted when the special verdict was drawn up in form. *Watson v. Delafield*, 1 J. R. 150.

402. When both a case and a special verdict have been made, the party must elect to proceed on one or the other only. *Sleight v. Rhinlander*, 1 J. R. 192.

403. Where the general issue and special pleas have been pleaded, and a verdict is found on the general issue only, for the plaintiff, without regarding the other issues, if it is apparent that the verdict on the general issue could not have been found, if the special pleas had been supported, the omission is merely matter of form, and is not a ground for impeaching the verdict. *Thompson v. Button*, 14 J. R. 84.

404. So, in *replevin*, the defendant pleaded, 1. *non cepit*; 2. *an assuery*, averring the goods taken to be his property, to which the plaintiff replied, and took issue, &c. The jury having found a verdict for the plaintiff generally, on the issue of *non cepit*, without saying any thing as to the other issue, the Court gave judgment according to the verdict. *Ibid*.

405. In actions for *torts* against several defendants, although all join in the plea of not guilty; yet one of them may be found guilty, and the others not guilty. *Van Deusen v. Van Slyck*, 15 J. R. 223.

406. If the jury, in an action for an escape, find that the prisoner returned voluntarily, before suit brought, but that the defendant had not filed an affidavit with his plea, that the escape was without his knowledge or consent, (See Stat. sess. 36. ch. 67. s. 23.) the finding, as to the want of an affidavit, must be rejected as surplusage, it being a matter beyond the issue tried, and belonging exclusively to the Court. *Richmond v. Talmadge*, 16 J. R. 307.

407. Where a special verdict stated that A. and others, being some of the proprietors of a patent, in 1763, released part of the patent to certain Indians, in trust, in which release R., another of the patentees, refused to join, and that in 1764, A. and the other proprietors were seised of the patent, and made partition of the whole, including the allotment of the Indians; held, that the jury having found the fact of seisin, without explaining how the proprietors became resealed in 1764, it was to be presumed that they were lawfully resealed, and that any intendment might be made that the fact might require. *Jackson, ex dem. Klock, v. Rightmyre*, 16 J. R. 314.

408. Where, in an action of assumpsit on a bill of lading, for the non-delivery of the goods, the jury found, among other things, that the goods were lost *without any fault or negligence of the defendants, or their agents*; held, that the plaintiff could not recover in this form of action, the jury having negatived the *gravamen* of the action, to wit, the *negligence* of the defendants; and that the Court would not look to the other facts found by the jury [*223] in order to support the action, *as that would be to allow a party to declare for one cause of action, and recover for another. *Palmer v. Lorillard*, in error, 16 J. R. 348.

409. Where the defendant pleads his discharge under the insolvent act, passed subsequent to the making of the contract on which the suit is brought, and which, therefore, would have been bad, on demurrer, and the plaintiff, instead of demurring, replies fraud, and goes to trial on the issue, as to the fact of fraud, or not, and a verdict is found against him: yet as the plea of such a discharge contains no ground of defence against the action, the Court, *non obstante veredicto*, may give judgment for the plaintiff. *Burdick v. Green*, 18 J. R. 14.

Amending verdict. See AMENDMENT, VII.
And see JURY, II. III.

XIII. Judgment.

410. Where three issues were joined, and one of them was on an immaterial point, and the jury found a special verdict, the Court gave judgment for the plaintiff, the merits of the cause being with him. *Havens v. Bush*, 2 J. R. 387.

411. The clause of *in toto se attingunt*, is a mere clerical addition, and if the sum mentioned in it vary from that in the judgment, it is immaterial. *Jackson, ex dem. Martin, v. Pratt*, 10 J. R. 381.

And see AMENDMENT, VIII. JUDGMENT.
PRACTICE.

XIV. Pleadings in assumpsit; (a) Declaration; (b) Plea.

(a) Declaration.

412. The declaration must show a consideration for the defendant's promise. *Bailey v. Freeman*, 4 J. R. 280.

413. So, in an action brought against A., on his guaranty of the performance by B., of his agreement with C.; the declaration ought to state a consideration for the undertaking of A. *Ibid.*

414. Mutual promises must be stated to have been made at the same time: "In consideration that the plaintiff had, at the defendant's request, promised the defendant, afterwards, to wit, on the same day, promised," &c., is bad. *Livingston v. Rogers*, 1 C. R. 583.

415. Several of the common counts on different contracts may be included in one count, and the plaintiff is not bound to prove all the causes of action, in order to entitle him to recover; but it is enough if he prove any one of the causes of action, and he will recover *pro tanto*. *Bailey v. Freeman*, 4 J. R. 280. *S. P. Nelson v. Swan*, 13 J. R. 483.

416. And the count may also include a count for goods sold and delivered, in the like general form. *Nelson v. Swan*, 13 J. R. 483.

*417. But a count generally for *certain lands sold and conveyed by* [*224] the plaintiff to the defendant, is bad, and cannot be joined with the common counts. *Ibid.*

418. Where the plaintiff declares on a special agreement, seeking to recover thereon, but fails altogether, he may recover on a general count, if the cause be such, that supposing there had been no special contract, he might still have recovered. *Truttle v. Mayo*, 7 J. R. 132.

419. Where a plaintiff declares on a special agreement, and also on the common counts, he may, at the trial, waive the special agreement, and proceed on the common counts; and where the evidence is sufficient to support the general count, supposing he had not declared on a special agreement, the plaintiff is entitled to recover on such general count, without any attempt to prove the agreement. *Linningdale v. Livingston*, 10 J. R. 36.

420. A special agreement for the exchange of notes, with a warranty of the note exchanged, cannot be given in evidence in support of the money counts. *Richardson v. Smith*, 8 J. R. 439.

421. It is sufficient to state a promissory note in the declaration, according to its terms. *Herrick v. Bennett*, 8 J. R. 374.

422. If the endorser of a note die before it becomes due, the promise to pay must be alleged to have been made by the defendant; if by the testator, it will be fatal. *Stewart v. Eden*, 2 C. R. 121.

423. Where a promissory note, payable in chattels, is declared upon as under the statute, after verdict, the reference to the statute may be rejected as surplusage. *Thomas v. Roosa*, 7 J. R. 461.

424. The words, *for value received*, in setting

forth a promissory note in a declaration, are words of description, and not an averment. *Saxton v. Johnson*, 10 J. R. 418.

425. A declaration on a promise by parol, may be supported by a promise in writing, if it comports with the promise stated. *Nelson v. Dubois*, 13 J. R. 175.

(b) *Plea.*

426. The plaintiff must prove a promise from all the parties alleged in the declaration to have made it; and the joinder of improper parties may be taken advantage of under the general issue, without pleading it in abatement. *Tom v. Goodrich*, 2 J. R. 213.

427. Under the plea of *non assumpsit*, infancy may be shown. *Wailing v. Toll*, 9 J. R. 141.

428. So, payment may be given in evidence; but if it is intended as matter of set-off, it must be pleaded, or notice given with the plea of the general issue. *Drake v. Drake*, 11 J. R. 531.

429. In an action of *assumpsit* by an attorney for his fees, the defendant cannot give the negligence of the plaintiff in conducting the suit, (admitting that *that* would be a good defence,) in evidence under the general issue, but must plead or give notice of it. *Rumyan v. Nichols*, 11 J. R. 547.

*430. Any matter which shows [*225] that the plaintiff never had a cause of action, may be given in evidence under *non-assumpsit*; and most matters in discharge of the action, which show that at the commencement of the suit there was no subsisting cause of action, may be taken advantage of under this issue. *Will v. Ogden*, 13 J. R. 56.

431. Where *assumpsit* is brought for the non-performance of a contract, the defendant may show, under the general issue, that he offered to perform his part of the contract, but was prevented by the act of the plaintiff. *Ibid.*

432. In *assumpsit* against A. and B. on their joint note payable to C., on demand; A. pleaded that he signed the note as *surety* for B., and requested C. to proceed immediately to collect the money of B., who was then solvent; but that C. neglected to do so, until B. became insolvent and absconded, whereby the money as against B. was lost; *held*, on demurrer, that this was a good plea in bar of the plaintiff's action against A. *Pain v. Packard*, 13 J. R. 174.

433. In *assumpsit* on a promissory note given for the price of a chattel sold, the defendant may, under the general issue, show *deceit* in the sale. *Sill v. Rood*, 15 J. R. 230.

434. Where, in *assumpsit*, the declaration sets forth an agreement to answer for the debt, default or miscarriage of another, the defendant may plead the statute of frauds specially in bar. *Myers v. Morse*, 15 J. R. 425.

XV. *Pleadings in covenant.*

435. In declaring for a breach of the covenant for quiet enjoyment, &c., it must be al-

leged that the plaintiff was evicted by one having a lawful title, and by process of law. *Greenby v. Wilcocks*, 2 J. R. 1.

436. The plaintiff must show an entry and expulsion from, or some actual disturbance in the possession. *Whitbeck v. Cook*, 15 J. R. 483.

437. In covenant for the non-payment of the consideration for a lot of land conveyed by the plaintiff to the defendant, plea that one A. claimed title to the land is bad, without averring that it was a lawful claim, and that A.'s title existed before or at the time of the deed to the defendant; but he need not set forth the particulars of A.'s title. *Folliard v. Wallace*, 2 J. R. 395.

438. A breach of the covenant of warranty is bad, if it does not state an eviction. *Sedgwick v. Hollenback*, 7 J. R. 376.

439. A breach of the covenant of seisin, is well assigned in the words of the covenant. *Ibid.*

440. In an action for a breach of the covenant for quiet enjoyment, the defendant pleads *non est factum*, with notice, denying the eviction; the defendant is bound to prove that there was no eviction, as the pleadings merely put the deed in issue. *Kane v. Sanger*, 14 J. R. 89.

441. In an action for the breach of a covenant of seisin in a deed, the breach was assigned, negating the words of the covenant; the defendants pleaded that they were seised, &c., pursuing the exact words of the covenant; and the defendant replied merely negating the words of the covenant, and reiterating the breach assigned in the declaration; *held*, that both the replication and plea were good, and that the breach was well assigned in the declaration. *Abbott v. Allen*, 14 J. R. 248.

442. The defendants are not bound in their plea, to set forth the particulars of their title; and the plaintiff was not bound to set forth any particular outstanding title, he being presumed to be ignorant of the real state of the title, and the grantor retaining the evidence of it. *Ibid.*

443. In an action for the breach of the covenant of seisin, the defendant pleaded that the plaintiff became seised of the premises, and might have held the same without molestation, but that he did, by deed, defeat and bar his said estate, &c. A replication to this plea, denying that the plaintiff did defeat and bar his estate, without confessing or traversing that the plaintiff was previously seised, is bad. *Gelston v. Burr*, 11 J. R. 482.

444. But as the plea did not show the nature of the instrument whereby the plaintiff defeated his estate, and the parties to it, (although he was not bound to give over of it,) the plea was held bad. *Ibid.*

445. Action for a breach of the covenant of seisin; the defendant had sold the land to A., who, to secure the consideration money, mortgaged it to the defendant, and the defendant afterwards sold or conveyed the same land to the plaintiff; the plaintiff assigned the seisin of A. as a breach of the covenant; the

defendant pleaded that the mortgage from A. to him had become forfeited, whereupon he entered and became seised of the land, and being so seised, conveyed to the plaintiff; *held*, that the plea was bad, in not stating that A.'s equity of redemption had been barred. *Ibid*.

446. The defendant to an action of covenant pleaded, that the plaintiff himself and others were associated as co-partners, under a certain firm, and that the defendant, with B. and C., were appointed agents and directors for the company, and that he executed the agreement in his capacity of agent, or director, and not otherwise, without averring or setting forth his authority; *held*, that the plea was bad on demurrer. *White v. Skinner*, 13 J. R. 307.

447. Where a person seals a deed or covenant in behalf of others, he is bound to aver or set forth and prove the authority under which he acted. It is not enough to crave *oyer* of and set forth the instrument executed by him in his plea. *Ibid*.

448. Where the plaintiff, in an action of covenant, assigns a particular breach, a general plea of performance, pursuing the words of the covenant, is bad, on demurrer. *Bradley v. Osterhout*, 13 J. R. 404.

449. So, where the covenant was to convey a farm, and the plaintiff assigned for breach, that before executing the conveyance, the defendant removed from the premises a cider mill which was annexed to the freehold, the defendant must answer particularly the breach assigned. *Ibid*.

450. Where, in the declaration, the covenant is set forth in *hæc verba*, concluding with "sealed and delivered," &c., and [*227] the "names of the covenanters, with the letters (L. S.), but it is no where else alleged that it was sealed, the declaration is bad, on a general demurrer. *Maccomb v. Thompson*, 14 J. R. 207. *S. P. Van Santwood v. Sandford*, 12 J. R. 197.

451. In a declaration for a breach of a covenant in a deed, it is sufficient to state, that the defendant conveyed to the plaintiff certain land or premises in the said deed particularly mentioned and specified, without any further description. *Dunham v. Pratt*, 14 J. R. 372.

452. Where the breach is assigned generally in the declaration, to which the defendant pleads performance, the plaintiff must, when the subject of the breach is within his own knowledge, and is *multifarious*, specify it in the replication. Per *Platt, J.* *Abbott v. Allen*, 14 J. R. 248.

453. In a declaration on an agreement, it is necessary to set forth such covenants, or parts of the agreement, as relate to the breaches assigned. *Henry v. Cleland*, 14 J. R. 400.

454. If a material part of the agreement has been omitted to be stated in the declaration, the defendant cannot take advantage of the omission as a variance, under the plea of *non est factum*, but must crave *oyer* and demur. *Ibid*.

455. Where, by articles of agreement, it

was submitted to arbitrators to determine the sum which the defendant should pay the plaintiff for certain land, the title to which the defendant acknowledged to be in the plaintiff, and which the defendant occupied or claimed, and such amount, on being ascertained, to be paid or secured to be paid by the defendant to the plaintiff, and the land to be conveyed to the defendant, and he should pay or secure to be paid to the plaintiff, a certain sum, &c.; in an action of covenant for a breach of the agreement, in not paying or securing to be paid the sum awarded, a plea that the defendant did not occupy the land which was the subject of the award, is bad, not being co-extensive with the articles of agreement, on which the plaintiff declared, and which applied to the land which the defendant claimed as well as occupied. *Maccomb v. Thompson*, 14 J. R. 207.

456. An averment in the declaration that a deed was given, implies that it was accepted by the grantee. *Gazley v. Price*, 16 J. R. 267.

457. Where, on a covenant to give a good and sufficient deed of land, an action is brought to recover the consideration money, and the plaintiff avers that he gave the defendant a good and sufficient deed, a plea that the plaintiff was not seised of the land, and had no power to sell it, is bad. *Ibid*.

XVI. *Pleadings in debt*; (a) Declaration; (b) Plea; (c) Replication; (d) Assignment of breaches on a bond conditioned for the performance of covenants, and proceedings and judgment thereon.

(a) Declaration.

458. If, in a declaration on a bond conditioned to pay several sums of money, at several days, the plaintiff assign two several breaches for the non-payment of two several sums; it will be bad on special demurrer, for duplicity. *Tuft v. Brauster*, 9 J. R. 394.

459. A breach of the condition of a bond "to free the land from all legal encumbrances, either by deed or mortgage, now in existence, and binding on the premises by the 20th. of February," is not well assigned by following and negating the words of the condition, as such assignment does not necessarily amount to a breach, and the plaintiff ought to have shown some existing encumbrance on the 20th of February, or at the commencement of the suit. *Julband v. Burgott*, 11 J. R. 6.

460. A declaration on a bond conditioned for the performance of covenants, commencing in debt, after setting forth the condition, and assigning breaches, and concluding in covenant, and demanding damages, is good, if seems, on special demurrer. *Gale v. O'Brien*, 13 J. R. 189. It is certainly good on general demurrer. *Ibid*. *S. P. S. C.* 12 J. R. 216.

461. It is not necessary for the plaintiff, in declaring in debt on a recognizance of bail, to allege that a *f. fa.* had been issued against the principal previous to the return of the *ca. sa.* *Gillespie v. White*, 16 J. R. 117.

(b) *Plea.*

462. *Nil debet* is not a good plea to an action of debt on a recognizance, nor to any action founded on a record or specialty. *Bullis v. Giddens*, 8 J. R. 82.

463. But where the record or specialty is merely inducement to the action, which is grounded on matter of fact, as in debt for rent, for an escape, or on a *devastavit*, there *nil debet* may be pleaded. *Ibid.* S. P. *Minton v. Woodworth*, 11 J. R. 474.

464. In debt for an escape from the gaol liberties, *nil debet* is a good plea. *Minton v. Woodworth*, 11 J. R. 474.

465. *Nul tiel record* may be pleaded to an action on a judgment given in another state. *Andrews v. Montgomery*, 19 J. R. 162. (See ante, tit. DEBT, II. 9.) Contra, *Post v. Neafie*, note, 2 J. C. 257. *Rush v. Cobbett*, 2 J. C. 256. *Hickcock v. Aicken*, 1 C. R. 460. And see 3 C. R. 22. [7 *Cranck*, 481.]

466. Under the plea of *nul tiel record*, the defendant cannot give notice of special matter to be offered in evidence at the trial. *Raymond v. Smith*, 13 J. R. 329.

467. Under the plea of *non est factum*, the defendant may give in evidence fraud in the manner of obtaining the instrument, or so far as relates to the execution of the instrument on which the plaintiff declares. *Van Valkenburgh v. Rusk*, 12 J. R. 337. *Dow v. Minisell*, 13 J. R. 430.

468. So *coverture* may be given in evidence, under this plea. Per *Spencer, J.* *Ibid.*

469. But *infancy* cannot be given in evidence under it, but must be pleaded. Per *Spencer, J.* *Ibid.*

470. Where judgment has been obtained against joint debtors, and an action is brought on that judgment, the defendants, [*229] who are not brought into Court, in the original action, cannot plead *nul tiel record*; for it is regular to enter judgment as well against those who were not taken as against those who were. *Dando v. Doll*, 2 J. R. 87.

471. In debt on a bond for the gaol liberties, *non damnificatus* is not a good plea. *Woods v. Rowan*, 5 J. R. 42.

472. In an action of debt on a bond to indemnify, *non damnificatus* is a good plea; but not to a bond conditioned to pay off and discharge another bond. *Douglas v. Clark*, 14 J. R. 177.

473. In debt on recognizance of bail, a plea that the bail piece was acknowledged after judgment had been obtained in the original action, and was therefore void, is bad; for a record cannot, in pleading, be impeached or affected by any supposed defect or illegality in the transaction on which it is founded; nor can there be any allegation against the validity of a record. *Green v. Orington*, 16 J. R. 55.

474. In debt on a judgment or recognizance, the defendant can plead no matter inconsistent with the record. *Ibid.*

475. Whether bail, in an action or the recognizance, can plead that the *ca. sa.* against the principal did not lie four days in the

sheriff's office? *Gillespie v. White*, 16 J. R. 117.

476. Where a *ca. sa.* is issued after a year and day, without a *scire facias* to revive the judgment, the bail cannot take advantage of the objection. *Ibid.*

477. Where in an action of debt for rent reserved, payable in book accounts, warranted to be good for collection and due in cash, the defendant pleaded that he was at the premises during three hours before sunset, and at the setting of the sun on the day of payment, ready to pay and offering to pay the rent, but neither the plaintiff, nor any person in his behalf, was there ready to receive it, and concluding by averring a readiness to pay, and bringing the book accounts into Court; held, that the plea was sufficient in point of form, though it seems unnecessary to allege the bringing the book accounts into Court; and that it was proper to conclude with a prayer of judgment generally, and not of judgment whether the plaintiff ought to have or maintain the action to recover further damages than those admitted. *Walter v. Dewey*, 16 J. R. 222.

478. In debt on a bond conditioned to pay a certain sum of money on a certain day, the defendant pleaded that he gave the bond to the plaintiff merely as collateral security for the performance of a contract or agreement between the parties; held, that the plea was bad, for where the condition of the bond is for the payment of money at a fixed time, no evidence is admissible to vary or contradict it. *Wells v. Baldwin*, 18 J. R. 45.

479. But if the bond had been single, without a condition, and the plaintiff had executed a separate instrument as a *defessance*, such *defessance* might have been pleaded to an action on the bond. *Ibid.*

480. A covenant by the obligee of a bond, not to sue the obligor within a certain time, cannot be pleaded in bar to an action on the bond, brought before the expiration of the time, for it is not a release, but a covenant merely, for the breach of which the obligee has his action. *Chandler v. Herrick*, 19 J. R. 129.

481. Where the parties to a bond payable by instalments, after several instalments became due, entered into an agreement by which the obligor was to [*230] deliver to the obligee all the hops the obligor should raise on a certain farm, during five years, and the obligee agreed to pay a certain price, and endorse two thirds of the value of the hops, in each year, on the bond, until the whole was paid; held, that admitting that this agreement enlarged the term of payment mentioned in the condition, which was doubtful; yet it could not be pleaded in bar to an action of debt brought on the bond, any time afterwards, or within the five years. *Ibid.*

482. Where several defendants have joined in pleas in bar, one of them cannot afterwards sever, and put in a plea going to his personal discharge from the debt. *Andrew v. Waring*, 20 J. R. 153.

483. A discharge under the insolvent act of a defendant who had executed a bond as a

surety, for a deputy sheriff, is not a good plea in bar to an action of debt on the bond; as the damages sustained in consequence of the breach of the condition of the bond were not ascertained. *Ibid.*

484. In debt on bond, the failure, or want of consideration, cannot be pleaded. *Vrooman v. Phelps*, 2 J. R. 177. *S. P. Dorlan, v. Sammis, id.* 179. n.

485. The breach of a written warranty, as to the quality of goods sold, cannot be pleaded in discharge of a bond given for the consideration. *Vrooman v. Phelps*, 2 J. R. 177.

486. Much less, parol representations made antecedent to the contract, though false and fraudulent. *Ibid.*

487. Under a plea of no award, a demand and refusal of the award by the arbitrators cannot be given in evidence, but it must be specially pleaded. *Perkins v. Wing*, 10 J. R. 143.

(c) Replication.

488. In debt on a bond, to a release pleaded, the plaintiff may reply an assignment to A. B. prior to the release, and of which the defendant had notice. *Andrews v. Beecker*, 1 J. C. 411.

489. So, to a plea of payment, the plaintiff may reply, that before the time at which the payment is alleged to have been made, the plaintiff assigned to A. B., of which the defendant had notice. *Littlefield v. Storey*, 3 J. R. 425.

490. In debt on an arbitration bond, the defendant pleaded no award; replication, that the defendant revoked the submission without stating that the revocation was under seal, is bad. *Van Antwerp v. Stewart*, 8 J. R. 125.

491. The replication should aver a breach of the bond, and that no award was made by reason of a revocation; or that an award was made, and that the defendant refused to abide by it. *Ibid.*

492. Where an action of debt is brought on an arbitration bond, the plaintiff must, in his replication, set out the whole award, though it is not necessary in that case to set it out in *hæc verba*, but such parts as are void or immaterial may be omitted. *Diblee v. Best*, 11 J. R. 103.

493. Where, in an action of debt against devisees, the defendants pleaded *riens per descent*, and the plaintiff replied that [*231] they had assets by descent before the exhibiting of the bill, he may conclude with a verification. *Labagh v. Cantine*, 13 J. R. 272.

(d) Assignment of breaches on a bond conditioned for the performance of covenants, and proceedings and judgment thereon.

494. The usual course of pleading on a bond, conditioned for the performance of covenants, is, for the plaintiff to declare in debt for the penalty; the defendant to crave oyer, and plead a general performance; the plaintiff to reply, and set forth particular breaches; and the defendant to rejoin to those breaches and take issue thereon. *Per Kent, Ch. J. Post-*

master General of the United States v. Cochran, 2 J. R. 413.

495. It is compulsory on the plaintiff, in cases under the statute, to assign breaches. *Munro v. Alaire*, 2 C. R. 320. *S. P. Van Benthuyssen v. De Witt*, 4 J. R. 213. *S. P. Hodges v. Suffelt*, 2 J. C. 406.

496. The plaintiff may assign breaches in his declaration. *Postmaster-General of the United States v. Cochran*, 2 J. R. 413.

497. In debt on bond, it is not necessary to assign breaches in the declaration, but the plaintiff may leave the assignment to be made, afterwards, in consequence of the plea. *Munro v. Alaire*, 2 C. R. 320.

498. The plaintiff may assign double breaches. *Ibid.* *S. P. Postmaster General of the United States v. Cochran*, 2 J. R. 413.

499. It is not necessary, it seems, to refer to the statute; but if it were necessary, the omission would only be bad on special demurrer. *Munro v. Alaire*, 2 C. R. 320.

500. A breach assigned, generally, by negating the words of the condition or covenant, is sufficient. *Hughes v. Smith*, 5 J. R. 168. *S. P. Smith v. Jansen*, 8 J. R. 111.

501. That the defendant "had collected moneys, as under sheriff, to the amount of 1,000 dollars, which he had refused to account for, and pay," is a sufficient assignment of a breach of the condition of an under sheriff's bond. *Hughes v. Smith*, 5 J. R. 168.

502. So, "that he had embezzled 1,000 dollars, received by him, as under sheriff, and belonging to the plaintiff, which he had refused to account for." *Ibid.*

503. So, that the plaintiff has been obliged to pay the amount of 1,000 dollars, in consequence of the negligence and acts of the defendant in his office," is good, at least on general demurrer. *Ibid.*

504. Where the breaches are specifically assigned in the declaration, a general plea of performance (on which no issue can be taken) is insufficient; but the defendant should answer each breach, by showing when, how, and where he performed the covenant on which it is assigned. *Postmaster General of the United States v. Cochran*, 2 J. R. 413.

505. When breaches are assigned, the jury must assess damages for such breaches as the plaintiff shall prove to have been broken; otherwise, the verdict is erroneous, and a *verdict de novo* will be awarded. *Van Benthuyssen v. De Witt*, 4 J. R. 213.

*506. The entry of the suggestion [*232] of breaches on the record, may be made before the formal entry of judgment, in cases of demurrer, or by confession, or *nil dicit*. *Smith v. Jansen*, 8 J. R. 111.

507. In debt on a bond, where there is an issue of fact, and a demurrer, the plaintiff, before the issue is tried, ought to suggest breaches, and have the damages on the demurrer assessed by the same jury who tried the issue of fact; and not assign the breaches after a verdict, and issue a writ of inquiry of damages. *Tisbury v. Miller*, 19 J. R. 311.

508. The declaration having been adjudged sufficient, on demurrer, the entry on the record

was, that the judgment on the demurrer should be stayed, until the truth of the breach to be suggested should be ascertained, and the damages assessed; this is sufficient within the statute, which is to receive a liberal and beneficial construction. *Smith v. Jansen*, 8 J. R. 111.

509. The judgment must be for the penalty, which is the debt and the costs; and if the plaintiff add, in his entry for judgment, the damages assessed by the jury, it will be erroneous as to the damages, but the judgment will stand good as to the residue. *Ibid.*

510. If, in debt on a bond, conditioned for the performance of covenants, the plaintiff replies generally, without assigning breaches, and the jury find a verdict for him for six cents, he cannot issue execution for the penalty of the bond. *Cowerty v. Nichols*, 4 J. R. 189.

511. The plaintiff, after having his damages assessed, may enter judgment for the penalty, *pro forma*, and full costs; and if the damages are assessed at six cents, he will be entitled to nominal damages for the detention of his debt, and may issue execution for the damages and costs. *Hodges v. Suffelt*, 2 J. C. 406.

XVII. Pleadings in replevin.

512. In replevin, the declaration must state a place certain, within the village or town; but the omission may be cured by the defendant's pleading over. *Gardner v. Humphrey*, 10 J. R. 53.

513. The place of taking a distress for rent is material and traversable. *Jackson, ex dem. De Ridder, v. Rogers*, 11 J. R. 33.

514. Where the defendant, in his avowry, states the precise house or place, the plaintiff may traverse the place in the avowry, though not described with certainty in his declaration. *Ibid.*

515. But where the plaintiff does not traverse the place in the avowry, but joins issue on the tenancy, the *locus in quo* is rendered immaterial; and the plaintiff may show the taking of the goods in another place than the house demised, especially where the goods were removed from such house, leaving the rent unpaid, and were seized within thirty days thereafter. *Ibid.*

516. If the plaintiff means to make the place material, he must, in his plea in bar, or replication to the avowry, traverse the taking in the place alleged in the avowry, and take issue thereon. *Ibid.*

517. A plea of *de injuria*, to an avowry, is bad. *Hopkins v. Hopkins*, 10 J. R. 369.

*518. The plaintiff may plead in [*233] bar to the avowry, that the avowant so abused the distress, as to render himself a trespasser *ab initio*. *Ibid.*

519. The avowant must set forth his title, and allege the estate of which he is seised, or the avowry is bad. *Harrison v. McIntosh*, 1 J. R. 380. *S. P. Hopkins v. Hopkins*, 10 J. R. 369.

520. And the defect will not be cured by the plaintiff's pleading over, and a verdict. *Bain v. Clark*, 10 J. R. 424.

521. To a plea of property in a stranger, there need be no avowry. *Harrison v. McIntosh*, 1 J. R. 380.

522. An avowry, or cognizance, for part of a year's rent, without showing that the residue is paid, is bad. *Shepherd v. Boyce*, 2 J. R. 446.

523. A venue is not necessary to a plea, nor to a demise in an avowry for a distress, &c. *Davis v. Tyler*, 18 J. R. 490.

XVIII. Pleadings in slander, and actions for libels.

524. In a declaration for slander of an attorney, there should be a *colloquium* concerning the profession of the plaintiff, or judgment will be arrested. *Gilbert v. Field*, 3 C. R. 329.

525. An innuendo cannot be proved; but where an averment or colloquium introduces extrinsic matter into the pleading, that is a proper subject of proof. *Van Vechten v. Hopkins*, 5 J. R. 211.

526. An innuendo is explanatory of the subject matter sufficiently expressed before; but it cannot extend the sense of the words beyond their own meaning, unless it explain them by reference to some preceding averment or colloquium. *Ibid.*

527. But where the new matter stated in an innuendo is not necessary to support the action, it may be rejected as surplusage. Per *Spencer, J. Thomas v. Crosswell*, 7 J. R. 264.

528. Though an innuendo cannot supply the place of the colloquium, yet if there be a colloquium sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. *Lindsey v. Smith*, 7 J. R. 359.

529. In slander; the declaration stated, that the plaintiff was a justice of the peace, and that the defendant, meaning to injure and expose him to prosecution for corruption, &c. in a certain discourse, &c., said of the plaintiff, in his office of a justice: "L. (meaning the plaintiff,) had been fed by A. W., (meaning A. W., who had a cause pending and determined before the plaintiff,) and that he, (the defendant) could do nothing when the magistrate was in that way against him (the defendant.)" On a motion in arrest of judgment, this declaration was held sufficient. *Ibid.*

530. A declaration, for "falsely and maliciously charging and imposing on the plaintiff the crime of perjury," is bad, as being too general and uncertain. *Ward v. Clark*, 2 J. R. 10.

531. In a declaration for a libel, the plaintiff alleged, that the defendant had published several libels against him, in a certain newspaper; *and after setting out [*234] one part of the publication with innuendoes, he proceeded thus: "and in another part of the said newspaper, among other things, the libellous matter following, of and concerning the plaintiff, to wit," setting forth the words, among which were the following: "none but the bribers and the bribed contemplated the incorporation, meaning that the plaintiff had been guilty of bribery and corruption in obtaining the incorporation of the said bank." After an interlocutory judgment by default, and a writ of inquiry of damages executed, on which judgment was rendered in the Supreme Court; *held*,

that the declaration contained two distinct counts, and that the second count being bad, for want of sufficient averments, and entire damages having been given on the whole declaration, the judgment below was erroneous. *Cheetham v. Tillotson*, in error, 5 J. R. 430.

532. The declaration, after stating the plaintiff's good name, &c., stated, that the defendant, well knowing the premises, &c., maliciously intending to injure the plaintiff, &c., and to bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty of the crime of treason, and of the promulgation of treasonable sentiments, &c., published the libel; held, that these were not averments necessary to be proved, but mere suggestions, by way of inducement to the libel. *Coleman v. Southwick*, 9 J. R. 45.

533. A declaration in slander, charging the plaintiff with *swearing to a lie*, as a witness on a trial in a Justice's Court, in which it is not stated that the justice had jurisdiction, or that the testimony was given upon a material point, is good, at least after verdict. *Niven v. Munn*, 13 J. R. 48. And see *Chapman v. Smith*, per *Spencer, J.* 13 J. R. 78.

534. The same certainty is not requisite as in an indictment for perjury. *Ibid.*

535. A declaration in slander, that in a certain cause, before a Court of three justices of the peace, constituted under the act concerning apprentices and servants, to hear and determine a certain cause between the people, &c. and the defendant, the plaintiff was examined on oath administered by the said Court, they having full power to administer the same, and had given evidence for and in behalf of the people; and that the defendant spoke of and concerning the plaintiff, and the prosecution, and the evidence given by the plaintiff on the trial, and on a point material to the prosecution, these words, viz. "you have sworn to a damned lie, and I can prove it," is good, there being a sufficient averment of the jurisdiction of the Court, and the false title of the cause may be rejected as surplusage. *Chapman v. Smith*, 13 J. R. 78.

536. A declaration contained a count for a libel and counts for slander; the defendant pleaded to the whole declaration, that the supposed grievances alleged, &c. or any of them, did not accrue within two years; held, that the plea was bad, as regarded the count for a libel, and being bad in part, was bad in the whole. *Miller v. Merrill*, 14 J. R. 348.

537. Where the declaration stated, that the plaintiff at the time of publishing the slanderous words, was, and long before, had been a blacksmith, and carried on the business and trade of a blacksmith honestly, and found and provided all such iron as was necessary and required of him in his business, and made correct charges, *always kept honest, true, and faithful accounts with all persons relating to his trade, &c. Yet the defendant, in order to injure him in his business, and cause it to be believed, &c. in a certain discourse of and concerning the plaintiff in his said business, spoke and published the following words, to wit: "he keeps false books, and I

can prove it," &c.; this was held to be sufficient, without a more special averment that there was a discourse of and concerning the plaintiff's trade, and that the words were spoken of his trade. *Burtch v. Nickerson*, 17 J. R. 217.

538. In a plea of justification of a libel, that the subject comprehends a multiplicity of facts tending to prolixity, is no excuse for general pleading; nor is it sufficient that the plea is as general as the charge in the declaration. It ought to state specifically the facts on which the charge was founded, so as to give the plaintiff an opportunity of denying and taking issue upon them. *Van Ness v. Hamilton*, 19 J. R. 349.

539. As where the defendant charged the plaintiff, who was a member of the Council of Revision, with receiving money for services rendered in procuring an act of incorporation to be passed by the legislature, he must in the plea of justification state the particular facts which make out the charge, with certainty, so that the plaintiff can take issue on those very facts. *Ibid.*

540. A plea to a declaration for a libel, justified as to a part of the libel charged, but did not profess to answer the whole, though it prayed judgment of the action generally; held, that the plaintiff might demur to the defective plea, and that by so doing he did not discontinue his suit. *Sterling v. Sherwood*, 20 J. R. 204.

XIX. Pleadings in trespass; (a) Declaration; (b) Plea; (c) Replication; (d) Rejoinder.

(a) Declaration.

541. The words *contra pacem*, &c. in a declaration in trespass, is matter of form and not traversable. *Gardner v. Thomas*, 14 J. R. 134.

542. Where the township in which was the locus in quo, has been subdivided before bringing the action, the trespass may be laid to have been done in the original township. *Renaudet v. Crocken*, 1 C. R. 167.

543. A declaration with a *quod cum*, is bad, it seems, on special demurrer; but the defect will be cured by verdict. *Collier v. Moulton*, 7 J. R. 109.

544. A declaration in trespass, by husband and wife, for a personal injury to the wife, containing, also, a cause of action for which the husband alone could sue, as the loss of her company, and assistance, &c., in consequence of the battery, &c., though bad on demurrer, is good after verdict. *Lewis v. Babcock*, 18 J. R. 443.

(b) Plea.

545. If the defendant has any matter of justification or excuse, he must plead it, and cannot give it in evidence under the general issue, *without a special [*236] notice in writing. *Demick v. Chapman*, 11 J. R. 132.

546. In trespass *de bonis asportatis*, on a plea of not guilty, the defendant cannot give in evi-

dence, that the goods were the property of R. C., who had fraudulently conveyed them to the plaintiff, with intent to defraud and defeat the defendant, his creditor; and that they had been taken by virtue of an attachment issued against the property of R. C., in favor of the defendant. *Ibid.*

547. In a justification under *mesne process*, the cause of action for which the process was issued need not be stated. *Linsley v. Keys*, 5 J. R. 123.

548. In trespass *quare clausum fregit*, the plaintiff alleged several trespasses on several closes, at different times, and the defendant pleaded that the several closes were one and the same close, and that it was his freehold, &c.; this plea is bad: the defendant should have justified as to all the closes, or have denied the trespasses as to all the closes except one, and justified as to that. *Nevins v. Keeler*, 6 J. R. 63.

549. If the defendant gives notice with the general issue, that he will offer in evidence a prescriptive right of fishing in the sea adjoining the *locus in quo*, and of using and occupying the shore for that purpose, he cannot give evidence of any prescriptive right to erect huts on the shore, for the purpose of fishing; but such a custom or usage should be pleaded or mentioned in the notice. *Cortelyou v. Van Brundt*, 2 J. R. 357.

550. A party, who delivers an execution to an officer, on which the body of the defendant is arrested, cannot, in an action brought against him for the false imprisonment, under the general issue, give special matter in evidence as a justification. *Herrick v. Manly*, 1 C. R. 253.

551. But he may show that the arrest and imprisonment were not made by his instructions, but by virtue of the authority contained in the writ. *Ibid.*

552. In an action of trespass against an officer of militia, for collecting a fine for delinquency, pursuant to the order of a regimental Court Martial, the defendant cannot give this special matter in evidence, as a justification under the general issue. *Butterworth v. Soper* 13 J. R. 443.

553. An officer of the revenue seizing goods as forfeited, and causing them to be libelled, &c., in an action of trespass against him by the owner, can only plead a condemnation, or an acquittal with probable cause of seizure. *Gelston v. Hoyt*, in error, 13 J. R. 561.

554. Though a plea of *molliter manus impositus* may justify a mere assault, it is no answer to a charge of beating, bruising, wounding and ill treating the plaintiff. *Gates v. Lounsbury*, 20 J. R. 427.

(c) Replication.

555. To a plea of *liberum tenementum*, setting it forth by metes and bounds, the plaintiff should new assign. *Hallock v. Robinson*, 2 C. R. 233.

556. In trespass *quare clausum fregit*, to a plea of *liberum tenementum*, *the plaintiff must reply by either traversing the title set up, or, admitting

the source of the derivative title, state a title in himself paramount to that of the defendant. *Hyatt v. Wood*, 4 J. R. 150.

557. The plaintiff cannot reply *de injuria sua propria* to a plea of *liberum tenementum*. *Ibid.*

558. If the defence set up be matter of excuse, as contradistinguished from matter of justification, a replication *de injuria*, &c. puts the excuse in issue. *Ibid.*

559. To *son assault demesne*, the plaintiff must reply *molliter manus impositus*; he cannot give it in evidence under the general replication *de injuria sua propria*. *Collier v. Moulton*, 7 J. R. 109.

560. In an action of trespass by a mortgagor against a mortgagee, if the defendant plead *liberum tenementum*, the plaintiff may reply, that the freehold is in himself. *Rumyan v. Mercereau*, 11 J. R. 534.

561. In trespass, where the defendant, under the act for more easy pleading in certain suits, (Sess. 24. c. 47.) pleads that the supposed trespass was done by authority of a statute of this state, without expressing any other matter or circumstance contained in such statute, the plaintiff must reply *de injuria propria*, &c., and conclude to the country; and a special replication, concluding with an averment, is bad. *Comly v. Lockwood*, 15 J. R. 188.

(d) Rejoinder.

562. Where, to an action for assaulting, beating, bruising, &c. the plaintiff, the defendant pleaded *molliter manus impositus*, the plaintiff, to prevent him from taking the defendant's horse out of his possession, &c., the plaintiff replied, that the horse was wrongfully in his close, *damage feasant*, and he was leading him out of the close towards a certain pound, with intent to impound him as a distress, &c., as he might lawfully do, and, thereupon, the defendant *de son tort* committed the trespass, &c. The defendant rejoined, that the plaintiff was leading the horse towards the pound, with intent to impound him as a distress, before he had made application to the fence viewers of the town, to ascertain and appraise the damages, &c., as by the statute he was required to do, whereupon the plaintiff was a trespasser *ab initio*, &c.; held, on demurrer, that the rejoinder was bad. *Gates v. Lounsbury*, 20 J. R. 427.

Pleadings in Justices' Courts. See COURTS OF JUSTICES OF THE PEACE.

Pleadings in Chancery. See CHANCEERY, LI.

*POOR. [*238]

(See Act, sess. 36. c. 78. 1 N. R. L. 279.)

(a) *How a settlement is gained*; (b) *Order for the relief of the poor*; (c) *Order of removal*; (d) *Appeals*; (e) *Actions by and against overseers of the poor.*

(a) *How a settlement is gained.*

1. Assessment and performance of labor on the highways were not the payment of a tax, so as to gain a settlement, before the act, (Sess. 32. c. 90. s. 2.) which declared that it should not be so considered. *Overseers of Amenia v. Overseers of Stanford*, 6 J. R. 92.

2. Service, without any fixed time for its continuance, and under a verbal agreement for the payment of wages, does not gain a settlement. *Wynkoop v. Overseers of New-York*, 3 J. R. 15.

3. A binding by a voidable indenture, and a service under it, for two years, gives the apprentice a settlement in the town in which he served; and it is not competent to the town, to object to the validity of the indenture. *Overseers of Hudson v. Overseers of Taghkanac*, 13 J. R. 245.

4. The purchase of an estate in a town, will not gain a settlement for any longer time than the purchaser inhabits there, or resides on such estate, unless the consideration for the purchase amounts to 75 dollars, *bona fide* paid. *Overseers of New-Berlin v. Overseers of Norwich*, 10 J. R. 229. *S. P. Overseers of Sherburne v. Overseers of Norwich*, 16 J. R. 186.

5. And it is competent for the overseers, notwithstanding the consideration expressed in the deed of the estate to the pauper, to show whether any, and what consideration had been paid. *Ibid.*

6. *R* seems, that a mortgage by the pauper to the vendor of the premises sold, to secure the purchase money, is not such a payment of the consideration as will gain a settlement. *Ibid.*

7. A settlement is not gained by purchase, if no estate known or valid in law passes by the conveyance. *Overseers of Blenheim v. Overseers of Windham*, 11 J. R. 7.

8. If lands are sold as part of the patent of A., situate in the town of B., and the lands do not lie in that patent, no settlement is gained in B. *Ibid.*

9. If the pauper improves and clears part of the land for two seasons, and boards at the time in B., but at all other times has resided elsewhere, he cannot be deemed to have a title by possession, in B., sufficient to gain a residence. *Ibid.*

10. In order to acquire a settlement by purchase, a contract for the conveyance of land, on payment of the consideration, or purchase money, is not sufficient; but a title must have been acquired, and it must appear, that a consideration to the amount of seventy-five dollars *was actually paid.

[*239] *Overseers of Scaghticoke v. Overseers of Brunswick*, 14 J. R. 199.

11. It is not necessary within the 4th section of the act, that the sum of 75 dollars paid on the purchase of an estate, in order to give the purchaser a settlement, should have been paid on account of the principal of the purchase money; if part of it were paid on account of the interest, it will be sufficient. *Overseers of Whitelown v. Overseers of Constable*, 14 J. R. 469.

12. As, where there was an agreement to sell and to convey land, for the consideration

of 500 dollars, and the purchaser paid 72 dollars of the principal, and, afterwards, 28 dollars, for interest, this was held sufficient, as the payment of interest being provided for in the contract, is to be deemed part of the consideration for the purchase and conveyance. *Ibid.*

13. Though a title must pass to the purchaser, in order to give him a settlement; yet it is not necessary that it should be a legal title; as where he pays the consideration money, and the deed is taken in the name of a third person, the equitable title will gain him a settlement. *Ibid.*

14. But it seems, that the whole purchase money on a contract of purchase, must be paid, or possession taken, so as to entitle the purchaser to a conveyance in equity, in order to gain a settlement; and if, therefore, the purchaser pays only a part of the consideration, though more than 75 dollars, and does not take possession, he has not such an equitable title as will gain him a settlement. *Overseers of Augusta v. Overseers of Paris*, 16 J. R. 279.

15. A man seized of land, *jure uxoris*, gains a settlement thereby. *Overseers of Whiteslown v. Overseers of Constable*, 14 J. R. 469.

16. Where a person occupied and cultivated land upon shares, and, in one year, delivered to the owner, as his proportion of the crop, produce to the value of thirty dollars, but every other year, the share received by the owner of the land was less than thirty dollars; held, that this was not such a renting and occupation of a tenement of the yearly value of thirty dollars, for two years, and actual payment of rent, as to gain to the occupant a settlement in the town in which the land was situated. *Overseers of Plattekill v. Overseers of New Paltz*, 15 J. R. 305.

17. P. by deed assigned to C. a lease in fee of sixty acres of land, in the town of M., the consideration for which was a quit-claim deed by C. to P. of lands in H., supposed at the time to be worth 700 dollars; but it afterwards appeared that C. had no title whatever to the land so released by him, in exchange; held, that C. did not acquire a title, legal or equitable, to the lease so assigned; and, therefore, could not thereby gain a settlement in M., for the land released by him being of no value, he could not be said to have paid, *bona fide*, any thing for the consideration of the purchase of the lease. *Overseers of Pompey v. Overseers of Laurens*, 19 J. R. 238.

18. To gain a settlement in a town, by residing there and being charged with and paying taxes in such town for two years, it must appear that the taxes have been actually paid by the pauper, or by another person, at his request. It is not enough that he has paid the *tax one year, and [*240] that the collector paid the tax for him, the next year, without his authority or request. Such payment by the collector being voluntary, would give him no right of action against the person charged with the tax. *Overseers of Wallkill v. Overseers of Mamakating*, 14 J. R. 87.

19. Where a father gains a full settlement by the payment of taxes for two years, his in-

fant child, though not residing with him or under his immediate charge or control, has a derivative settlement in the same place with the father. *Adams v. Oaks*, 20 J. R. 282.

20. An infant pauper, notwithstanding the place of his birth, may be removed to the last legal settlement of its parents. *Overseers of Vernon v. Overseers of Smithville*, 17 J. R. 89.

21. Paupers coming directly from another state do not gain a settlement here, merely by a year's residence. *Overseers of Chatham v. Overseers of Middlefield*, 19 J. R. 56.

22. The second section of the act relative to the poor, applies to mariners, and other persons arriving from some port or place out of the United States, directly into this state. *Ibid.*

23. Living and working on a farm of the yearly value of 100 dollars, on shares, for above two years, is a renting and paying rent, within the meaning of the act; and the party, by such renting, gains a legal settlement in the town. *Overseers of Fort Ann v. Overseers of Kingsbury*, 14 J. R. 365.

24. By the statute, which has altered the common law, a bastard child is to be deemed settled in the city or town of the last legal settlement of his or her mother; (Act, sess. 36. c. 78. s. 3.) The place of the legal settlement of a legitimate infant child, is *prima facie* the place of its birth, until the settlement by parentage is discovered. *Delavergne v. Noxon*, 14 J. R. 333.

25. It makes no difference, whether the settlement of the mother was acquired by birth, from her father, or derived to her through him, by his acquiring a new settlement; she being, at the time of the change of the settlement of her father, in his family, and under age. *Overseers of Canajoharie v. Overseers of Johnstown*, 17 J. R. 41.

26. If the justices, and the overseers of the poor, seize the property of a person, under the 22d section of the act, it is an admission of his being legally settled in that town, and they are concluded by the proceeding from ordering his removal, afterwards, to another town. *Ibid.*

27. Where the overseers of the poor of the town of O. gave a certificate, in writing, "that the bearer J., the slave of H., was under the age of 50 years, and of sufficient ability to get his living," at the bottom of which certificate was written, "we do hereby manumit the same," and the whole was signed by the overseers, but not by the executors of H., to whom the slave belonged; and the certificate was recorded in the office of the clerk of the town; held, that this certificate, registered at the request of H., was conclusive evidence to charge the town with the future maintenance of such slave as a pauper. *Hopkins v. Fleet and others, Overseers of Oysterbay*, 9 J. R. 225.

28. Where the wife is a free woman, and the husband a slave, the children of the marriage, which is lawful, (Act, sess. 36. c. 88.) follow the condition of the mother, as to their civil right; and the custody *and

[*241] control of them belong to the

mother; and their settlement, therefore, is in the town in which the mother had her last legal settlement, without regard to the slave husband. *Overseers of Marbletown v. Overseers of Kingston*, 20 J. R. 1.

29. A father, who has acquired a legal settlement in a town, cannot by any deed, release, or act of emancipation, divest his son, who has arrived at 21 years of age, nor acquired a settlement for himself, of his right of settlement derived from his father; though the son, since such deed of emancipation, had not resided in his father's family, but had acted, in all things, for himself, and worked entirely for his own benefit. *Adams v. Foster*, 20 J. R. 452.

30. Where a woman has a husband residing within the state, and able to maintain her, any settlement which she may have had previous to her marriage, is suspended, and she cannot be removed to the place of her former settlement, but only to the place of her husband's last settlement or residence. *Overseers of Sacburne v. Overseers of Norwich*, 16 J. R. 185.

31. Whether, in case of the husband's inability to maintain his wife, she can be removed to her former place of settlement? *Querr. Ibid.*

32. Where a person is elected constable of a town, and enters upon the duties of his office, but before the expiration of the year, removes from the town, and does not afterwards act as constable, except occasionally coming to the town to collect his fees and settle his old accounts, but no constable is appointed in his place for the remainder of the year, this is not such an execution of a public annual office, during one whole year, as to gain him a settlement in the town in which he was constable. *S. C.* 16 J. R. 188.

33. Where a town is divided, by an act of the legislature, into two towns, and the poor are also directed to be divided between the two, those who afterwards become paupers are to be considered as settled within the towns within which they were respectively born, and not where they happened to reside at the time of the division. *Overseers of Washington v. Overseers of Stanford*, 3 J. R. 193.

(b) Order for the relief of the poor.

34. A previous order of a justice of the peace is not necessary, where security is given by a bond for the maintenance of a bastard child or helpless pauper; but only in case of the voluntary application of the pauper himself for relief. *Overseers of New Windsor v. Belknap*, 1 J. R. 486.

35. A party who has given bond for indemnifying the town against the maintenance of a bastard child, and who has already made a payment in pursuance of such bond, is concluded from alleging that the child's settlement was elsewhere. *Ibid.*

36. Under the 16th section of the act, (1 N. R. L. 284.) by which the charges of a pauper, unable to be removed, shall be levied, after notice and refusal, on the goods of the overseer of the place of his last legal settlement, his previous legal settlement must have been ascertained according to the provisions of the 7th section, by an order of two justices, after

[*242] an examination of the pauper on oath, before the overseers can be charged with payment of his expenses. *Voorhis v. Whipple*, 7 J. R. 89.

37. A subsequent adjudication, and a confirmation on appeal, will not render a warrant previously issued against the overseers valid, but it will be quashed on a return to a *certiorari*. *Ibid*.

38. An order signed by two justices, to an overseer of the poor, to provide for the maintenance of a pauper, under the 1st section of the act, (Sess. 32. c. 90.) is valid. *Adams v. Supervisors of Columbia*, 8 J. R. 323.

39. And though such order does not recite that the justice and overseer inquired into the state and circumstances of the pauper, before giving the order, such an inquiry will be intended to have been made and implied from the order. *Ibid*.

40. The justice and overseer need not make the inquiry together, for the order is not to be their joint act. *Ibid*.

41. Matters of form in orders for the relief of paupers, are to be overlooked, and the justice has a reasonable discretion, as to the nature and extent of the weekly allowance; and if the pauper be sick or wounded, medicines and the attendance of a physician are a reasonable charge; but all the charges of maintaining the pauper must be adjusted and paid, in the first instance, by the overseers of the poor, who are responsible to the persons rendering the assistance. *Ibid*.

42. A *mandamus* will not lie at the instance of the party, to compel the supervisors of the county to audit and pay the account of such charges: the supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. *Ibid*.

43. The declarations of a person who had been owner of a slave are inadmissible evidence to charge the town with his maintenance, whilst the person himself may be produced. *Overseers of Germantown v. Overseers of Livingston*, 2 C. R. 106.

44. Overseers of the poor who have expended money, under an order of two justices, for the maintenance of a pauper, cannot maintain an action on the case against a person who brought the pauper into the town, having no legal settlement in the state, for the amount so expended; but their remedy is under the statute, (Sess. 36. c. 78. s. 8. 1 N. R. L. 279.) to recover the penalty given in such case. *Crouse v. Mabbett*, 11 J. R. 167.

45. A physician who furnishes medicine to and attends on a pauper, cannot recover for his services from the overseers of the poor, unless it were done at their request, or they have subsequently promised to pay. *Everts v. Adams*, 12 J. R. 352.

46. It seems, that the justice, in his order of relief, may designate the physician to attend upon the pauper; and that if the overseers employ any other, and pay his bill, it will not be allowed them, in the settlement of their accounts. *Ibid*.

47. An order for maintenance legally made,

cannot afterwards be vacated by the order of two justices. *Carpenter v. Whitman*, 15 J. R. 208.

*(c) Order of removal. [*243]

48. An order of removal stated to have been made on complaint of the poor-masters, is good, although there are no such officers, for the justices may act on information obtained from any source, or on their own suspicion. *Overseers of Shawangunk v. Overseers of Mamakating*, 1 J. R. 54.

49. If the order state that the justices cannot find that the pauper had any legal settlement, and expressly find that he came from S., it is a sufficient adjudication to authorize them to order his removal to that place. *Ibid*.

50. An order of removal must contain an adjudication, that the pauper had a legal settlement at, or came last from, the town to which he is ordered to be removed. *Overseers of Newburgh v. Overseers of Plattkill*, 1 J. R. 330.

51. An adjudication in an order of removal, that a pauper's legal settlement was in the town to which he was removed, is sufficient, without saying his last legal settlement. *Overseers of Vernon v. Overseers of Smithville*, 17 J. R. 89. And see *Overseers of Scaghticoke v. Overseers of Brunswick*, 14 J. R. 198.

52. Where an order of removal has been made, and the pauper accordingly removed, and maintained by another town, and no appeal from the order, the justices by whom it was granted cannot afterwards supersede it. *Overseers of Southfield v. Overseers of Bloominggrove*, 2 J. R. 105.

53. Where paupers are to be sent out of the state, by virtue of the act, (Sess. 24. c. 184. s. 7.) the justices, in their order of removal, must designate the route by which the pauper is to be transported. *Overseers of Matakayna v. Overseers of Guelderland*, 8 J. R. 412.

54. So, an order, directing the constable to convey and transport the pauper to the town of W., being the place from whence he last came, and there deliver him to a constable of W., who was required also to deliver him to the next constable, and so, from constable to constable, until the pauper should be transported to the place of his last legal settlement, if any he had in the state, has no force beyond the town of W.; and as to every other place or purpose, is void, for uncertainty. *Ibid*.

55. And if the constable of W., on the pauper's being delivered to him, transport and deliver him to a constable of N., and the overseers of N. receive the pauper, they have no right of appeal to the Sessions; for, not being bound to receive him, they acted in their own wrong. *Ibid*.

56. A., the owner of an infirm slave, executed a bill of sale of her to B., who was unable to maintain her, at the same time paying B. forty dollars to take the slave off his hands. B. then sold the slave, and after several sales, she finally came into the hands of C., living out of the state. The sales were fair and bona fide. A. resided in Claverack, and after the sale to C. the slave was left in Claverack, and wandered thence into the city of Hudson, whence she was removed by an order of two

justices to *Claverack*; held, that the sale from A. to B. might be deemed collusive and void, within the 14th section of the act concerning slaves, (2 N. R. L. 206.) at the election of the justices, who might either consider A. as the master of the slave, or C., although he lived out of the state, there being no evidence that he had exported or attempted to export the slave; and therefore the order of removal was proper on both grounds; on the first, because *Claverack* was the place of A.'s settlement; and on the other, because if C. was the master, as he had no settlement in the state, and the slave had wandered from town to town, the justices were authorized, under the 33d section of the act relative to the poor, to remove the slave to the place from whence she last came. *Overseers of Claverack v. Overseers of Hudson*, 15 J. R. 283.

57. When the order for the removal of a pauper from one town to another, is reversed or quashed on appeal, the justices of the peace of the town to which the pauper was so improperly removed, may make an order for his removal back to the town whence he was removed; or, if it appears that the pauper has no settlement in that town, they may make a new order for his removal to the place of his last legal settlement. *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 J. R. 407.

58. But the overseers of the town to which such pauper is so improperly removed, cannot, after the order of removal is quashed, maintain an action on the case against the overseers of the town from which he was removed, to recover the expenses of his maintenance, he having fallen sick after his removal; the presumption being, that the order was obtained *bona fide*; and the statute does not make it the duty of the overseers who have caused the pauper to be removed to another town, to take him back at their own charge; it is a *casus omissus* in the act relative to the poor. *Ibid. Contra*, S. C. 15 J. R. 436. which was on a demurrer to a special plea. Whether, if the pauper so improperly removed has not any legal settlement in the state, such an action could be maintained? *Quære*. [In the case, 15 J. R. 436. it was admitted that the pauper had no legal settlement in the state, but it was proved afterwards that the pauper was a bastard, born in *Pittstown*, and her father lived in *Hoosick*.]

59. Where a pauper has actually become chargeable to the town, it is not necessary to order him to remove to the place of his last legal settlement, previous to issuing a warrant of removal. *Overseers of Vernon v. Overseers of Smithville*, 17 J. R. 89.

60. Where an order is made for the removal of a pauper from A. to B., from which order the overseers of B. appeal, but the overseers of A. take back the pauper, and the appeal, consequently, is never prosecuted, the order, though unreversed, is not evidence of the pauper's settlement in B. *Ibid.*

(d) Appeals.

61. On an appeal from an order of removal, the Court of Sessions ought not to compel one of the overseers, who is a party to the appeal,

to testify; but this is, notwithstanding, not a ground for reversing their order, as the proceedings were not before a jury, and the Supreme Court will reject [*245] the evidence improperly given.

Overseers of Plattekill v. Overseers of New Paltz, 15 J. R. 305.

62. Where an overseer of the poor, who had been summoned by two justices, to appear and answer to a complaint against him, for not taking care of a sick and lame pauper, upon request and notice, &c., according to the 16th section of the act relative to the poor, neglected to appear or show cause, &c.; and the justices, thereupon, issued a distress warrant, to levy the amount of the expense of relieving and supporting the pauper on the goods and chattels of the overseer, which was accordingly executed; held, that the overseer has no right of appeal to the General Sessions of the Peace, such a judgment by default being equivalent to a judgment by confession. *Overseers of Bangor v. Oaks*, 20 J. R. 282.

63. After an order for the removal of a pauper from the town of B. to the town of D., it was found, that he was too sick to be removed, and he afterwards died in B., so that the order was never executed; and the town of B. had taken no measures, under the 16th section of the act, against the town of D., to enforce by warrant the payment of the expense of maintaining the pauper in his sickness, and of his burial, though a notice had been sent by the overseers of B. to the overseers of D. for that purpose; held, that the overseers of D., not being aggrieved by the order and notice, within the meaning of the act, no appeal would lie by them to the Sessions. *Adams v. Foster*, 20 J. R. 452.

64. On appeals, the Sessions cannot award costs, except where authorized by statute. *Washburn v. Overseers of Hebron*, 9 J. R. 119.

65. The Sessions, on quashing an order of removal, may allow costs. *Overseers of Newburgh v. Overseers of Plattekill*, 1 J. R. 330.

(e) Actions by and against overseers of the poor.

66. An order of removal of a pauper from the town of T. to the town of S. was quashed, on appeal, and the overseers of T. directed to pay a sum of money to the overseers of S., on account of the expenses of the pauper between the time of the removal and the quashing of the order. At the time the order was quashed, the pauper was too sick to be conveyed back to T., but was supported for some time thereafter by the overseers of S.; held, that the overseers of S. could not maintain an action of *assumpsit* against the overseers of T., to recover the amount of those subsequent expenses, there being no previous request, nor express promise to pay them; and admitting that a moral obligation would support an implied promise, yet there was no such obligation on the part of the overseers of T. to pay, as it did not appear that the pauper was legally settled in T., for the order of Sessions quashing the original order of removal did not shew that the pauper was settled in T., but merely, that he was not

settled in *S. Overseers of Toga v. Overseers of Seneca*, 13 J. R. 380.

67. Whether the provision of the act (Sess. 36. c. 78. s. 15.) giving a summary remedy to the overseers of the poor of one [*246] town, against the overseers of another town, who have supported a pauper of another town, who, by reason of sickness, could not be removed to that town, is cumulative, or takes away the common law remedy? *Ibid.*

68. Whether, if the pauper had no legal settlement in the state, the overseers of S. could have maintained an action against the overseers of T. for the expense incurred subsequent to the order of removal? *Ibid.* But see *Overseers of Pittston v. Overseers of Plattsburgh*, 18 J. R. 407.

69. Where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper and furnished him with necessaries, he may maintain assumpsit against this overseer, although no order for the relief of the pauper had ever been made. *King v. Butler*, 15 J. R. 281.

70. An overseer of the poor contracted with the plaintiff for the support of a pauper, for which he agreed to pay a certain sum per week; held, that he was not personally responsible on the contract, as, from the facts and circumstances of the case, it did not appear that he intended to bind himself personally. *Olney v. Wickes*, 18 J. R. 122.

71. An act for the division of a town directed the supervisors and overseers of the two towns to meet and divide the money and the poor belonging to the town so divided, according to the tax list, and that each town thereafter should respectively maintain its own poor; and the supervisors and overseers accordingly divided the money between the two towns, and finding six paupers in the old town, they agreed that these paupers should be maintained by both towns in equal proportion, according to the division of the money; and then the paupers were to be disposed of by the overseers of both, or either of the towns, to the best advantage; in an action of assumpsit brought by the overseers of one of the towns, against the overseers of the other town, upon this agreement, for its proportion of the expense of supporting one of the paupers, after the money so divided had been spent; held, that the overseers and supervisors, in making this agreement, transcended the powers given to them by the act dividing the town, and therefore, no action could be maintained upon it, admitting even that the overseers of the poor may, as such, contract for the maintenance of the poor, so as to bind their successors in office. *Overseers of Norwich v. Overseers of New Berlin*, 18 J. R. 382. See 18 J. R. 407. Post, 72.

72. The overseers of the poor are the public agents and trustees of the towns, in respect to the poor, and must necessarily, and without any express authority from the legislature, possess a capacity to sue, commensurate with their public trust and duties; and they, like

the supervisors of counties, (8 J. R. 424.) possess a corporate capacity, *pro tanto*. *Overseers of Pittston v. Overseers of Plattsburgh*, 18 J. R. 407. Contra, *Shear v. Overseers of Hillsdale*, 13 J. R. 496. And see 15 J. R. 436, where the question as to the capacity of overseers of the poor to sue, or their liability in their private capacity for the official acts, or the acts of their predecessors in office, was reserved. And see 18 J. R. 122. 382. Ante, 68. 70, 71.

Settlement of a bastard child. See BASTARD.

*POWER.

[*247]

1. Powers are to be construed equitably in a Court of law, as well as in a Court of equity. *Jackson, ex dem. Hammond, v. Veeder*, 11 J. R. 169.

2. And the general intention must be carried into effect, though it may defeat a particular intent. *Ibid.*

3. Powers in wills are to be construed so as to effectuate the intent of the testator. *Jackson, ex dem. Ellsworth, v. Jansen*, 6 J. R. 73.

4. The testator empowers his executors to sell and dispose of his real estate, and directs them, after they have disposed of his estate, and converted the same into money, to place the same at interest on good security, and to pay the interest annually to his wife; and at and after his wife's decease, he gives and bequeaths to his son, an only child, all the principal sums of money and securities, in the hands of his executors, and appoints his wife, and two others, executors, one of whom renounces, and, after the death of the widow, the surviving executor sells the real estate; held, that the object of the testator in creating the power, being to make a provision for his wife, it ceased at her death, and the lands descended to the heir at law. *Ibid.*

5. And whether the power was a naked power, and consequently, could not go to the surviving executor? *Quære. Ibid.*

6. Where a testator devises his real and personal estate to several persons, as tenants in common, some of whom he appoints his executors, and empowers them, or the major part of them, to sell his real property, this is a power coupled with an interest, that is, the interest which the executors have as devisees; and the power may be executed by the survivors, or the major part of them. *Jackson, ex dem. King, v. Burtis*, 14 J. R. 391. *S. P. Franklin v. Ongeod*, 14 J. R. 527.

8. A. sells land to B., with a covenant of seisin, and B. sells the same land to C., and it is afterwards discovered that A. was not seised at the time of his conveyance; B., to secure C., agrees that he should have the benefit of the covenant of A., and executes and delivers to him a letter of attorney to sue A. in his name: this is a power coupled with an interest, and is irrevocable. *Raymond v. Squire*, 11 J. R. 47.

9. A., being seised of lands, by indenture, conveyed the same to his daughter H., and B.,

her husband, to the use of H. for life, with power to her to sell the same in fee, at any time, if she chose, to any person, by deed or will, and the money arising from such sale to keep for her own use and maintenance; and in case the said H. should not sell the premises, then, after her death, he, the said A., conveyed the same to B., the son-in-law, and after his death, to the heirs of the body of H., &c. B. and H. took possession, and, afterwards, for the consideration of five shillings, by lease and release, conveyed the premises to C., in fee, in trust, that he should reconvey the same premises to B., in fee; and C., being so seised, by virtue of such lease and release, on the next day, for the consideration of ten shillings, reconveyed the premises to B.; *held*, that the power was well executed, and that

[*248] the estate vested in C., and those claiming under him. *Brand v. Goston*, 2 J. C. 384.

10. V., by his last will, devised his real estate to E., his wife, during her life or widowhood, with the remainder to his six sons, by name, as tenants in common in fee; and by a codicil to his will, devised a certain farm, in fee; "to such of his said sons as shall agree, and live best with their mother, which was to be signified in writing, under hand and seal, signed in the presence of two credible witnesses," with this proviso, that "the same should serve as part of the portion of such son as his wife should allot the same to, and that his other sons should receive so much land in lieu thereof;" E., by an instrument, purporting to be her last will, under her hand and seal, executed in the presence of three credible witnesses, by virtue of the codicil to the will of her husband, devised "the farm, &c. to V., S., and A., three of the sons of V., their heirs, &c., and in case either of them should die without lawful issue, then to the survivors or survivor of them, binding them, in every other respect, as they were bound by the last will of their father." This was *held* a good execution of the power. *Jackson*, ex dem. *Hammond*, v. *Veeder*, 11 J. R. 169.

11. The execution of power must be according to the substantial intention of the party creating the power. *Ibid*.

12. A testator directed, that in case of a deficiency of his personal estate, some of his real estate should be sold for the payment of his debts; he then devised his real and personal estate to his wife for life, and appointed her and another person his executors. The widow alone undertook the execution of the will, and the testator having disposed of all his personal property in his lifetime and dying indebted, the executrix sold and conveyed the real estate; *held*, that the power was well executed by the executrix alone. *Jackson*, ex dem. *Hunt*, v. *Ferris*, 15 J. R. 346.

13. R., a soldier, entitled to military bounty lands, by a deed, dated January 12, 1788, granted, bargained, and sold, for a valuable consideration to B., all the bounty lands to which he was entitled; and in the same deed, empowered A. as his attorney, for him and in

his name, to grant, bargain and convey the same land to B., his heirs and assigns, in case the same should be necessary upon the grants having passed the grand seal of the state for those lands. Afterwards, on the 5th July, 1790, a patent in the usual form was issued to K. the soldier, who, on the 25th of February, 1792, for a valuable consideration, granted, bargained and conveyed the same lands to C., his heirs and assigns, forever. On the 9th of February, 1802, H., as the attorney of K., in his name, executed a release in fee of the land to B., in pursuance of the power contained in the first deed from K. to B.; *held*, that the first deed from K., for want of words of inheritance, conveyed only a life estate to B., and K., having, before the execution of the power, which was a naked power, conveyed the reversion in fee to C., a bona fide purchaser for a valuable consideration, without notice of the prior deed, C. was seised of the legal estate or reversion on the death of B. *Jackson*, ex dem. *Henderson*, v. *Davenport*, 18 J. R. 295. S. C. in error, 20 J. R. 537.

14. The doctrine, that a deed executing a power, generally speaking, relates back to the instrument creating [*249] the power, so as to take effect from the original deed, is a fiction of law for the advancement of right; and is not to be applied to the injury of a stranger, by defeating his lawful intervening rights. S. C. 20 J. R. 537.

15. A will contained the following clause: "I will and positively order my executors hereafter named, or any two of them, to sell all my estate, both real and personal, whatsoever and wheresoever." The testator then directs the proceeds to be equally divided among his children, and appointed his wife, two of his sons, and his son-in-law, executors: the two sons having an interest in their own right, and the son-in-law, in right of his wife, as legatees, in equal proportions, in the proceeds of such sale. After the death of the executrix and two of the executors, the other and sole surviving executor sold and conveyed the real estate of the testator; *held*, that the power was well executed, even, as it seems, at common law; it being the express intention of the testator, that the land should be sold at all events; and the executor taking under the will a part of the proceeds, the power was coupled with an interest, and survived. *Jackson*, ex dem. *Cooper*, v. *Given*, 16 J. R. 167.

16. But the power, in this case, was clearly well executed under the statute, (Sess. 36. ch. 23. See Stat. 21 Hen. VIII. c. 4.) which controls the restriction or limitation in the power that it shall be executed by two, at least, of the executors; the object of the statute being to give effect to powers, where the testator has used words of restriction which would otherwise defeat the intent, and to prevent the failure of a trust, for want of a trustee, and the necessity of resorting to a Court of Chancery for the appointment of a trustee. *Ibid*.

See *tit. CHANCERY, LIIL. Power*.

[*250] *PRACTICE.

- I. Original writ ; process and outlawry.
- II. Appearance ; (a) Endorsing appearance ; (b) Appearing by attorney, and notice of retainer ; (c) Notice to appoint a new attorney.
- III. Entitling and signing papers.
- IV. Notices.
- V. Service of papers.
- VI. Affidavits.
- VII. Common rules.
- VIII. Agreements and stipulations between the parties or their attorneys.
- IX. Removal of causes by habeas corpus or certiorari.
- X. Declaration ; (a) Filing and serving declaration andoyer ; (b) Rule to plead, and rules to answer.
- XI. Bill against an attorney.
- XII. Judgment of non pros. for not declaring.
- XIII. Imparance ; time for pleading, and filing, and delivering plea.
- XIV. When a cause is at issue, and the effect of it.
- XV. Judgment by confession, and on warrant of attorney.
- XVI. Judgment by default ; (a) When, and how a default may be entered ; (b) Interlocutory judgment and assessment of damages generally, and also, under the 7th section of the statute ; (c) Setting aside default ; (d) Setting aside proceedings subsequent to default.
- XVII. Striking out counts, &c.
- XVIII. Frivolous demurrer.
- XIX. Particulars of demand and set-off.
- XX. When the venue will be changed.
- XXI. Consolidating actions.
- XXII. Bringing money into Court.
- XXIII. Examining witnesses de bene esse.
- XXIV. Commission to examine witnesses ; (a) When a commission will be granted, and how it is to be obtained and executed ; (b) Effect of a commission as a stay of proceedings.
- XXV. Discontinuance and nolle prosequi.
- XXVI. Judgment as in case of nonsuit ; (a) When a judgment as in case of nonsuit will be granted ; (b) Stipulation to go to trial ; (c) Consequence of not going to trial according to stipulation, and what will be an excuse.
- XXVII. Trial ; (a) Proceeding to trial or inquest ; (b) Putting off the trial ; (c) Preventing and setting aside an inquest.
- XXVIII. Nonsuit.
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- XXX. Reference ; (a) When a cause may

be referred ; (b) Proceedings on a reference, and for what a report will set aside.

- XXXI. Notices of motion.
- XXXII. Judge's order to stay proceedings, and certificate of probable cause.
- *XXXIII. Non enumerated motions.
- XXXIV. Cases for argument. [*251]
- XXXV. Enumerated motions ; noticing for argument, * points and argument.
- XXXVI. Special rules and orders.
- XXXVII. Feigned issue.
- XXXVIII. When taking a subsequent step in a cause cures a previous irregularity of the opposite party.
- XXXIX. Rule for judgment, and entering, filing, and docketing judgment.

I. Original writ ; process and outlawry.

1. Original writs issuing out of the Supreme Court, pursuant to the statute of the 17th February, 1815, (Sess. 38. c. 38.) must be tested like all process issuing out of that Court, that is, on some day in term. *Lynch v. Mechanics' Bank*, 13 J. R. 127.

2. And it seems that they may be tested before the cause of action accrued, if issued after. *Ibid.*

3. The original writ in *assumpsit*, against a corporation, must be in the nature of a summons, and not by *pone* or attachment. *Ibid.*

4. And where the original is by *pone* or attachment, it cannot be amended, being conformable to the *precipe*, but may be quashed on motion. *Ibid.*

5. The original writ against a private person, for a certain demand, is a *precipe* on which the process is by summons. *Ibid.*

6. But where the demand is uncertain, it is a *si te fecerit securum*, and the process is by *pone* or attachment. *Ibid.*

7. Proceedings in outlawry, in a bailable action, will not be reversed on motion and affidavit, because the defendant was not a citizen of this state, but resided in another state or a foreign country ; unless the defendant puts in special bail, on a writ issued by the plaintiff in a new action, but the defendant will be left to his writ of error. *Roosevelt v. Crommelin*, 18 J. R. 253.

8. Where the process is not bailable, or there is no *ac etiam* in the writ, the plaintiff may join any number of defendants in the writ, and declare against them severally. *Montgomery v. Hasbrouck*, 3 J. R. 538.

9. If any one of the defendants be not declared against, and he wishes to get rid of the action, he must proceed by obtaining a rule against the plaintiff to declare against him, or be nonsuited. *Ibid.*

10. In bailable process the plaintiff cannot join several defendants in one writ, and declare against one defendant only. *Roosevelt v. Soulden*, 16 J. R. 44.

11. Process issued in term, must be tested in term ; and if tested of the preceding term, it may be set aside for irregularity. *Gordon v. Valentine*, 16 J. R. 145.

12. But the plaintiff may amend the writ on payment of costs. *Ibid.*

13. The attorney may alter the test and return day of a *capias ad resp.* before it is served. *Sullivan v. Alexander*, 18 J. R. 3.

14. And where the sheriff is authorized and instructed by the attorney to alter the return day, in case the writ cannot [*252] be served in *due season, he may make the alteration before bail is taken or an appearance endorsed on the writ. *Sloan v. Isattles*, 13 J. R. 158.

15. So, if the agent of the attorney is authorized by him to alter the test and return day of a writ, if a debtor within the liberties should be seen beyond them, and such alteration be necessary. *Sullivan v. Alexander*, 18 J. R. 3.

16. When the office of chief justice is vacant, writs may be tested in the name of the senior judge of the Court. *Anon.* 16 J. R. 1.

17. It is the duty of the sheriff to return a writ, without a rule of Court for that purpose; and he cannot avail himself of his neglect of duty to defeat an action against him for an escape. *Hinman v. Brees*, 13 J. R. 529.

18. The latest period allowed for the service of a writ, is the day on which it is made returnable. *Slingerland v. Swart*, 13 J. R. 255.

19. If the sheriff, after an arrest on mesne process, has the body of the defendant at the return of the writ, it is sufficient. *Stone v. Woods*, 5 J. R. 182.

20. Process cannot be issued or executed on a Sunday. *Van Vechten v. Paddock*, 12 J. R. 178.

21. A seal of the Court that has been once used by being affixed to blank process which has been filled up, though not issued or delivered to the sheriff, cannot be again used, by being detached, and affixed to another writ, and if so used, the writ will be set aside. *Filkins v. Brockway*, 19 J. R. 170.

And see AMENDMENT, II.

II. Appearance; (a) Endorsing appearance; (b) Appearing by attorney, and notice of retainer; (c) Notice to appoint a new attorney.

(a) Endorsing appearance.

22. In all cases where special bail is not required, an appearance must be entered, or common bail filed: a mere notice of retainer, by an attorney, is not a sufficient appearance on which to enter a default for want of a plea. *De Wandelaer v. Coomer*, 6 J. R. 328.

23. On a defendant's endorsing his appearance on the writ, it is the duty of the clerk, and not of the party, to enter it of record. *Ross v. Hubble*, 1 C. R. 512.

24. The want of entering the defendant's appearance will not prejudice, and it may be entered, *nunc pro tunc*, at any time, even after judgment signed. *Ibid.*

Appearance by putting in special bail. See BAIL, VI.

(b) Appearing by attorney, and notice of retainer.

25. An appearance by an attorney, without

warrant, is a good appearance as to the Court. *Denton v. Noyes*, 6 J. R. 296. And see JUDGMENT, IV. 28, 29, 30.

26. Notice of appearance is for the benefit of the plaintiff's attorney, and may be waived by him. *Leispenard v. Baker*, 6 J. R. 323.

*27. A notice of retainer of an attorney is implied in a notice [*253] by him of bail. *Quick v. Merrill*, 3 C. R. 133.

28. If the plaintiff's attorney receives notice of retainer from two attorneys for the defendant, he ought to inform the second attorney of the first notice, in order to prevent surprise. *M'Neely v. Morison*, 1 J. C. 23. S. C. C. C. 61.

29. It is improper practice in an attorney to appear and act for a party in a suit, as agent merely, and not as attorney. *Heyer v. Denning*, 1 J. C. 103. S. C. C. C. 70.

30. He is to be considered as a mere stranger in the cause, and any rule obtained by him will be set aside, with costs, to be paid by the attorney himself. *Ibid.*

31. If an infant defendant appears by attorney, and not by guardian, it is error in fact. *Arnold v. Sandford*, 14 J. R. 417.

32. A person *non compos mentis*, not an idiot from nativity, may appear by attorney, and the Court, on motion, will appoint an attorney for him. *Faulkner v. M'Clure*, 18 J. R. 134.

Further, as to notice of retainer, see post, XVI.

(c) Notice to appoint a new attorney.

33. If the attorney of one of the parties becomes incapacitated from conducting the suit, the opposite party must give him notice to appoint a new attorney; otherwise, he is not bound to take notice of the proceedings. *Given v. Driggs*, 3 C. R. 150.

34. Personal notice, or such as the Court will deem tantamount, must be given; 30 days is sufficient notice, and it need not be by rule of Court. *Ibid.*

35. A notice to appoint another attorney, must be served on the party; putting it up in the clerk's office, or giving notice of subsequent proceedings, is insufficient. *Hilbrith v. Harvey*, 3 J. C. 300.

III. Entitling and signing papers.

36. Where several defendants in one suit sever in their appearance and plea, and appear by different attorneys, the plaintiff, in his proceedings, must entitle the cause against all the defendants; but each defendant must be served with a separate notice. *Jackson*, ex dem. *Jauncey v. Cooper*, 1 C. R. 20.

37. Where a notice is entitled *versus*, instead of *ad sectam*, but the affidavit annexed is properly entitled, the error will not vitiate. *Ryers v. Hülyer*, 1 C. R. 112.

38. But if neither the notice, nor affidavits annexed, are properly entitled, the error will be fatal. *Parkman v. Sherman*, 1 C. R. 344.

39. On moving to amend an erroneous *ca. sa.*, on which the defendant was taken, and had brought an action for false imprisonment,

the papers may be entitled in the latter suit. *Holmes v. Williams*, 3 C. R. 98.

40. The affidavit, on which to move for a mandamus, must not be entitled. *Haight v. Turner*, 2 J. R. 371.

41. On moving to set aside the proceedings in a bail bond suit, the *papers [*254] must be entitled in that suit. *Pell v. Jadwin*, 3 J. R. 448. *Executors of Phelps v. Hall*, 5 J. R. 367.

42. Before an attachment issues against a sheriff, the proceedings are to be entitled in the names of the parties in the civil suit. *Folger v. Hoogland*, 5 J. R. 235.

43. But, after the attachment has been granted, all the proceedings must be in the name of the people. *Ibid.*

44. If two persons appear on the writ, as attorneys, it is sufficient if only one of them sign or endorse the subsequent proceedings. *Gould v. Spencer*, 2 C. R. 109.

45. In all notices for argument, and all papers on which arguments are to be had, on motions to be made or resisted, the names of the attorneys for the plaintiffs and defendants must be inserted or written thereon. *Reg. Gen. May*, 1814. 11 J. R. 408.

Signing notices. *See post*, IV. 48. 54, 55.

IV. Notices.

46. If the party served with a notice be not misled, or the papers be not such as evidently may mislead, a mere clerical mispension will not prejudice. *Quick v. Merrill*, 3 C. R. 133.

47. As if a wrong letter be substituted in the Christian name of one of the parties, it will not vitiate the notice. *Ibid.*

48. A notice, in ejectment, signed, *attorney for the tenant*, instead of *attorney for the defendant*, is good. *Jackson, ex dem. Lawyer, v. Stiles*, 3 C. R. 140.

49. In all notices, one day is inclusive, and the other exclusive. *Charles v. Stansbury*, 3 J. R. 261. So, service of a notice on *Thursday*, for the *Monday* following, is sufficient. *Ibid.*

50. Where an act is to be done within a specified number of days, the day on which the notice is given, and the day on which the act is to be done, are considered the one inclusive, and the other exclusive. *Gillespie, v. White*, 16 J. R. 117.

51. The rule in the *Mayor's Court* of the city of *New-York*, requiring a *ca. sa.* issued against a principal, for the purpose of charging his bail, to be *four days* in the sheriff's office, exclusive of the return day, means that it is only the return day which is exclusive, and not the day on which the writ is delivered to the sheriff. *Ibid.*

52. Therefore, the delivery of a writ to the sheriff on the 15th, returnable on the 19th day of a month, is good. *Ibid.*

53. The contents of a notice may be proved by parol. *Tower v. Wilson*, 3 C. R. 174. *S. P. Willoughby v. Carleton*, 9 J. R. 136.

54. It seems, that a notice signed with the name of the attorney, without the addition of

attorney, &c. is good. *Bergen v. Boerum*, 2 C. R. 256.

55. In particular cases, where the signature of the attorney, on record, to a notice, cannot be obtained, his name, signed for him by a counsel in the cause, will be sufficient. *Bogert v. Bancroft*, 3 C. R. 127.

*56. In all cases where a three [*255] months' advertisement is required, a weekly publication of the notice is sufficient. *Anonymous*, 2 C. R. 385.

Notices of motions. *See post*, XXXI.

Service of notices. *See post*, V.

Notice of rule to declare. *See post*, XII.

Notice of executing writ of inquiry, and of assessment by the clerk. *See post*, XVI.

Notice of trial. *See post*, XXVII.

V. Service of papers.

57. To make the service of a notice good, it must be shown that every thing has been done to bring it home to the party. *Gelston v. Swartwout*, 1 J. C. 136. *S. C. C. C. 76.*

58. The service must be on some person in the office, and belonging there; if no person is there, it must be on some one in the house where the attorney resides, or where his office is kept; and, if there is no person there, it may be left in the office. *Ibid. Anonymous*, 1 C. R. 73.

59. Where there is an attorney retained, service must be made on him, and not on the party. *Wardell v. Eden*, 2 J. C. 121. *S. C. C. C. 137.*

60. Although he was only constituted attorney to confess judgment. *Ibid.*

61. Wherever an attorney is employed, although after it is too late to plead, yet he is entitled to all subsequent notices. *Van Loon v. Driggs*, C. C. 50.

62. Service, by leaving a paper at an attorney's lodgings, is not sufficient; it should be served personally on the attorney, or left in his office. *Jackson, ex dem. Pickart, v. Eacker*, 1 J. C. 331.

63. Service on a person in the attorney's office, who appeared to be one of his family, is not sufficient; especially, where the receipt of it is denied, and no reason shown why a better service was not made. *Salter v. Bridgen*, 1 J. C. 244.

64. But, in another case, service on the attorney's brother, who happened to be in his office, was held sufficient. *Wardell v. Eden*, 2 J. C. 121. *S. C. C. C. 137.*

65. An affidavit of service on an attorney's clerk, must state that he was, at the time, in the attorney's office. *Paddock v. Beebe*, 2 J. C. 117. *S. C. C. C. 135.*

66. Affidavit of service on a clerk, without stating where made, is defective. *Jackson, ex dem. Counter, v. Giles*, 3 C. R. 8.

67. Affidavit of service on a clerk need not specify his name. *Tremper v. Wright*, 2 C. R. 101.

68. Where a paper is served on a person in the attorney's office, a relation between the person served and the attorney must be shown. *Rathbone v. Blackford*, 1 C. R. 343.

69. Service, by leaving a paper in an attorney's office, is bad, unless *the [*256] affidavit state that there was no one in the office. *Jackson*, ex dem. *Norton*, v. *Gardner*, 2 C. R. 95.

70. Service of a notice on an attorney, or his clerk, in his office, at 10 o'clock in the evening, is good. *Cooper v. Carr*, 8 J. R. 360.

71. Affidavit of service on an attorney's agent, by leaving it at his dwelling house, should state his absence, and to whom it was delivered. *Holmes v. Williams*, 3 C. R. 126.

72. Where the attorney of one of the parties resided out of the city of *New-York*, but within 40 miles, and had an agent in the city, service of a notice in the cause on such agent in vacation, is not sufficient. *Hunt v. Onderdonk*, 3 J. R. 149.

73. Service of a notice on an agent, in vacation, of a motion to be made in term, need not be on the agent of the attorney in that place only in which the Court is to sit. *Chapman v. Raymond*, 8 J. R. 360. *S. P. Caines v. Gardner*, 11 J. R. 89. The rule of *January term*, 1799, refers only to notices given in term time.

74. Where two attorneys are jointly concerned for a party, they must have a joint agent appointed under the rules of the Court. *Jackson*, ex dem. *Tillotson*, v. *Stiles*, 11 J. R. 195.

75. And if each has a separate, but no joint agent, papers may be served by affixing them in the clerk's office. *Ibid.*

76. In suits against attorneys, not only the bill or declaration, and notice to plead, but notices of all subsequent proceedings in the cause must be served personally on the defendant or his agent. *Bridgeport Bank v. Sherwood*, 16 J. R. 43.

77. And it makes no difference whether the attorney is sued by bill or by writ. *Brown v. Childs*, 17 J. R. 1.

78. Service on a *Sunday*, of a notice, affidavits, or other papers, which are to be the foundation of a motion for a rule, is irregular and void. *Field v. Park*, 20 J. R. 140.

79. In every case of service on a party in a suit, except it be to bring him into contempt, leaving the paper at his dwelling house is sufficient. *Johnston v. Robins*, 3 J. R. 440.

80. If service of a paper has not been properly made, but the party can show circumstances, which are not contradicted, to induce a belief that it was received, the Court will consider it as having been received. *Anonymous*, 2 C. R. 384.

81. Where the affidavit of the person who made the service could not be obtained, a memorandum by him, and an affidavit of information derived from him, were received. *Jackson*, ex dem. *Rosekrans*, v. *Howd*, 3 C. R. 131.

82. The service of a notice may be proved, where no copy has been kept, by an affidavit of its contents. *Tower v. Wilson*, 3 C. R. 174.

83. To bring a party into contempt, for disobeying a judge's order, the original order

must be shown at the same time the copy is served. *Howland v. Ralph*, 3 J. R. 20.

84. To bring a party into contempt for the non-payment of costs, the person serving the taxed bill, &c. must show the party his authority to receive the costs. *Jackson*, ex dem. *Lowe*, v. *Virgil*, 3 J. R. 138.

85. The party is to be governed by the pleadings delivered to him, *and is not to search the office to see [*257] whether the originals are filed. *Smith v. Wells*, 6 J. R. 286.

See ante, II. 36. post, X. 137—148. XI. 154, 155. XII. 168. XXXII.

VI. Affidavits.

86. Judges of the Courts of Common Pleas are, *ex officio*, commissioners of the Supreme Court to take affidavits. *Hopkins v. Menderback*, 5 J. R. 234.

87. An affidavit taken before an officer, who is an attorney in the cause, cannot be read. *Taylor v. Hatch*, 12 J. R. 340.

88. In collateral matters arising in the progress of a suit, as on a motion for a commission to examine witnesses abroad, affidavits may be taken before a magistrate or public officer out of the state. *Marshall v. Mott*, 13 J. R. 423.

89. An affidavit taken before a commissioner, or recorder, who is counsel in the cause, may be read, but not if he is the attorney. *Willard v. Judd*, 15 J. R. 531.

90. The act (Sess. 41. ch. 55.) of the 24th of *March*, 1818, authorizing the appointment of commissioners, to perform certain duties of a judge of the Supreme Court, did not supersede the commissioners appointed by that Court for taking affidavits to be read in Court. *Jones v. Smith*, 16 J. R. 232.

91. An affidavit taken before a commissioner, an attorney of the Supreme Court, and a partner in business with the attorney of the defendant, was allowed to be read; he not being named in the record as an attorney in the cause. *Hallenback v. Whitaker*, 17 J. R. 2.

92. The *jurats* of affidavits taken before judges of the Common Pleas, or commissioners, must be signed by them, with the addition of their official description. *Jackson*, ex dem. *Root*, v. *Stiles*, 3 C. R. 128.

93. If the affidavit begin with the deponent's name, it is a sufficient signing. *Huff v. Spicer*, 3 C. R. 190. *S. P. Jackson*, ex dem. *Kenyon*, v. *Virgil*, 3 J. R. 540.

94. The copy of an affidavit, served on the opposite party, need not be signed with the deponent's name, or have the *jurat*. *Livingston v. Cheetham*, 2 J. R. 479.

95. On an original application to the Supreme Court, counter affidavits are admissible. *Hart v. Faulkener*, 5 J. R. 362.

96. Where a judge at his chambers, on a rule to show cause of action, allowed the plaintiff to make supplementary affidavits, on which the defendant was held to bail, on a motion of the defendant, afterwards for an *exoneretur*, on the ground of the irregularity of the judge's order; *held*, that this was an original application, and that counter affidavits

on the part of the plaintiff were admissible. *Ibid.*

97. Where the first affidavit of the plaintiff is insufficient, whether a supplementary affidavit, in order to hold the defendant to bail, is admissible? *Quære. Ibid.*

[*258] *98. Counter affidavits are inadmissible where merits are sworn to. *Anonymous*, 1 J. R. 313.

99. Counter affidavits may be read to oppose a motion, though copies have not been served. *Campbell v. Grove*, 2 J. C. 105.

100. On an application to be discharged, on filing common bail, counter affidavits are admissible. *Welsh v. Hill*, 2 J. R. 100.

101. But where the plaintiff swears positively to a debt, it would be improper to receive them. *Ibid.*

102. Supplementary; affidavit in support of a motion, cannot be read. *Campbell v. Grove*, 2 J. C. 105. Unless copies of them have been duly served upon the adverse party.

And see post XVI. XXVI. XXVII. XXXI.

VII. Common rules.

103. Common rules are such rules as a party is entitled to, of course, without showing special cause. *Reg. Gen. I., April, 1796.*

104. Every other rule is denominated a special rule. *Ibid.*

105. Common rules, and all rules by consent of parties, in actions of ejectment and personal actions, shall be entered with the clerk, at his office, in a book provided for that purpose, and may be entered as well in vacation as during a term, and the day when the rule shall be entered shall be noted therein. *Ibid.*

106. But in real actions, rules shall be taken on motion in open Court. *Ibid.*

107. Every common rule is taken at the peril of the party, and does not conclude the opposite party from applying, on special motion, to vacate it. *Reg. Gen. II., April, 1796.*

108. The rule to produce the record, on the issue of *nul tiel record*, is a common rule. *Winter v. Carter*, C. C. 47.

VIII. Agreements and stipulations between the parties or their attorneys.

109. Rules by consent, or agreements between the parties or their attorneys, are not binding, unless entered in the book of common rules, or reduced to writing, and signed by them, or some person authorized for that purpose. *Reg. Gen. XII., April, 1796. Combs v. Wyckoff*, 1 C. R. 147. *Bain v. Thomas*, 2 C. R. 95. *Shadwick v. Phillips*, 3 C. R. 129. *Dubois v. Roosa*, 3 J. R. 145.

110. The Court will not take notice of a *parol* agreement between the attorneys, even as to bringing on a cause to trial at the circuit. *Parker v. Root*, 7 J. R. 320.

111. An agreement between the counsel in a cause respecting the *proceedings, must be in writing. *Griswold v. Lawrence*, 1 J. R. 507.

112. If it is not objected to the agreement, that it is by *parol*, the Court will give it its effect.

Brandt, ex dem. Palmer, v. Berrian, 3 C. R. 131. *But see Griswold v. Lawrence*, 1 J. R. 507. in which the Court say that this case is not accurately stated. *And see Dubois v. Roosa*, 3 J. R. 145. *Ante*, 109.

113. An appearance endorsed on a writ, is not evidence of an agreement that the proceedings in the cause should be considered as being of the term when the writ was returnable. *Gordon v. Bowne*, 1 C. R. 513.

114. Where an agreement or stipulation is vacated on application of one of the parties, the opposite party is restored to all the rights and advantages which he possessed when the stipulation was entered into. *Malin v. Kinney*, 1 C. R. 117.

And see post, XXVI.

IX. Removal of causes by habeas corpus, or certiorari.

115. If it appears, from the face of the declaration, that the plaintiff's demand is certain, and that he could not, in any event, recover the sum of 250 dollars, the Court of Common Pleas are not bound to regard a *habeas corpus* issued to remove the cause. *Shotwell v. Daniels*, 8 J. R. 341.

116. But if the demand is uncertain, and might exceed the sum of 250 dollars, the amount stated in the conclusion of the declaration must be considered as the test of the plaintiff's demand, and the *habeas corpus* ought to be returned. *Ibid.*

117. Where an attorney is sued in an inferior Court, in which he is privileged from arrest, the cause cannot be removed into the Supreme Court by *habeas corpus cum causa*. *Webb v. Cleveland*, 9 J. R. 266. [But now attorneys are liable to arrest, (Stat. sess. 36. c. 48.). See ATTORNEY and COUNSEL, IV. 47.]

118. If the defendant shall not, in twenty days after the service of the notice of the rule to appear, or that a *procedendo* issue, put in bail, or if the bail, being excepted to, shall not, within four days after service of the notice of excepting, justify in double the amount of the sum in the writ below, the plaintiff may then, on filing an affidavit of service of the notice of the rule to appear, and purporting also that no notice of bail hath been received, or if bail hath been put in, that the bail hath been excepted to, and hath not justified within four days after service of the notice of excepting, have the default of the defendant, in not appearing, entered, and may thereupon, at any time thereafter, take out a *procedendo*, of course, and without waiting until the term after the default shall be entered, if it shall be entered in the vacation. *Reg. Gen. X., April, 1796.*

119. Where a cause has been removed to the Supreme Court by *habeas corpus*, the plaintiff must enter a rule for the defendant to appear *in twenty days, [*260] or that a *procedendo* issue, and serve a notice thereof on the defendant, before he can be entitled to move for a *procedendo*, for want of bail in that Court. *Youls v. Graham*, 11 J. R. 199.

120. And the same course is necessary to be taken where all the defendants jointly sued were not arrested on the process from the Court below. *Ibid.*

121. Where the action is against two defendants in the Court below, and one only is taken, and removes the cause by *habeas corpus*, whether he must put in bail in the Supreme Court for both defendants or not? *Quære. Ibid.*

122. *It seems*, that if the defendant might have been held to bail in the Court below, he may, on removing the cause, be held to bail in the Supreme Court, although the action be not bailable according to the course of that Court. *Vosburgh v. Rogers*, 8 J. R. 91.

123. Where the defendant is held to bail in the Court of Common Pleas, he must, on the removal of the cause by *habeas corpus*, put in special bail in the Supreme Court; though if the action had been originally brought in the Supreme Court, he would not be held to bail there. *Bell v. Hall*, 12 J. R. 152. *S. P. Kirkham v. Fox*, 19 J. R. 126.

124. Where a cause is removed to the Supreme Court by *habeas corpus*, the defendant must put in special bail in that Court, on the return of the writ, though common bail only was filed in the Court below. *Caldwell v. Blanchard*, 14 J. R. 331.

125. But he will be allowed twenty days to perfect his bail. *Ibid.*

126. On the return of the *habeas corpus*, the plaintiff's attorney must enter a rule for the appearance of the defendant in 20 days, or that a *procedendo* issue, and serve a copy of the rule; he cannot file bail and enter a default according to the statute. *Vanduzen v. Weller*, 5 J. R. 231.

127. The record is not removed by the *habeas corpus*, and the plaintiff, if he has declared in the Court below, must declare *de novo* in the Supreme Court. *Vosburgh v. Rogers*, 8 J. R. 91. *S. P. Platt v. Platt*, C. C. 35. *S. P. Caldwell v. Blanchard*, 14 J. R. 332. *S. P. Bank of Niagara v. McCracken*, 18 J. R. 493.

128. And the plaintiff may declare in the Supreme Court for a different cause of action, and for a demand which has accrued subsequent to the commencement of the suit below, and prior to the removal of the cause. *Vosburgh v. Rogers*, 8 J. R. 91. *S. P. Bank of Niagara v. McCracken*, 18 J. R. 493.

129. And the defendant may, in like manner, plead or set off any demand which has accrued subsequent to bringing the action below and prior to its removal. *Ibid.* 18 J. R. 493.

130. But he cannot plead the statute of limitations, or coverture, or matter subsequently arising, that does not go to the merits of the plaintiff's demand. *Ibid.* *Platt v. Platt*, C. C. 35.

131. So, the plaintiff may declare on a cause of action accrued subsequent to the test and allowance of the *habeas corpus*. *Platt v. Platt*, C. C. 36.

132. In a cause removed into the Supreme Court, by *habeas corpus*, the plaintiff cannot be non pressed; but then, if he does

[*261] not declare *in time, the defend-

ant is not bound to plead. *Chedham v. Lewis*, 3 C. R. 256.

133. So, the defendant is not bound to accept a declaration after two terms have elapsed. *Drake v. Hunt*, C. C. 43.

134. Where a cause was removed from an inferior Court by *habeas corpus*, and the plaintiff filed his declaration, and entered a rule to plead, and a *procedendo* was issued for want of bail, the plaintiff's costs in the Supreme Court were not allowed to be taxed. *Murray v. Smith*, 1 J. C. 105. *S. C. C. C. 71.*

135. A cause may be removed from a Court of Common Pleas to the Supreme Court in every case by a writ of *certiorari*, as well as by a writ of *habeas corpus cum causa*, &c. *Jackson, ex dem. Kip, v. Corley*, 14 J. R. 323.

136. And a *certiorari* is exclusively the proper writ for that purpose, where the defendant is not in custody, or has not filed common or special bail, nor endorsed his appearance on the writ. *Ibid.*

X. Declaration; (a) *Filing and serving declaration and oyer*; (b) *Rule to plead and rules to answer.*

(a) *Filing and serving declaration and oyer.*

137. If the plaintiff's attorney shall not have received a written notice of retainer, and service has not been made on the defendant personally, the service may be, if the defendant shall be returned in *custodia*, on the sheriff or one of his deputies. *Reg. Gen. V.*, April, 1796.

138. If the writ be returned *cepi corpus*, or the defendant's appearance be endorsed on the writ, service of the declaration may be made, by affixing a notice to plead alone, without a copy of the declaration, in some conspicuous place in the clerk's office. *Ibid.* *Graves v. Hassenfratz*, 1 J. C. 391. *S. C. C. C. 97.*

139. Where a copy of an amended declaration is served, new oyer need not be given, if the first was correct. *Lefferts v. Byron*, 1 J. C. 415. *S. C. C. C. 110.*

140. Where the venue has been changed, the plaintiff must either alter the declaration on file, and the copy delivered, accordingly, or file and deliver a new declaration. *Thomas v. Douglass*, 2 J. C. 226.

141. It is not necessary to serve a new declaration; but only a copy of the rule for changing the venue; and the declaration may be altered on file, at any time, so as to conform to the rule; and the want of such alteration is no excuse for any irregularity on the part of the defendant, who must proceed as if the alteration had been made. *Smith v. Sharp*, 13 J. R. 466.

142. Where the plaintiff files common bail for the defendant, according to the statute, the declaration may be filed *de bene esse*, any time within the forty days. *Conklin v. Havens*, 6 J. R. 127.

143. Whether the declaration may be filed *de bene esse*, at any time before bail is filed, or an appearance, and after the time allowed for the defendant's appearance? *Quære. Ibid.*

[*262] *144. The service of a second declaration by the plaintiff's agent, though without his knowledge, is a waiver of the first. *Kemble v. Finch*, 1 J. C. 414. S. C. C. C. 109.

145. Where a notice of the rule to plead shall be affixed in the clerk's office, if the attorney for the plaintiff shall, before entering the default of the defendant, receive a notice from an attorney that he is retained to defend the suit, he shall be held to serve the attorney for the defendant with a notice of the rule to plead, and with a copy of the declaration; and the rule of pleading shall be from the time of such service, so that the time for which the notice of the rule to plead may have been affixed in the office, shall not be taken into computation. *Reg. Gen. XIII., January, 1799. Storey v. Graham*, C. C. 111. *Kleecke v. Styles*, 3 J. R. 250.

146. But where a copy of the declaration and notice of the rule to plead, have been served on the defendant, personally, and he afterwards employs an attorney, who gives notice of his retainer, the declaration and rule to plead need not be served *de novo* on the attorney, but he must plead in 20 days from the first notice. *Kleecke v. Styles*, 3 J. R. 250. *Haskins v. Snowden*, 2 J. C. 287.

147. A defendant who craves *oyer* of a deed, is entitled to a copy of the attestation and names of the witnesses. *Smith v. Alworth*, 18 J. B. 445.

148. A defendant, entitled to *oyer*, cannot be compelled to plead without it. But if he elects to answer, it is a waiver of the objection, that the names of the witnesses were not given in the *oyer*, and it cannot be a ground of demurrer to the declaration. *Ibid.*

(b) *Rule to plead, and rules to answer.*

149. The declaration or pleading to be answered to, must be filed before a rule can be taken for the opposite party to plead or answer. *Reg. Gen. III., April, 1796.*

150. The rule to plead, and every other rule to answer, shall be a rule of twenty days after service of notice thereof, and of a copy of the pleading to be answered. *Reg. Gen. IV., April, 1796.*

151. So, the rule, in ejectment, for the tenant to appear and enter into the consent rule and in *scire facias*, for the defendant to plead, shall be a rule of twenty days from the day when the same shall be entered. *Ibid.*

152. But the rule to join in demurrer to a plea in abatement, and the rule, on *scire facias*, for the defendant to appear, shall be rules of four days only. *Ibid.*

And see post, XIII.

XI. *Bill against an attorney.*

153. The bill against an attorney is in the nature of process. *Backus v. Rogers*, 8 J. R. 346.

[*263] *154. Personal service is required, or some other service, which the Court, under the circumstances of the case, may regard as equivalent. *Ibid.*

155. Service on the attorney's agent is not sufficient. *Ibid.*

156. Bills against attorneys may be filed in vacation; and the suit is deemed to commence only from the time of filing the bill. *Sabin v. Wood*, 10 J. R. 218.

157. Though a bill be entitled generally of the term, the plaintiff is allowed to show, at the trial, the time when the cause of action arose. *Ibid.*

158. If the true time when the cause of action arose is set forth in the bill, and it is subsequent to the term of which it is filed, and there is no special memorandum, it is bad on special demurrer. *Ibid.*

See ante, V.

XII. *Judgment of non pros.: for not declaring.*

159. The plaintiff may declare at any time, unless non prossed. *Cheatham v. Lewis*, 3 C. R. 256. *S. P. Dole v. Young*, 11 J. R. 90.

160. After the defendant's appearance, by putting in special bail, or otherwise, and the bail having justified, if excepted to, the defendant may, at any time, take a rule against the plaintiff, to declare before the end of the term next following, after service of the notice of the rule. *Reg. Gen. V., April, 1796.*

161. If the plaintiff shall make default in not declaring, the defendant, after filing an affidavit of service of notice of the rule, may enter the plaintiff's default in the book of common rules. *Reg. Gen. VI., April, 1796.*

162. After the plaintiff's default shall have been duly entered, the defendant shall not be held to accept a declaration, and may, at any time, after four days in term shall have intervened, have a rule entered for such judgment, as it is to be rendered by law, by reason of the default. *Reg. Gen. VIII., April, 1796.*

163. But the Court, in term, or a judge, in vacation, may, on motion of the plaintiff, before the default has been entered, make such order for enlarging the time to declare, as shall be judged reasonable in the case. *Ibid.*

164. The recorder of the city of New-York may grant an order in term time, as well as in vacation, for enlarging the time to declare or plead. *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 343.

165. Before the defendant can enter judgment of *non pros.* for not declaring, he must enter a rule for the plaintiff to declare, and give him notice thereof. *Gilbert v. Field*, 2 J. C. 292.

166. Notice of a rule to declare need not specify in the alternative, or that "a default will be entered; notice to declare, or that *judgment of non pros. will be entered," is sufficient. *Gardener v. Buel*, 2 C. R. 103.

167. Where a rule is entered for the plaintiff to declare before the end of the next term, the plaintiff has the whole of the last day of the term in which to declare; and his default cannot be entered until the next day thereafter. *Sharp v. Dorr*, 15 J. R. 531.

168. Service of notice of the rule to declare, may be made either on the plaintiff's attorney

or his agent, at any time before the term; and if the plaintiff does not declare before the end of the term, his default may be entered, though forty days have not elapsed from the time of serving the notice on the agent. *Dizen v. Bates*, 7 J. R. 537.

169. Where there are several joint defendants, some of whom only have been taken, the plaintiff may, notwithstanding, be *non prossed*, for not declaring, by those who have been brought into Court. *Shawee v. Colfax*, 3 C. R. 98.

170. To avoid which, the plaintiff, on being ruled to declare, should apply, from time to time, for an enlargement of the rule, on showing that he was endeavoring to bring all the defendants into Court, or was proceeding to outlawry against those who were not brought in. *Ibid*.

171. If the plaintiff declares after the expiration of a year, and no attorney has been employed for the defendant, the copy of the declaration, and notice of the rule to plead, should be served on the defendant personally, or left at his usual place of abode. *Dole v. Young*, 11 J. R. 90.

172. If the plaintiff neglects to deliver to the defendant the *particulars* of his demand, pursuant to an order for that purpose, the defendant is entitled to judgment as in the case of non pros. in the same manner as for want of a declaration. *Fleurot v. Durand*, 14 J. R. 329. And in that case, a rule was granted, that the plaintiff deliver to the defendant the *particulars* of his demand in *twenty* days, or that a judgment of *non pros.* be entered. *Ibid*.

173. The plaintiff, in the bill of particulars of his demand, is not obliged to state the credits or payments made by the defendant. *Ryckman v. Haight*, 15 J. R. 222.

174. An order, for the plaintiff to furnish a bill of particulars, is not granted without an affidavit showing the necessity of such an order. *Willis v. Bailey*, 19 J. R. 268.

See ante, I. 9.

XIII. *Impar lance ; time for pleading, and filing and delivering plea.*

175. Where the plaintiff has amended his declaration, after plea pleaded, the defendant is entitled to an impar lance. *Holmes v. Lansing*, 1 J. C. 248.

176. In an action of trespass, against the collector of the port of *New-York*, for seizing the vessel of the plaintiff, against which a libel was filed in the District Court of the *United States*, under a law of the *United States*, but which had not been heard or determined, on account of the sickness of the judge; the Supreme Court refused to *grant the [*265] defendant an impar lance, indefinitely until the libel could be heard and decided in the District Court. *Hoyt v. Gelston*, 8 J. R. 179.

177. The time to plead is to be calculated one day exclusive, and the other inclusive, so that the party may have the full number of days. *Hoffman v. Duel*, 5 J. R. 232.

178. Where the rule to plead expires on Sunday, the last day is not reckoned, and the

party has all the next day to plead in. *Cod v. Bunn*, 6 J. R. 326.

179. If a defendant wants more time to plead, he must apply to the Court in term, or to a judge in vacation, to enlarge the rule. *Reg. Gen. VIII., April*, 1796. *Gorham v. Lansing*, 2 J. C. 107. S. C., C. C. 116.

180. And the last day of the time granted by the judge is to be reckoned inclusively, so that the plaintiff cannot enter a default until the day after. *Thomas v. Douglass*, 2 J. C. 226.

181. The recorder of the city of *New-York*, &c., as well as a judge of the Supreme Court, may grant an order, in term time, as well as in vacation, for enlarging the time to declare or to plead. *Dutchess Cotton Manufactory v. Davis*, 14 J. R. 343.

182. A defendant has the same time to plead after oyer is given, as he had when he demanded it. *Read v. Patterson*, 14 J. R. 322.

183. As, if five days only of the time for pleading remained unexpired when oyer was demanded, he must plead in five days after oyer is given. *Ibid*.

184. Where a rule, on a judgment of the Supreme Court, on demurrer, gives a party leave to amend his plea within a certain specified time, on payment of costs, an order by a judge at his chambers, or of the recorder of a city, extending the time so allowed by the Court, is irregular and void. *Van Ness v. Hamilton*, 20 J. R. 124.

185. If the rule for pleading has expired when the venue is changed on motion of the defendant, he must plead forthwith to the amended declaration: if the 20 days are not out, he has only the remaining days in which to plead. *Russel v. Ball*, 3 J. C. 91. *Burrows v. Hillhouse*, 6 J. R. 132.

186. A plaintiff may accept or refuse an imperfect copy of a plea; and if he accepts it, the Court will compel the defendant to file a perfect plea. *Cohan v. Kip*, C. C. 45.

187. The plaintiff is not held to accept a plea in abatement, after four days from the day of the service of a notice of the rule to plead and of a copy of the declaration. *Reg. Gen. IV., April*, 1796.

188. And where there shall have been a judgment of *respondens ouster*, on a demurrer to a plea in abatement, the plaintiff having served the defendant with the notice of the judgment, shall not be held to accept of any answer to the declaration after four days from the day of the service of such notice. *Ibid*.

189. The Court will not permit the general issue to be withdrawn to let in a plea in abatement delivered in time. *Anonymous*, 3 C. R. 102.

And see post, XVI.

*XIV. *When a cause is at issue, [*266] and the effect of it.*

190. If the defendant shall plead the general issue, and if the plaintiff shall not, within twenty days after service of a copy of the plea, either demur thereto, or amend the declaration, or, if either party shall, in pleading,

in any degree, after the plea, tender an issue to the country, and if the opposite party shall not demur to the pleading within twenty days after service of a copy thereof, the cause shall, in each of these cases, be deemed to be at issue. *Reg. Gen. IX., April, 1796.*

191. If a cause shall be put at issue in the vacation, or, if it shall be put at issue in term, and there shall not be four days in term thereafter, then, in these two cases, the four first days in the next term, or, if it shall be at issue in term, and there shall be at least four days remaining in term thereafter, then, in this case, the days so remaining in term, shall be the time limited to obtain a rule for a commission to examine witnesses, or for a view, or for a struck jury, whereby the defendant obtaining the rule may stay the plaintiff from bringing the cause on to trial, or whereby the plaintiff obtaining the rule may stay the defendant from serving a notice to bring the case on to trial. *Ibid.*

192. But if the rule shall be subsequently obtained, the plaintiff may bring the cause to trial, or the defendant may serve a notice to bring the cause on to trial, and be entitled to judgment thereupon, notwithstanding the commission may not be returned, or the jury may not be balloted for the view, or may not be struck, as the case may be. *Ibid.*

193. And if, at the time of giving notice of trial, the jury, on such subsequent rule obtained by the defendant, should not be balloted for the view, or be struck, as the case may be, the plaintiff may proceed to trial on the ordinary jury process. *Ibid.*

194. But if the rule shall be obtained within the time limited, and there shall be a delay in the party obtaining the rule to have the commission returned, or to have the jury balloted for the view, or struck, the Court may, on motion of the other party, order the rule to be discharged, and otherwise further order, as the case shall be judged to require. *Ibid.*

195. Where an issue to the country is tendered by the plaintiff, and he adds a *similiter*, he may notice the cause for trial immediately, without waiting twenty days, to see whether the defendant will demur or not; but at the peril, however, of the defendant's striking out the *similiter*, and demurring *bona fide*. He cannot do so merely for delay; for that would be a fraud on the 9th rule of April term, 1796. *Shultys v. Owens*, 14 J. R. 345.

XV. Judgment by confession; and on warrant of attorney.

196. Judgment may be entered on a *cognovit*, in vacation. *Arden v. Rice*, 1 C. R. 498.

*197. A confession of judgment [*267] ought to be for a certain and specified sum. *Nichols v. Hewit*, 4 J. R. 423.

198. A confession of judgment for the amount of an award, before it is published, is bad. *Ibid.*

199. To a *scire facias* on a judgment entered by confession, the defendant cannot plead any matter which might have been pleaded to the original action, or which existed prior to the judgment, any more than he could

have done to a *scire facias* on a judgment after plea pleaded, but his proper remedy is by an application to the Court for relief on motion. *M'Farland v. Irwin*, 8 J. R. 77.

200. If, after judgment by confession, the want of an original bill shall be assigned for error, the plaintiff may file an original bill, as of course, and *nunc pro tunc*, as of the term when the suit was commenced. *Reg. Gen. XIII., April, 1796.*

201. The Supreme Court exercises an equitable jurisdiction over judgments entered upon bonds and warrants of attorney. *Frasier v. Frasier*, 9 J. R. 80.

202. Where a notice is endorsed after it becomes due, and in an action by the endorsee against the maker, he confesses judgment, the judgment will not be set aside to let in an equitable defence, especially where the original parties are in *pari delicto*. *Sebring v. Rathbun*, 1 J. C. 331.

203. It seems, that if a defendant, in custody on *mesne* process, executes a warrant of attorney, the nature of which is explained to him by an attorney who does not witness it, and who is attorney for neither party, the Court will not set it aside. *Manhattan Company v. Brouer*, 1 C. R. 511.

204. A warrant of attorney was given in vacation, to enter up judgment in vacation or term, on a bond given at the same time, and payable immediately; and judgment was entered up as of the preceding term, which, though erroneous, the Court refused to set aside on motion. *King v. Shaw*, 3 J. R. 142.

205. The defendant, in such case, must be left to his remedy by writ of error; and the plaintiff, to protect himself, by a release of errors, if he can procure it. *Ibid.*

206. The Court will set aside a warrant of attorney and judgment entered on a bond given to a sheriff or gaoler by a prisoner charged in execution, for the amount of the debt and additional charges, (in order to obtain his discharge,) and will leave the obligee to seek his remedy, if any, on the bond, at law. *Richmond v. Roberts*, 7 J. R. 319.

207. On the application of a judgment creditor, stating that a judgment had been fraudulently entered up on a bond and warrant of attorney, an issue was directed between the parties to try the truth of the allegation, and the plaintiff directed to prove the consideration of the bond, and the creditor allowed to *subpæna* witnesses, in the name of the defendant, to attend the trial. *Frasier v. Frasier*, 9 J. R. 80. But the Court will not interfere to set aside such a judgment, at the instance of a creditor at large. *Wintringham v. Wintringham*, 20 J. R. 298.

208. Where it appeared that a bond, on which judgment was entered *by confession, was given for a gaming [*268] debt, and the counter affidavits were equivocal or evasive, the Court refused to award an issue to try the fact, but set aside the judgment, and declared the warrant of attorney void, so as to leave the party to his remedy on the bond by suit. *Everitt v. Knapp*, 6 J. R. 331.

209. After the lapse of 18 years, the Court refused to permit a judgment to be entered up on a bond and warrant of attorney, on the usual affidavit, (i. e. that the bond was duly executed, and still remained due; and that the obligor was still living, and that judgment was not entered before, because of the insolvency of the obligor,) the legal presumption being that the bond was paid. *Executors of Clark v. Hopkins*, 7 J. R. 556.

210. The obligee ought to have rebutted the presumption, by showing a demand of payment and an acknowledgment of the debt within 18 years. *Ibid.*

211. The specification of the nature and consideration of the debt required by the act, (Sess. 41. c. 259. s. 8.) to be filed with the record, on entering up a judgment by virtue of a warrant of attorney, should be so precise and particular, as to apprise all parties interested, of the nature and consideration of the debt. It ought to be as precise, at least, as a bill of particulars; a statement as general as the common counts in a declaration is not sufficient. *Lawless v. Hackel*, 16 J. R. 149.

212. If the debt be for goods sold and delivered, the specification ought to state the kind, quantity, price, and time of sale. *Ibid.*

213. A specification filed, may be amended, but not so as to interfere with the rights of intervening judgment creditors. *Ibid.*

XVI. Judgment by default; (a) *When and how default may be entered*; (b) *Interlocutory judgment and assessment of damages generally*; and also under the 7th section of the statute; (c) *Selling aside default*; (d) *Setting aside proceedings subsequent to default*.

(a) *When and how default may be entered.*

214. If either party shall make default in not answering, the opposite party, after filing an affidavit of service of notice of the rule to answer, and of a copy of the pleading, may have his default entered in the book of common rules. *Reg. Gen. VII., April, 1796.*

215. But if special bail should be required in the cause, although twenty days from service of notice of the rule to plead may have expired, the default shall not be entered until four days after notice of bail shall have been received; and if bail shall be excepted to, then, not until four days after the bail shall have justified. *Ibid.*

216. If matter which must be pleaded in abatement be contained in a plea in bar, without being verified by affidavit, the plaintiff may treat it as a nullity, and enter a default. *Robinson v. Fisher*, 3 C. R. 99.

217. A default cannot be entered before the defendant has appeared. *Howell v. Denniston*, 3 C. R. 96.

*218. The party is to be governed by the pleadings delivered to him, and is not to search the office, to see whether the originals are filed. *Smith v. Wells*, 6 J. R. 286.

219. So, if the defendant serves a plea, and a plaintiff, on searching the office, find none on file, he cannot enter a default. *Ibid.*

220. A default cannot be entered until the day after the time for pleading has expired. *Thomas v. Douglass*, 2 J. C. 226.

221. If the defendant gives notice of motion to change the venue, without obtaining an order to enlarge the time to plead, or a certificate, the plaintiff may, when the time for pleading is out, enter a default. *Ekhart v. Dearman*, 2 C. R. 379.

222. But if, when the defendant brings on his motion, the plaintiff does not attend to oppose it, it is tantamount to a waiver of his default. *Ibid.*

223. Where the notice of a rule to plead, with a copy of the declaration, was served on the defendant, personally, on the 12th of May, and special bail was filed on the 28th of May, but no notice thereof, or of the retainer of an attorney, was given to the plaintiff's attorney until the 6th of June, and a default was entered on the 4th of June, for want of a plea; *held*, that the default was regularly entered. *Leispenard v. Baker*, 6 J. R. 323.

224. The notice of appearance is for the benefit of the plaintiff's attorney, and may be waived by him. *Ibid.*

225. It is sufficient, under the 7th rule of April term, 1796, that the defendant, though the rule for pleading has expired, has four days after bail is actually filed before his default is entered. *Ibid.*

226. It is absolutely necessary that the plaintiff should enter a default, to entitle himself to interlocutory judgment. *Oudenarde v. Van Bergen*, C. C. 47.

227. An affidavit of the service of a copy of a declaration and notice of the rule to plead, must be positive, and sufficient at the time the default is entered thereon, for not pleading. *Executors of Doolittle v. Executors of Ward*, 5 J. R. 359.

228. It cannot be made good by a subsequent knowledge of the fact, that the notice was received by the defendant's attorney at the time. *Ibid.*

229. The default being duly entered, the party who shall have had it entered, shall not be *held*, afterwards to accept an answer, and may, at any time, after four days in term shall have intervened, have a rule entered for such judgment as is to be rendered by law by reason of the default. *Reg. Gen. VIII., April, 1796.*

230. But the Court, in term, and a judge, in vacation, may, on motion of the party against whom the rule to answer may have been taken, make such order for enlarging the time to answer as shall be judged reasonable in the case. *Ibid.*

(b) *Interlocutory judgment and assessment of damages generally*; and also under the 7th section of the statute.

231. Rules for interlocutory judgment, or assessment of damages, must be entered before the plaintiff can perfect his judgment on the default. *Griswold v. Slaughter*, 1 C. R. 6.

*232. Notice of executing a writ of inquiry may be given at any time after default. *Gould v. Spencer*, 2 C. R. 109.

[*270]

223. Interlocutory judgment may be entered at any time before issuing a writ of inquiry. *Ibid.*

224. A notice of executing a writ of inquiry at a certain day, "provided an interlocutory judgment shall have then been obtained in the cause," is good, and the words of the proviso may be rejected as surplusage. *Oothout v. Root*, 12 J. R. 151.

225. If no interlocutory judgment should, in fact, be obtained, and the notice be not countermanded, the party giving such notice must pay costs. *Ibid.*

226. The same notice of assessment of damages before the clerk must be given, as for the trial of a cause. *Green v. Guthrie*, 10 J. R. 128.

227. In actions of debt, where a judgment by default is obtained, the plaintiff need not issue a writ of inquiry to ascertain the interest or damages, but the same may be ascertained by the clerk, and taxed with the costs. *Fenton v. Garlick*, 6 J. R. 287.

228. The plaintiff must, however, give notice to the defendant of the taxation before the clerk; and if he neglects to give such notice, the Court will set aside the judgment, but order a retaxation, on proper notice; and if any deduction is made on the retaxation, the amount is to be credited on the execution. *Ibid.*

229. The clerk, on an assessment of damages, may take proof of the loss of the original paper, on which the action is brought. *Per Curiam*, 14 J. R. 347.

240. If the clerk makes a mistake in the assessment of damages, the Court will order him to make another assessment. *Burr v. Reeve*, 1 J. R. 507.

241. Where, after the execution of a writ of inquiry, judgment is arrested on some of the counts in the declaration, the plaintiff may, on payment of costs, have a writ of inquiry, *de novo*, on the counts which are good. *Callagan v. Hallett*, 1 C. R. 104.

242. If it appears that important questions of law will arise on the execution of the writ of inquiry, the Court will order it to be executed before a judge at the Circuit. *Tillotson v. Cheetham*, 2 J. R. 107.

243. The executing a writ of inquiry is an inquest of office, and the officer who presides acts ministerially, and not judicially. *Tillotson v. Cheetham*, 2 J. R. 63.

244. It may be executed before a sworn deputy of the sheriff. *Ibid.*

245. A defendant who attends before a sheriff with his witnesses, on notice of the executing of a writ of inquiry, is entitled to his costs, if the plaintiff does not appear, or the writ is not then executed. *Butler v. Kelsey*, 14 J. R. 342.

246. A writ of inquiry of damages cannot be executed on a Sunday; nor can the jury who have been empanelled on Saturday, and heard the allegations and proofs of the parties before 12 o'clock at night, assess the damages and deliver their verdict to the sheriff on Sunday. *Butler v. Kelsey*, 15 J. R. 177.

247. If the plaintiff has any objection to

the jurors summoned on the inquest, he must state them openly; and if he state them privately "to the sheriff," [*271] who thereupon discharges a juror, the inquest will be set aside. *Ibid.*

248. If a party to an arbitration bond revokes the power given to the arbitrators, as he may, before an award is made, the penalty of the bond is thereby forfeited; but the plaintiff must assign breaches, and have his damages assessed under the 7th section of the statute: *Allen v. Watson*, 16 J. R. 205.

249. Where one of two defendants pleads and the other makes default, the plaintiff cannot proceed to try the issue joined, and have the damages assessed against both defendants, before an interlocutory judgment has been regularly entered against the defendant who neglects to plead. *Hart v. De Lord*, 17 J. R. 270.

250. The Court may assess damages without the intervention of a jury. *McCollum v. Barker*, 3 J. R. 153.

251. So, where it appeared by the record on a writ of error from a Court of Common Pleas, that a jury was summoned, and the damages assessed in the presence of the Court, and judgment entered for the amount, without an inquisition returned, the judgment was affirmed. *Ibid.*

252. It seems, that the plaintiff cannot take an inquisition on such of the counts of his declaration as he thinks fit, but that the assessment of damages must apply to the whole declaration, as set forth in the writ of inquiry. *Backus v. Richardson*, 5 J. R. 476.

253. If, after judgment by *nil dicit*, or *non sum informatus*, the want of an original bill be assigned for error, the plaintiff may file it, of course, *nunc pro tunc*, as of the term when the suit was commenced. *Reg. Gen. XIII, April, 1796.*

254. In an action upon a recognizance given by the father of a bastard child, under the act, (Sess. 36. c. 12. s. 4.) the damages are not to be assessed, it not being within the seventh section of the act for the amendment of the law; but the verdict must be for the penalty, the whole of which is to be recovered, and is not intended to stand merely as a security against further breaches. *The People v. Relyea*, 16 J. R. 155.

(c) Setting aside default.

255. A regular default will be set aside, on an affidavit of merits, and payment of costs, if an opportunity for a trial has not been lost. *Davenport v. Ferris*, 6 J. R. 131. *S. P. Tullmadge v. Stockholm*, 14 J. R. 342. Contrary to the previous practice, which required an excuse to be shown for not having pleaded. *McKinstry v. Edwards*, 2 J. C. 113. *S. C. C. C. 124. Spencer v. Webb*, 1 C. R. 118. *Cogswell v. Vandenberg*, *id.* 156. *Beckman v. Franker*, 3 C. R. 95.

256. Where the Court is applied to, to set aside a proceeding for irregularity, the want of merits will not be regarded. *Howell v. Denniston*, 3 C. R. 96.

257. Where the plaintiff's attorney receiv

ed notice of retainer from two attorneys for the defendant, successively, and, without informing the second attorney of the first notice, served a declaration on the [*272] *first attorney, a default was set aside, with costs, on the application of the second attorney. *M'Nealy v. Morrison*, 1 J. C. 28.

258. A default was set aside, on affidavit that the plea was sent by mail to the plaintiff's attorney, the receipt of which was not denied in his counter affidavit, with costs, to be paid by the plaintiff's attorney himself. *Stafford v. Cole*, 1 J. C. 413. *S. C. C. C. 107. Hudson v. Henry*, 1 C. R. 67. *S. P. Ludlow v. Heycraft*, 2 C. R. 386.

259. On an application to set aside a default, bail are not entitled to any peculiar indulgence. *Gorham v. Lansing*, 2 J. C. 107. *S. C. C. C. 117.*

260. A default was set aside, where the defendant's attorney acted under a mistake as to the practice, and swore to merits. *Russel v. Ball*, 3 J. C. 91.

261. Where an attorney appeared for the defendant, in a bail bond suit, after a default had been entered, and was not apprised by the plaintiff's attorney of the state of proceedings, who entered judgment, and executed a writ of inquiry in the original suit; on application of the defendant, the Court ordered the judgment on the bail bond to stand as security, and the costs on that to remain also; the default, and subsequent proceedings in the original suit, to be set aside, on payment of the costs of entering the judgment under the statute, and executing the writ of inquiry; the defendant to plead *instantly* to the declaration filed, take short notice of trial, and pay the costs of the application. *Tennent v. Steele*, 1 C. R. 68.

262. In an action not bailable, a default will not be set aside, because the clerk had neglected to enter the defendant's appearance; and it may be done *nunc pro tunc*. *Ross v. Hubble*, 1 C. R. 512.

263. The plaintiff, on demand, gave *oyer* different from that set out, to which the defendant pleaded *non est factum*; the plaintiff then, without any rule or notice, served a fresh *oyer*, and 20 days after, signed judgment by default: the default was set aside, with costs. *Clinton v. Porter*, 2 C. R. 176.

264. If, in an action by a corporation, a default be entered, while the defendant is petitioning them for relief in the premises on which the action is brought, it will be set aside, with the proceedings thereon, on affidavit of the circumstances, and of merits. *Corporation of New-York v. Sands*, 2 C. R. 378.

265. If a notice of retainer of attorney be sworn to have been given by the defendant, and denied by the plaintiff, for want of which a default has been entered, it will, with the subsequent proceedings, be set aside, on payment of costs, if accompanied by an affidavit of merits. *Thompson v. Payne*, 3 C. R. 88.

266. Where notice of appearance was

sworn to have been sent to the agent of the defendant's attorney, to be served on the plaintiff's attorney, who denied the receipt of it, the Court would not set aside a default unless the agent to whom the papers were sent would show that he had not received them. *Lansing v. Horner*, 3 C. R. 95.

267. Misapprehension of a stipulation, and a delay, from accident, were admitted as grounds for setting aside a default. *Olney v. Bacon*, 3 C. R. 132.

268. A default was set aside, the defendant supposing the suit to *have been brought in the Common Pleas, and [*273] having retained an attorney to defend there. *Wilson v. Guthrie*, 3 C. R. 134.

269. Misapprehension of the time of the return of the writ was admitted as an excuse, and the default set aside, on payment of costs, and pleading issuably. *Gardiner v. Crocker*, 3 C. R. 139.

270. A default was set aside, the defendant supposing that he had not been arrested, and swearing to merits. *Bennet v. Fuller*, 4 J. R. 486.

271. Where a plea was sent to the plaintiff's attorney, but miscarried, and a judgment by default was entered for want of a plea, the Court, on an affidavit of merits, allowed the defendant to come in and plead, and go to trial; but ordered the judgment to stand as security, as the party had lost a trial. *Fenton v. Garlick*, 6 J. R. 287.

272. A default was set aside, on payment of costs, where the defendant's attorney had forgotten to file the plea, and a copy without signature was served. *Kip v. Cohan*, C. C. 45.

273. If a regular judgment has been obtained against an executor or administrator, by default, and more than a term has elapsed since the defendant knew of the default, yet the Court will set aside the default, on payment of costs, to let in the defendant to plead, so as to prevent his being made liable, *de bonis propriis*, through the ignorance or negligence of his attorney. *Philips v. Hawley*, 6 J. R. 129.

274. An affidavit of a *good and substantial defence in the cause*, is a sufficient affidavit of merits. *Briggs v. Briggs*, 3 J. R. 449. *But see Jackson v. Stiles*, 3 C. R. 93.

275. In the ordinary affidavit of merits, to set aside a default, it is requisite that the party should state as to his being advised by counsel. *Wilkes v. Hotchkiss*, 5 J. R. 360.

276. But where he sets forth the facts which constitute the merits of his defence, so that the Court can judge of the merits, it is sufficient, without saying he is advised by counsel. *Ibid.*

277. An affidavit of the defendant's attorney, stating, that "he was informed, and verily believed, that the defendant had a substantial defence," on the merits, is not sufficient. *Briggs v. Briggs*, 3 J. R. 258.

278. To set aside a default on the ground of having since discovered evidence sufficient to support a plea, the names of the witnesses must be disclosed, as well as what is expected to be proved by them. *Richardson v. Backus*, 1 J. R. 59.

(d) *Setting aside proceedings subsequent to a default.*

279. Proceedings subsequent to a default, may be set aside for irregularity; but the default itself will still remain, unless the defendant can excuse it. *Griswold v. Stoughton*, 1 C. R. 6. *S. P. Spencer v. Webb*, *id.* 118.

280. Where the parties agreed that any matter might be given in evidence before the sheriff, which could be given on a trial, or could have been pleaded, an inquisition will not be set aside, because the sheriff admitted improper, or rejected proper evidence. *Sharp v. Dusenbury*, 2 J. C. 117. *S. C. C. C.* 134.

[*274] 281. An inquest of office is to inform the conscience of the Court; and an inquisition will not be set aside, on the ground of the admission of improper evidence, unless it appears that injustice has been done. *Ward v. Haight*, 3 J. C. 80.

282. A writ of inquiry, never executed or returned, and in the possession of the plaintiff, cannot be set aside; but the Court will permit him to issue one, *de novo*. *Abel v. Wolcott*, 1 C. R. 250.

283. In an action on a promissory note, the plaintiff's attorney resided in New-York, and had no agent in Albany, near which the defendant's attorney lived; the defendant's attorney non proessed the plaintiff for not declaring, putting up his notices in the clerk's office in Albany; in the mean time, the plaintiff's attorney, at New-York, obtained judgment by default, and the damages assessed were endorsed on the note by the clerk; the plaintiff's attorney having discovered the circumstances, paid the defendant the costs of the *non pros.*, and vacated his own judgment; having commenced a second suit, he was allowed, on motion, to strike out the assessment endorsed. *Alterbury v. Teller*, 1 C. R. 495.

284. Default, judgment, and execution were set aside, with costs, for irregularity, where no merits were sworn to, on condition that the defendant should not bring an action for false imprisonment. *Deptyster v. Warne*, 2 C. R. 45.

285. An inquisition will be set aside where the defendant's attorney is prevented, by indisposition, from attending on the execution of the writ, and the defendant himself has had no notice of the day, especially if the damages are excessive; but the defendant must consent that judgment should be entered as of the same term. *Koy v. Clough*, 2 C. R. 381.

286. If any one mix with the jury, on a writ of inquiry, the inquisition will be set aside, each party paying his own costs. *Woods v. Hart*, 3 C. R. 96.

287. Where, in an action against executors, there was a special count in the declaration, and several money counts added, as matter of course, but no distinct causes of action, and after interlocutory judgment, damages were separately assessed on each count, and judgment was arrested on the first count, the inquisition on the other counts was set aside, and the defendant allowed to plead, upon terms. *Livingston v. Executors of Livingston*, 3 J. R. 254.

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288. In an action for slander or a libel, an inquisition will not be set aside on the ground of excessiveness of damages, unless they appear to be very outrageous and enormously excessive. *Tillotson v. Cheetham*, 2 J. R. 63.

289. Where, after interlocutory judgment, an attorney was retained by the defendant, who gave notice of his retainer, and the plaintiff executed a writ of inquiry, without giving notice to the attorney, the writ and subsequent proceedings were set aside. *Van Loon v. Driggs*, C. C. 50.

290. After the plaintiff has perfected his judgment, the defendant can only be relieved, on payment of costs and [*275] filing a plea *instantly*. *Giles v. Coines*, 3 C. R. 107.

291. Where a rule was granted to set aside a default and subsequent proceedings on payment of costs, and the costs were regularly demanded of the defendant, but not paid, and the plaintiff afterwards issued an execution on the judgment, the Court refused to set aside the execution. *Pugsley v. Van Allen*, 8 J. R. 352.

292. Where the plaintiff, after obtaining in interlocutory judgment, neglected to proceed further, for more than two terms, a rule was granted, on motion of the defendant, that the plaintiff execute his writ of inquiry, in thirty days, or he non proessed. *Kent v. McDonald*, 15 J. R. 400.

XVII. *Striking out counts, &c.*

293. Where the defendant, in an action for a libel, in his plea, set forth, in *hæc verba*, two declarations by the plaintiff in two other actions, the Court ordered them to be struck out, as being an oppressive encumbrance on the record. *Spencer v. Tabele*, 9 J. R. 130.

294. In an action for a libel, the defendant pleaded *not guilty*, and gave notice of certain facts to be proved on the trial; and afterwards moved for leave to strike out the notice, but the Court refused to grant the motion, unless he would make affidavit of the falsehood of the matters stated in the notice. *Clinton v. Mitchell*, 3 J. R. 144.

XVIII. *Frivolous demurrer.*

295. To take the effect of a motion for judgment in case of a frivolous demurrer, notice of bringing on the argument must be given. *Anonymous*, 2 C. R. 56.

296. If the notice of motion specify that it will be grounded on the frivolousness of the demurrer, it will give the applicant a priority before other enumerated causes, and entitle him to judgment, on reading the affidavit of service and notice, if no opposition be made. *McCabe v. McKay*, 2 C. R. 100.

297. By opposition, is not meant the mere saying of counsel that they oppose; it must be such as has, at least, a color or semblance of reality. *Kane v. Scofield*, 2 C. R. 368.

298. A motion for judgment on a frivolous demurrer will not gain a priority, unless the notice state that the frivolousness of the demurrer is the ground of application. *Kibbe v. Stoddard*, 3 C. R. 129.

299. The Court will not allow a frivolous

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demurrer to be withdrawn, on an affidavit of merits. *Griswold v. Haskins*, 1 J. C. 135. S. C. C. C. 75.

XIX. Particulars of demand and set-off.

300. The defendant may call on the plaintiff for the particulars of *his demand, where they are not disclosed in the declaration. *Mercer v. Sayre*, 3 J. R. 248.

301. So, the plaintiff may call on the defendant for the particulars of his set-off, where they are not set forth in his notice or plea. *Ibid*.

And see ante, XII. 173, 174.

XX. When the venue will be changed.

302. After issue joined, the defendant may apply to have the venue changed, provided a trial has not been lost, and it will occasion no delay. *Delavan v. Baldwin*, 3 C. R. 104.

303. And, under these circumstances, it may be done at any time after issue joined. *Kent v. Dodge*, 3 J. R. 447.

304. The Court has an equitable power over venues, which they will exercise to promote the convenience of suitors, and to save expense to the parties. *Manning v. Downing*, 2 J. R. 453.

305. On a motion to change the venue, where the party swears that he has a good defence on the merits, he must also add, *as he is advised by counsel*, as in other cases. *Stuartwout v. Hoage*, 16 J. R. 3. *Contra*, *Metcalf v. Clark*, 5 J. R. 361.

306. The defendant's affidavit need not state the cause of action; the plaintiff must show that it is not transitory. *Baker v. Sleight*, 2 C. R. 46.

307. The defendant's affidavit must be positive that the cause of action arose in another county; if he swears to his belief, it is not sufficient. *Franklin v. Underhill*, 2 J. R. 374.

308. It must be stated positively, and not argumentatively. *Manning v. Downing*, 2 J. R. 453.

309. On a motion to change the venue, no costs are allowed on either side. *Worthy v. Gilbert*, 4 J. R. 492.

310. The venue will be changed in a transitory action, on an affidavit that the cause of action, if any, arose in the county into which it is moved to change it; and also stating that material witnesses reside there, unless the plaintiff stipulate to give material evidence in the county in which it is laid. *Bentley v. Weaver*, 1 J. C. 240. *Woods v. Van Ranken*, 1 C. R. 122. *Spencer v. Hulbert*, 2 C. R. 374. *Dubois v. Fronk*, 3 C. R. 95. *Franklin v. Underhill*, 2 J. R. 374.

311. It is not sufficient to change the venue, for the defendant to state that material witnesses reside in the county to which he wishes to remove it; it ought to be added, that evidence will be given of some material fact happening there. *Gowley v. Shoemaker*, 1 J. C. 392. S. C. C. C. 103.

312. An affidavit of the defendant's attorney, that the plaintiff confessed that the cause of

action arose in another county is sufficient. *Scott v. Gibbs*, 2 J. C. 116. S. C. C. C. 127.

313. In *assumpsit*, on a promissory note, the venue was changed on an affidavit stating fraud in obtaining the note, and that the defendant's witnesses reside in the county to which it was moved to change the venue. *Allen v. Brack*, 1 C. R. 107.

*314. In an action for use and [*277] occupation, the venue will be changed to the county in which the premises are situated, and in which all the defendant's witnesses reside, if the plaintiff do not show that he has any in the county in which it is laid. *Low v. Hallett*, 2 C. R. 374.

315. In an action for a libel, if the defendant swears that the libel was published in a different county from that in which the venue is laid, and that he has a number of material witnesses residing in such county, the Court will direct the venue to be changed. *Nicholson v. Lothrop*, 3 J. R. 139.

316. In *assumpsit*, where the count is general, the venue will not be changed on the general affidavit. *Wheaton v. Slosson*, 2 J. C. 111. S. C. C. C. 121.

317. But the affidavit must state that the defendant has reason to believe, that special matter is intended to be given in evidence, enumerate the particulars, and declare that it arose in the county to which he would remove the cause, and not elsewhere. *Ibid*.

318. The venue will not be changed from the city of New-York, because the corporation are plaintiffs. *Corporation of New-York v. Dawson*, 2 J. C. 335.

319. In an action against a sheriff, the supposed influence of his office in his county is not a reason for changing the venue. *Baker v. Sleight*, 2 C. R. 46.

320. In an action for a libel, the Court will not, on the common affidavit, change the venue from a county in which the libel had been circulated, to that in which it was printed. *Clinton v. Crosswell*, 2 C. R. 245.

321. In an action by a turnpike company, for running a road parallel to theirs, in order to draw off the toll, the Court will not change the venue on an affidavit, stating, that from the prejudices of the county against turnpike roads, 'an impartial trial could not be had. *New-Windsor Turnpike Company v. Wilson*, 3 C. R. 127.

322. The Court would not change the venue from the county of Kings to the city of New-York, as from the proximity of the courthouse in the former to the latter place, there could be no inconvenience. *Mumford v. Cammann*, 3 C. R. 130.

323. On a motion to change the venue on account of material witnesses residing in another county, the defendant ought to state their number, otherwise the Court cannot intend that he has more than one, so that if the plaintiff swear to one witness, the preponderance will be in his favor. *Minor v. Garrison*, 4 J. R. 481.

324. Where the cause of action is not wholly or necessarily confined to a single county, the venue will not be changed, but

upon special grounds, as where the witnesses of both parties reside in the county to which the defendant wishes to bring the venue. *Duryee v. Orcott*, 9 J. R. 248.

325. And if the plaintiff's witnesses reside in the county in which he has laid the venue, unless there is a great and striking preponderance against him, the venue will not be changed. *Ibid.*

326. The plaintiff cannot retain the venue on an affidavit of his belief, that he cannot have a fair trial, by reason of certain local prejudices, &c., without also stating the reasons and ground of his belief. *Scott v. Gibbs*, 2 J. C. 116. S. C. C. C. 127.

327. In an action of slander, the Court would not retain the venue, on an affidavit, that a violent party spirit prevailed in the county to which it was moved to be changed. *Zobieskie v. Bauder*, 1 C. R. 487.

328. In actions perfectly transitory, and arising on contracts, the plaintiff will not be permitted by stipulation to retain the venue, where the defendant will satisfy the Court that he has material witnesses in a distant county: but if the plaintiff can swear that he has material witnesses residing in the county in which he has laid the venue, he may retain it. *Manning v. Downing*, 2 J. R. 453. S. P. *Stoutenbergh v. Legg*, 2 J. R. 481.

329. So, in trespass *de bonis asportatis*, the plaintiff, to retain the venue, must stipulate to give material evidence in the county in which he laid it. *Ross v. Lown*, 8 J. R. 354.

330. So, in trover, the plaintiff has not an option as to the venue; the place where the cause of action arose, is, *prima facie*, the place where the venue ought to be; and if the defendant shows, by affidavit, where the cause of action arose exclusively, and that he has witnesses material to his defence residing in that county, he has a right to have the venue there. *Duryee v. Orcott*, 9 J. R. 248.

331. The plaintiff cannot divest him of this right, but by stipulating to give evidence arising in the county where he has laid the venue; and in addition to that stating that he has witnesses material to his cause residing in that county. *Ibid.*

332. It seems, that if the plaintiff stipulates to bear all the expenses of bringing the defendant's witnesses to the county where the venue is laid, the Court will not change it. *Worthy v. Gilbert*, 4 J. R. 492.

333. Where the venue in a cause is changed, it is not necessary to serve a new declaration on the defendant, but only a copy of the rule for changing the venue; and the declaration may be altered at any time, so as to conform to the rule. *Smith v. Sharp*, 13 J. R. 466. S. P. *Root v. Taylor*, 18 J. R. 335.

334. The want of the alteration of the declaration on file is no excuse for any irregularity on the part of the defendant, who must proceed as if it had been actually made. *Ibid.*

335. The plaintiff cannot move directly to change the venue; but he may move to amend the declaration for that purpose. *Swartwood v. Payne*, 16 J. R. 149.

336. Where the plaintiff obtains a rule to amend his declaration, by changing the venue, the notice of trial has no effect, nor is the defendant bound to take notice of it, until he has received notice of the change of venue. *Clark v. Belden*, 19 J. R. 174.

XXI. Consolidating actions.

337. The consolidation rule of the Supreme Court is the same as the *English* rule. *Clason v. Church*, 1 J. C. 29. S. C. C. C. 62.

338. Where several actions are brought on one policy of insurance, the Court will grant imparlances in all the cases except one, until the plaintiffs consent to enter into the consolidation rule. *Ibid.*

339. Actions upon different policies, though on the same risk, will not be consolidated. *Camman v. New-York Insurance Company*, 1 C. R. 114.

340. Where separate suits are brought at the same time, and between the same parties, of different dates, for different sums, and payable at different times, the Court will not order them to be consolidated. *Thompson v. Shepherd*, 9 J. R. 262.

341. But, it seems, that where separate suits are brought upon notes or contracts made at the same time, which might have been united in one action, and when the defence is the same in all, a consolidation will be granted. *Ibid.*

342. Where a commission has been issued in a consolidated cause, in which the opposite party had joined, the evidence taken under it may be read on the trial of the principal suit. *Waterbury v. Delafield*, 1 C. R. 513.

343. After judgment for the plaintiff in one cause, the defendants in the other causes have eight days to pay the money, after judgment and taxation of costs. *Earl v. Lefferts*, 1 J. C. 395. S. C. C. C. 98.

344. If the judgment is rendered in *Albany*, and the defendants live in *New-York*, they have fourteen days, and so *vice versa*. *Ibid.*

345. The plaintiff may, for his own security, enter up judgment in the other causes immediately; but the costs are to be deducted, if the money is paid in time. *Ibid.*

XXII. Bringing money into Court.

346. In an action on a policy of insurance, the defendant may, after plea pleaded, bring into Court what sum he pleases with costs to the time; but not specifically as the premium on the policy. *Dunlap v. Commercial Insurance Company*, 1 J. R. 149.

347. If, in an action on a policy of insurance, the defendant pays the premium into Court, which the plaintiff's attorney takes out, after informing the defendant that the plaintiff meant to go for a total loss, he will not be concluded from proceeding for a total loss. *Sleght v. Rhinelander*, 1 J. R. 192.

348. Bringing money into Court is an admission of the cause of action, as stated in the plaintiff's declaration. *Johnston v. Columbian Insurance Company*, 7 J. R. 315.

XXIII. Examining witnesses de bene esse.

349. The examination of a witness who is so aged and infirm as not to be able to attend Court, may be taken *de bene esse*. *Concklin v. Hart*, 1 J. C. 103. S. C. C. C. 69.

350. So, the examination of a witness who is about to depart the state. *Mumford v. Church*, 1 J. C. 147.

351. Notice to attend the examination on the same day that the *judge's [*280] order is obtained, if it is all the time in the party's power to give, is sufficient. *Ibid.*

352. It may be taken at any time after the commencement of the suit, whether issue has been joined or not. *Ibid.* S. P. *Concklin v. Hart*, 1 J. C. 103.

XXIV. Commission to examine witnesses; (a) When a commission will be granted, and how it is to be obtained and executed; (b) Effect of a commission, as a stay of proceedings.

(a) When a commission will be granted, and how it is to be obtained and executed.

353. The granting a commission rests in the sound discretion of the Court, and is not always a matter of course, on the general affidavit. *Vandervoort v. Columbian Insurance Company*, 3 J. C. 137.

354. Where the opposite party can show sufficient to render the propriety of issuing the commission doubtful, the Court will require the party moving to show the particular object of the commission, the evidence he wants to obtain, and in what manner it is material. *Ibid.*

355. Where a witness, under a commission, has disclosed some new fact, a second commission will be granted to inquire into it; but it must be at the peril of the party applying. *Nichol v. Columbian Insurance Company*, 1 C. R. 345.

356. If the witness, to examine whom the commission was issued, should die, the Court will not allow a new name to be inserted; but the party may issue a new commission, not, however, to be a stay of proceedings. *McVicker v. Woolcot*, 3 C. R. 321.

357. A commission will be granted, to examine an officer in the army of the *United States*, on an affidavit of his being a material witness, and expected to be ordered away. *Cardall v. Wilcox*, 9 J. R. 266.

358. A commission cannot be applied for without notice. *Watson v. Delafeld*, 2 C. R. 260.

359. Where the defendant intends to sue out a commission, he should give notice of it before he receives a notice of trial, or within reasonable time after issue is joined, according to the circumstances of the case; and such notice will stay the proceedings. *Burr v. Skinner*, 1 J. C. 391. S. C. C. C. 97.

360. If the defendant does not apply until he receives notice of trial, he must pay the costs of the notice for trial. *Ibid.*

361. It is not enough to state in the affidavit,

that it is supposed sufficient evidence might be obtained in the place to which the commission is intended to be issued, but it must show that material evidence does exist there. *Franklin v. United Insurance Company*, 2 J. C. 68.

362. The affidavit may be made by a person not a party to the suit. *Demar v. Van Zandt*, 2 J. C. 69.

363. An affidavit of a plaintiff in a cause, residing at *Havana*, taken before the commercial and naval agent of the *United States*, *resident there, [*281] may be read, on a motion for a commission. *Welsh v. Hill*, jun. 2 J. R. 373.

364. The affidavit must state, that the cause is at issue, or special circumstances, to induce the Court to grant a commission before issue joined. *Hackley v. Patrick*, 2 J. R. 478. *Jackson, ex dem. Atkins, v. Bankcraft*, 3 J. R. 233. *Anonymous*, 2 C. R. 259.

365. A commission to examine witnesses out of this state, may be directed to persons residing within it. *Jackson, ex dem. Lewis, v. Im Leon*, 3 C. R. 105.

366. Where the commissioners are named in the notice of motion, the opposite party should object to them at the time; it is too late to do so at the time the motion is made. *Townsend v. New-York Insurance Company*, 1 C. R. 4.

367. Objections to commissioners named to take the examination of witnesses abroad, will not be received upon mere suggestion, but there must be an affidavit of the grounds of objection. *Biays v. Merrihue*, 3 J. R. 251.

368. The Court will not refuse the commission, though the opposite party makes affidavit that the witnesses named are interested, but will leave the question of their competency to be determined at the trial of the cause. *Graves v. Delaplaine*, 11 J. R. 200.

369. In the return, the commissioners should certify, that they caused the witness to be examined on oath, upon the interrogatories annexed, and that they caused the examination to be reduced to writing; if this be wanting, the depositions cannot be read. *Bailis v. Cockran*, 2 J. R. 417.

370. The return to a commission stated, in the caption to the deposition, that the witness was sworn and examined by virtue of the commission, and that at the bottom of the deposition the commissioners had signed their names, *qua* commissioners; this is sufficient, and it will be intended that the witness was sworn and examined by the commissioners, and that the deposition was reduced to writing by them, or under their direction. *Boile v. Van Rosten*, 4 J. R. 130.

371. A commission issued to take the examination of witnesses residing abroad, must be returned and delivered to a judge of the Court, and *actually filed in the clerk's office*, before the depositions can be read in evidence. *Jackson, ex dem. Parker, v. Hobby*, 20 J. R. 357.

372. Where a commission was returned and delivered by the agent to a judge *ad nisi prius*, who took his affidavit as to the manner of receiving it, after the cause was called, but before

the trial was commenced; *held*, that the depositions annexed to the commission so opened by the judge were not legal evidence. *Ibid.*

373. Depositions of a witness, residing abroad, taken under a commission, were read on the trial of a cause, and the jury, not being able to agree in a verdict, were discharged, and a second commission to re-examine the same witness, was allowed to be issued. *Fisher v. Dale*, 17 J. R. 343.

[*282] (d) *Effect of a commission, as a stay of proceedings.*

374. That the commission may be a stay of proceedings, the affidavit must state, positively, that the party has a defence on the merits, and that he seeks only the requisite proof. *Franklin v. United Insurance Company*, 2 J. C. 285.

375. When a commission is returned, although the return may be irregular, it ceases to be any longer a stay of proceedings. *Rush v. Cobbel*, 2 J. C. 70.

376. When a rule for a commission has been obtained, it suspends the cause till, on application to the Court, a *vacatur* is ordered, or leave obtained to proceed to trial. *Brain v. Rodelicks*, 1 C. R. 73.

377. But if the plaintiff, notwithstanding, bring on the cause, and the defendant appears and examines witnesses, it is a waiver of the commission, and the *vacatur* is unnecessary. *Ibid.*

378. Where the rule for a commission is obtained after the expiration of four days in term after issue joined, it does not stay the proceedings, unless the Court expressly direct that it is to have that effect. *Jackson, ex dem. Wadsworth, v. Woodworth*, 18 J. R. 135.

379. But if the commission is obtained within the four days, it stays the proceedings of course, though nothing is said in the rule as to its effect. *Ibid.*

380. It is, therefore, unnecessary to state, in the rule, whether it is to operate as a stay of proceedings, or not, unless by special direction of the Court, on application for that purpose. *Ibid.*

381. Where both parties have joined in the commission, the Court will not vacate it; but the plaintiff may have a rule to proceed to trial, notwithstanding the commission. *Shuter v. Hallett*, 1 C. R. 115.

382. The plaintiff not having joined in the commission, and sufficient time having elapsed for the return of it, the rule was so far vacated as to permit him to proceed to trial, notwithstanding the commission. *Kirby v. Walkies*, 1 C. R. 503.

383. On a commission to *England*, after eight months, without a return, the Court will permit the plaintiff to proceed to trial; but the defendant may, at the circuit, show cause for putting off the trial. *Ibid.*

384. Three months are sufficient time for executing and returning a commission arrived in *London*. *Coles v. Thomson*, 1 C. R. 517.

385. The plaintiff, issuing a commission,

must show due diligence, or he must stipulate, or be nonsuited, as if no commission had issued. *Ibid.*

386. The plaintiff will have leave to notice his cause for trial, although a commission has not been returned, and the time for returning it not expired; but the defendant will not thereby be prevented from showing cause for the postponement of the trial. *Pell v. Bunker*, 2 C. R. 46.

387. After a second commission issued, with leave to go to trial, notwithstanding, on the defendant's showing that the testimony of the witness to be examined was almost conclusive on the question, and that the commission had been sent without a knowledge of the exact *spot where the witness [*283] was, the rule for permitting the plaintiff to go to trial was vacated, and time allowed for the return of the commission. *Ferrie v. Smith*, 2 C. R. 253.

388. Where a commission to examine witnesses in *France* had been issued, on the part of the defendant, in *May*, 1805, and not returned in *February*, 1807, the Court allowed the plaintiff to proceed to trial, no satisfactory cause being shown to the Court for the delay of the return. *Bouchereau v. Le Guen*, 2 J. R. 196.

389. And an affidavit of the defendant's counsel, that he believes that the return is delayed by the acts of the plaintiff, will not be sufficient to prevent him from proceeding to trial. *Ibid.*

390. A plaintiff who issued a commission, not having proceeded to trial, was permitted to stipulate anew, on an affidavit, stating the commission to have been mislaid by the defendant's commissioner, to have been found, and shortly expected to be returned. *Coles v. Thompson*, 2 C. R. 47.

XXV. *Discontinuance and nolle prosequi.*

391. The plaintiff may discontinue without costs, where the defendant is sentenced to the state prison. *Lackey v. McDonald*, 1 C. R. 116.

392. If the defendant becomes insolvent, the plaintiff may discontinue without costs. *Hart v. Storey*, 1 J. R. 143.

393. But the defendant must, in such case, have obtained his discharge. *Collins v. Evans*, 6 J. R. 333.

394. If an executor or administrator bring a wrong action, by mistake, he will be permitted to discontinue without costs. *Phamx v. Hill*, 3 J. R. 249.

395. Where the plaintiff discontinues, the defendant cannot obtain his costs on motion, but must proceed to *non pros.* the plaintiff, treating the discontinuance as a nullity. *Leonard v. Slaughter*, 10 J. R. 367.

396. Where the defendant has enlisted as a soldier in the army of the *United States*, the Court will not give leave to discontinue without costs, if it appear that the sum to be recovered may exceed 20 dollars. *Reynolds v. Lammond*, 3 J. R. 445.

397. After judgment for the plaintiff on de-

murrer to the whole declaration, and assessment of damages, the plaintiff cannot enter a *nolle prosequi*, as to one of the counts in the declaration, and take judgment on the others, but should obtain leave of the Court, before awarding the writ of inquiry; so that, if some of the counts of the declaration are bad, and entire damages are assessed, the assessment will be considered as applying to all the counts. *Backus v. Richardson*, 5 J. R. 476.

398. And whether a *nolle prosequi* can, under any circumstances, be entered without leave of the Court? *Quere. Ibid.*

399. Where a defendant obtains a discharge under the act for the relief of debtors, with respect to the imprisonment of their persons, or under the act to abolish imprisonment for debt, in certain cases, the plaintiff may [*284] discontinue his suit, without costs. *Ludlow v. Hackett*, 18 J. R. 252.

400. But, if the plaintiff, knowing of the defendant's discharge, proceeds in the cause, he must, if he afterwards discontinues, pay the costs accruing since the discharge. *Ibid.*

401. Where husband and wife were sued jointly on a bond executed by them jointly, the plaintiff, before plea, was allowed to enter a *nolle prosequi* as to the wife, and amend his declaration accordingly, as if the suit was against the husband alone, on payment of the costs of the amendment. *Pell v. Pell*, 20 J. R. 126.

Discontinuing a *qui tam* action. See ACTION ON STATUTE AND POPULAR ACTIONS, 8—13.

XXVI. Judgment as in case of nonsuit; (a) When a judgment as in case of nonsuit will be granted; (b) Stipulation to go to trial; (c) Consequence of not going to trial according to stipulation, and what will be an excuse.

(a) When a judgment, as in case of nonsuit, will be granted.

402. The defendant is entitled to move for judgment, as in case of nonsuit, whenever there is, after issue joined, time to notice the cause for trial at the next circuit. *Brooks v. Hunt*, 3 C. R. 94.

403. And where the defendant has a right to move, if under the circumstances of the case the Court excuse a stipulation, it must be on payment of costs. *Ibid.*

404. Judgment, as in case of nonsuit, is never granted in replevin. *Barrett v. Forrester*, 1 J. C. 247. S. C. C. C. 92.

405. Sending notice of the motion to the plaintiff's attorney, by mail, is not sufficient service. *Hudson v. Henry*, 1 C. R. 67.

406. Where the defendant waives the default by not applying in proper season, and afterwards moves for judgment, the plaintiff will be entitled to the costs of resisting. *Brandt*, ex dem. *Van Courtlandt*, v. *Buckhout*, 1 C. R. 113.

407. A younger issue being tried, is not conclusive that a cause might have been brought on. *Weed v. Ellis*, 1 C. R. 115.

408. Motion for judgment, &c. was not granted where the plaintiff's attorney and counsel were taken sick when too late to employ

others, but the plaintiff must pay the costs of not proceeding to trial. *Jackson*, ex dem. *Rodman*, v. *Brown*, 1 C. R. 152.

409. Where the plaintiff resists the application, on the ground that the cause could not have been heard, he must show that the issues tried were older than his. *Jackson*, ex dem. *Williams*, v. *Chamberlain*, 1 C. R. 171.

410. The defendant cannot read supplementary affidavits, to rebut the allegations contained in the plaintiff's counter affidavits. *Deas v. Smith*, 1 C. R. 171.

411. The plaintiff cannot excuse himself by the want of a witness, unless he shows due diligence to obtain his testimony. *Ibid.*

412. That the cause was called on, and passed for the accommodation of the defendant, is a fact which ought [*285] to be sworn to by the plaintiff's counsel; the plaintiff's oath alone is insufficient. *Ibid.*

413. The absence of a witness, who has been duly subpoenaed, is an excuse for not going to trial. *Jackson v. Mann*, 2 C. R. 92. But the plaintiff must pay the costs. *Marselles v. Clopper*, 2 J. R. 480.

414. So, the want of papers which the plaintiff had cause to expect; but if he had noticed the cause, and not brought it on, he must pay the costs of the circuit. *Jackson*, ex dem. *Van Bergen*, v. *Haight*, 2 C. R. 93.

415. So, if the judge at the circuit intimate that he will not try the cause; but the plaintiff must pay for the attendance of the defendant's witnesses on the first day of the circuit. *Jackson*, ex dem. *Salisbury*, v. *Weed*, 2 C. R. 94.

416. If two causes turn upon the same point, and one has been tried, and a case made, the plaintiff will not be nonsuited, or compelled to stipulate, for not proceeding to trial in the other cause, but he must pay costs. *Palmer v. Mulligan*, 2 C. R. 95.

417. That a public officer, as the attorney-general, is concerned in a cause, is no excuse for not going to trial according to notice, and is not a reason for refusing judgment of nonsuit. *Anonymous*, 2 C. R. 246. Contra, *McVicker v. Alden*, 1 C. R. 58.

418. Where a new trial has been granted, the plaintiff may be nonsuited for not going to trial a second time. *Patrick v. Hallett*, 2 C. R. 378.

419. The plaintiff may show in excuse, that the cause was not on the day docket. *Manhattan Company v. Brower*, 2 C. R. 381. But it is not necessary for the defendant to state, in his affidavit, that the cause was on the day docket. *Ibid.*

420. A cause was regularly brought to trial pursuant to notice, and the jury were discharged, because they could not agree on their verdict, and the judge allowed the cause to be again put on the calendar, for the purpose of being tried by another jury, but the plaintiff refused to bring the cause to trial at that sittings; held, that the defendant was not entitled to judgment as in case of nonsuit, for not bringing the cause to trial. *Fisher v. Dale*, 17 J. R. 342.

421. If the judge at the circuit intimate that a cause will not be brought on, and the plaintiff, in consequence, leaves the Court with his witnesses, he will not be in default, and is excused from costs and stipulation. *Jackson, ex dem. Cobley, v. Valentine*, 3 C. R. 128.

422. The plaintiff will not even be obliged to stipulate, if it appear that the defendant is in prison, and notoriously a bankrupt. *Steinbach v. Hallett*, 1 J. R. 141.

423. The insolvency of the defendant is a sufficient excuse for not proceeding to trial according to notice. *Hart v. Storey*, 1 J. R. 143.

424. In the city of *New-York*, a defendant is not entitled to judgment of nonsuit, if it appear that, the cause could not have been tried in its order on the calendar, had it been noticed for trial. *Currie v. Moore*, 1 J. R. 492. *S. P. Ross v. Vaughan*, 3 J. R. 442. *Russell v. Barnes*, 13 J. R. 156.

425. An agreement to put off the trial of a cause made between the defendant's and plaintiff's counsel, must be in writing, otherwise the Court will grant a rule for judgment, as in case of nonsuit, for not proceeding. *Griswold v. Lawrence*, 1 J. R. 507. But the Court will not grant it, if there appear to have been any intention to impose upon or mislead the plaintiff. *Ibid.*

426. Where there is an issue at law, and an issue of fact, the defendant cannot, while the issue in law remains undetermined, move for judgment as in case of nonsuit. *Overseers of Pittstown v. Overseers of Plattsburgh*, 15 J. R. 308.

427. Where there are several defendants, some of whom suffer judgment to pass by default, and the others plead, those who plead cannot obtain judgment, as in case of nonsuit. *Yates v. Lansing*, 8 J. R. 289.

428. If the plaintiff will not proceed to trial, because the judge has improperly overruled a challenge, the defendant is not entitled to judgment, as in case of nonsuit. *Gardner v. Turner*, 9 J. R. 260.

429. The certificate of the clerk of the circuit is sufficient evidence that the cause was not tried at the circuit. *Wright v. Murray*, 6 J. R. 286.

430. If, after the defendant has settled the suit, with the knowledge of his attorney, the attorney proceeds, and obtains judgment as in case of a nonsuit, it will be set aside with costs, to be paid by the attorney. *Cornell v. Allen*, C. C. 70.

431. Where a new trial is granted at the instance of the defendant, he must serve a copy of the rule on the plaintiff's attorney, before he can move for a nonsuit for not proceeding to trial. *Jackson, ex dem. Banyar, v. Wilson*, 9 J. R. 265.

432. The affidavit must state positively where the venue was laid. *Brooks v. Hunt*, 3 C. R. 128. *S. P. Walsh v. Hill*, 3 J. R. 446.

433. The affidavit should be made by the defendant's attorney himself, and should state

that the cause was not tried. *Jackson, ex dem. Metcalfe, v. Woodworth*, 3 C. R. 136.

434. Costs of opposing motion will be granted to the plaintiff, where the cause has not been brought on to trial in consequence of an agreement between the parties. *Phelps v. Eddy*, 1 C. R. 252.

435. Unavoidable occurrences may prevent judgment, but they will not excuse from payment of costs. *Russel v. Ball*, 1 C. R. 252.

436. If, after the parties have submitted the cause to arbitration, the defendant moves for judgment as in case of nonsuit, he must pay the plaintiff's costs for opposing. *Brad v. Way*, 2 C. R. 96.

437. Where a *feigned issue* is awarded by the Court, to ascertain the validity of the judgment entered on a bond and warrant of attorney, both parties are actors, and a judgment as in case of nonsuit will not be granted, for not bringing the issue to trial. *Rogers v. Tyft*, 17 J. R. 267.

(b) Stipulation to go to trial.

438. On motion for judgment, as in case of nonsuit, for not proceeding to trial, the rule will not be granted for the first default, if the plaintiff stipulates to bring the cause to trial at the next circuit. *Wild v. Gillet*, 1 J. C. 30. S. C. C. C. 64. [*287] *Rogers v. Garrison*, 2 C. R. 379.

439. Such motion must be made the next term after the default, or the defendant need not stipulate. *Ibid.* *S. P. Brandt, ex dem. Van Cortlandt, v. Buckhout*, 1 C. R. 113. *S. P. Mumford v. Columbian Insurance Company*, 2 C. R. 251.

440. The plaintiff will not be required to stipulate, if he can sufficiently account for the default. *Wild v. Gillet*, 1 J. C. 30.

441. If a plaintiff get relieved from his own stipulation, he restores the defendant to all his rights, as he stood when the stipulation was entered into. *Main v. Kinney*, 1 C. R. 117.

442. The plaintiff will not be obliged to stipulate, where, having noticed the cause for the circuit, he had been nonsuited by the judge in another cause embracing the same questions, and depending on the same evidence, and was waiting until the judgment of the Court could be had in that cause. *Campbell v. Munger*, 1 C. R. 129.

443. The cause being noticed for trial, the defendant served the plaintiff with notice to produce certain papers, which were to be procured from a distance; the Court, deeming the time to have been sufficient to have obtained the papers, ordered the plaintiff to stipulate and pay costs. *Jackson, ex dem. Watson, v. Marsh*, 1 C. R. 152.

444. And nine days' notice was held sufficient to produce them from a distance of 180 miles. *Ibid.*

445. A mistake of a rule of practice by the plaintiff's attorney will not excuse him from stipulating and paying costs. *Sheffield v. Watson*, 1 C. R. 22.

446. A stipulation by the counsel in the

cause, is good. *Wilcox v. Woodhall*, 2 C. R. 250.

447. Where the plaintiff is entitled to stipulate, the defendant does not, by giving notice of an application for a commission, waive a previous notice for judgment, as in case of nonsuit. *Brandt, ex dem. M'Clelland, v. Burrows*, 3 C. R. 140.

448. After a new trial has been granted, the plaintiff may be compelled to stipulate, or be nonsuited, as in other cases. *Jackson, ex dem. Ludlow, v. Meyers*, 3 J. R. 541.

449. When the plaintiff is admitted to stipulate, the terms upon which the Court grant their indulgence are the payment of costs for the default at the preceding circuit and of the motion. *Philips v. Peck*, 2 J. C. 104. S. C. C. C. 112. See *post*, 455.

450. So, the defendant in a real action must pay costs. *Ibid.*

451. When the demand of costs, on admitting the plaintiff to stipulate, is not regularly made, the plaintiff may notice his cause, and bring it on to trial; and if he has been irregular on his part, the appearance of the defendant at the trial will be a waiver of it. *Gilliland v. Morrell*, 1 C. R. 154. See *Reg. Gen., October term, 1802*, 1 C. R. 109. And *post*, 455.

452. When a stipulation is offered before notice of motion for judgment, as in case of nonsuit, costs will be allowed up to the time of the offer. When after notice, and before actual application, up to that time; but if not till the Court is applied to, then all the cost must be paid. *Anonymous*, 2 C. R. 56.

*453. Misapprehension as to a [*288] point of practice, never before settled, will excuse the party from paying costs on stipulating. *Patrick v. Hallett*, 2 C. R. 378.

454. Where the plaintiff stipulates, without motion, the defendant, to obtain costs, must file the stipulation, enter a rule nisi, for judgment, serve a certified copy of the rule with a taxed bill of costs, and make demand of payment. *Wilmors v. Russell*, 3 C. R. 135.

455. Where the plaintiff stipulates, on payment of costs, he shall have 20 days after demand, accompanied with service of a certified copy of the rule, and of the taxed bill of costs, to pay the same; and the defendant, on filing an affidavit of the demand and non-payment, may, at the expiration of the 20 days, enter judgment, as in case of nonsuit, as of the preceding term. *Reg. Gen., October, 1802*. 1 C. R. 109. *Gilliland v. Morrell*, 1 C. R. 154. *Ante*, 451. Where a party comes for a favor, and it is granted, on payment of costs by him, the rule is conditional, and he must seek the other party, and pay or tender the costs *instantly*. *Pugsley v. Van Alen*, 8 J. R. 352, and *Jackson, ex dem. Onderdonk, v. Weston*, there cited. But where a party applies for a right, and the opposite party is ordered to pay costs, a demand of them must be made, and a copy of the rule served; and the payment may be enforced by attachment. 2 J. C. 114.

(c) *Consequences of not going to trial according to stipulation, and what will be an excuse.*

456. If the plaintiff neglects to bring the cause to trial, pursuant to his stipulation, the defendant must move for judgment, at the term next after the default; or, if he omit to do so, it is a waiver of the default; and if moved for at a subsequent term, the plaintiff may stipulate anew. *Haskins v. Sebor*, 2 J. C. 217.

457. After the plaintiff had stipulated, the prevalence of an epidemic in the place where the sittings were to be held, was admitted as an excuse for not proceeding to trial. *Torrey v. Morehouse*, 1 J. C. 242.

458. The unexpected departure of a material witness, so that his attendance could not be procured at the circuit, is an excuse for not proceeding to trial according to stipulation. *Nixon v. Hallett*, 2 J. C. 218.

459. The constant absence of a witness, since the commencement of the suit, was admitted as an excuse for not proceeding to trial according to stipulation, and the plaintiff allowed to stipulate again. *Livingston v. De-lafield*, 1 C. R. 6.

460. Judgment, as in case of nonsuit, will not be granted, where, after a stipulation, the defendant is sentenced to the state prison. *Lackey v. McDonald*, 1 C. R. 116.

461. In the city of New-York, if it appear that the cause could not have been tried, had it been noticed, the plaintiff will be excused from stipulating. *Ross v. Vaughan*, 3 J. R. 442.

462. But it is otherwise as to causes at the country circuits. *Ibid.*

*XXVII. Trial; (a) *Proceeding to trial or inquest*; [*289] (b) *Putting off the trial*; (c) *Preventing and setting aside an inquest.*

(a) *Proceeding to trial or inquest.*

463. Trial by the record is a non-enumerated motion. *McKenzie v. Wilson*, 2 C. R. 325. And must come on, by motion, pursuant to a notice of four days. *Knapp v. Mead*, 2 J. C. 111. S. C. C. C. 122. *Manhattan Company v. Herbert*, 1 C. R. 6.

464. Where an issue and demurrer are taken in the same cause, it is at the election of the plaintiff to proceed to trial, either before or after the demurrer is determined. *Munro v. Alaire*, 2 C. R. 320.

465. The defendant shall not try a cause by proviso, without a previous rule for that purpose, to be granted by the Court on the usual notice. *Codwise v. Hacker*, 2 C. R. 326. *Reg. Gen. Ibid.*

466. Where a pleading, tendering an issue, is demurred to within 20 days after service, the party cannot go to trial on the issue, although the opposite party has not struck out the *similiter*, which is unnecessary to be done, (9th rule of April term, 1796.) *Boardman v. Bradson*, C. C. 45. But the plaintiff, who adds a *similiter* in tendering an issue to the country, may notice the cause for trial, in-

mediately; on the peril, however, of the defendant *bona fide* striking it out and demurring within twenty days. The defendant cannot do it merely for delay. *Shultys v. Owens*, 14 J. R. 345.

467. No issue shall be tried at the bar of the Supreme Court, after the first week in term, unless, by special leave of the Court, for that purpose obtained. *Reg. Gen. XIV., April, 1796.*

468. A counsel, at *nisi prius*, must, if asked, answer whether his client has a defence or not. *Schenck v. Woolsey*, 3 C. R. 100.

469. Causes in which the public officers, as the attorney-general, &c., are concerned, have no preference at the circuit. *Anonymous*, 2 C. R. 246.

470. A subpoena ticket in the Supreme Court, not mentioning where the Court will be held, is good. *The People v. Van Wyck*, 2 C. R. 333.

471. So, it will be good, although the witness was directed to appear at the term, and the indictment on which he was summoned to testify was in the Oyer and Terminer. *Ibid.*

472. A notice of trial, at the sittings, without the right day of the month, is sufficient, although the day of the week be incorrectly stated. *Wolfe v. Horton*, 3 C. R. 86.

473. When a trial is put off, on payment of costs, the defendant is bound to pay the costs *instantly*, and to seek the plaintiff, without any previous request for that purpose; and the plaintiff may either wait the event of the suit, demand the costs immediately, and if not paid, proceed in the cause; or he may have the costs regularly taxed, on due notice; and if, after service of the taxed bill and a payment demanded of the defendant's attorney, the costs are not paid, he may *take [*290] out an attachment immediately.

Jackson, ex dem. *Lewis*, v. *Larroway*, 2 J. C. 114. S. C. C. C. 124. See *ante*, 465; and *Jackson*, ex dem. *Pinkney*, v. *Pell*, 19 J. R. 270.

474. The plaintiff, at the circuit, may, at the opening of the Court on each day, or on such day as the presiding judge shall allow, and before the Court shall proceed to try any litigated cause, take an inquest, provided his intention shall be expressed in the notice of trial. *Reg. Gen., November, 1808.* 3 J. R. 245.

475. And provided the inquest shall, afterwards, be set aside, the defendant shall be liable to pay the costs of the trial, together with the costs of the application, unless the defendant shall, before the jury is empanelled to take the inquest, file with the clerk of the sittings an affidavit, satisfactory to the judge, that he has a good and substantial defence; and serve a copy thereof on the opposite party. *Ibid.* See *Cannon v. Titus*, 5 J. R. 355. *Baker v. Ashley*, 15 J. R. 536.

476. If a defendant living within forty miles of the place of trial, changes his residence permanently, to a place beyond that distance, before issue is joined in the cause, he will be entitled to fourteen days' notice of trial; but if he changes his residence after issue is joined, he is entitled only to eight days' notice. *Jenks v.*

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Payne, 15 J. R. 399. (See Act, sess. 36. ch. 4. s. 3. 1 N. R. L. 315, 316.)

(b) Putting off the trial.

477. If the plaintiff countermand his notice of trial, he must pay the defendant's costs for subpoenaing witnesses previous to the countermand. *Jackson v. Mann*, 1 C. R. 123. Or such costs as the defendant has incurred between the time of receiving the notice of trial and the countermand. *Keys v. Beardley*, 18 J. R. 135.

478. If the plaintiff is prevented from going to trial by inevitable accident, but does not countermand the notice after the impossibility is discovered, there being sufficient time for that purpose, he must pay the costs of the circuit. *Jackson*, ex dem. *Prior*, v. *Brown*, 1 C. R. 484.

479. The absence of a transient witness, whom the party has had an opportunity of examining, *de bene esse*, is no cause for putting off the trial. *McKay v. Marine Insurance Company*, 2 C. R. 384.

480. Where the plaintiff is apprized of a material witness, whose appearance he cannot procure in time, he ought to apply to the judge to postpone the trial; and if he goes to trial without the testimony of the witness, and a verdict is found against him, it will not be set aside, and a new trial granted, for the purpose of letting in the testimony of such witness. *Jackson*, ex dem. *Malin*, v. *Malin*, 15 J. R. 293.

481. When a judge, on a circuit, has not time to try a cause, the costs must abide the event of the suit. *Way v. Bradt*, 1 C. R. 115. *S. P. Reed v. Bogardus*, 3 C. R. 126.

482. So, if the circuit is not held at all. *Reed v. Bogardus*, 3 C. R. 126.

483. Where a cause was not brought to trial pursuant to notice, owing to an objection made by the defendant to the jury process, *which was defective, the de- [*291] fendant was allowed costs. *Dill v. Wood*, 1 J. C. 394. S. C. C. C. 106.

(c) Preventing and setting aside an inquest.

484. An inquest will be set aside, with costs, on an affidavit of merits. *Roosevelt v. Kemper*, 2 C. R. 30. *Bailey v. Caldwell*, 3 J. R. 451.

485. An inquest, taken by default, will not be set aside, on the ground that the defendant's attorney, through mistake, supposed that there was no defence to be made. *Crammond v. Roosevelt*, 2 J. C. 282.

486. It will be set aside, when taken after regular notice of an intended application at the next term for a commission to examine witnesses. *Le Conte v. Pendleton*, 1 J. C. 135. S. C. C. C. 74.

487. It will not be set aside on an affidavit of merits, the cause being on the day docketed, and the defendant's counsel in Court when called on, but the defendant himself, and his witnesses, absent, and no excuse shown for their absence. *Post v. Wright*, 1 C. R. 111.

488. If, on a feigned issue from the Court of Chancery, an inquest be improperly taken, re-

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lief must be sought in the Supreme Court; and, if notice of trial has not been given, it will be set aside, with costs, to be paid by the plaintiff's attorney. *Den v. Fen*, 1 C. R. 487.

489. An inquest will not be set aside, on the ground that the defendant did not attend, because the plaintiff's attorney had expressed an opinion that the cause would not come on that day. *Sayer v. Finck*, 2 C. R. 336.

490. An inquest, taken after the parties have appointed to meet, in order to try to compromise, will be set aside. *Brevort v. Sayre*, 2 C. R. 377.

491. If delay appears to have been the object of the defendant, an inquest taken against him, will not be set aside, although he swear that the demand is for more than is due; he ought to state that he has a defence, as advised by counsel. *Bruen v. Adams*, 3 C. R. 97.

492. Where an inquest was taken, by reason of the defendant's counsel not being able to produce his discharge under an insolvent law, it was set aside, on payment of costs, on its being shown that a discharge had been obtained, that, by accident, it could not be produced, and that the defendant lived at a great distance, and, through bodily infirmity, was prevented from attending the trial; for the moral obligation which the defendant may be under, of paying his debts, will not deprive him of the benefit of his legal defence, unless a new liability has been incurred. *Schenck v. Woolsey*, 3 C. R. 100.

493. An affidavit of merits on the part of the defendant, taken before the return of the writ against him, or the filing of the declaration, is not sufficient to prevent an inquest from being taken by default at the sittings. *Geib v. Icard*, 11 J. R. 82.

494. The affidavit of merits, to prevent an inquest, should state that the defendant was advised by counsel. *Cannon v. Tivus*, 5 J. R. 355.

*495. A copy of the affidavit of merits must be served on the opposite party. *Ibid.* *S. P. Baker v. Ashley*, 15 J. R. 536.

496. An inquest was set aside on an affidavit of the attorney of the defendant, that, from the representations made to him by the defendant, and the papers he had examined, he verily believed that the defendant had a legal defence. *Philips v. Blagge*, 3 J. R. 141.

497. Counter affidavits are inadmissible to oppose the motion. *Ibid.*

498. The affidavit must state, that an inquest was taken by default. *Fink v. Bryden*, 3 J. R. 244, 245.

499. And the certificate of the clerk of the sittings cannot be produced to the Court, unless a copy of it has been served upon the opposite attorney. *Ibid.*

500. Where the defendant's affidavit of merits stated, also, that the verdict was taken for more than was due, and the opposite party offered to relinquish the surplus, the Court refused the motion, but gave the defendant until a subsequent day, to produce a further affidavit to explain whether the excess of the verdict was the sole ground

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of his affidavit of merits. *Fink v. Bryden*, 3 J. R. 245.

501. On a motion to set aside an inquest, an affidavit, that the defendant has a good and substantial defence in the cause, is a sufficient affidavit of merits. *Briggs v. Briggs*, 3 J. R. 449.

502. On a motion to set aside an inquest, by default, against two defendants, one having previously been discharged as an insolvent, the Court refused the rule, upon the plaintiff's stipulating to enter a verdict for the defendant, who was discharged. *Oakley v. Stedford*, 3 J. R. 253.

503. Where a defendant's attorney received short notice of trial, and did not, therefore, attend the circuit, and an inquest was taken against the defendant, by default, of which the attorney was not informed, until it was too late to apply at the next term to set aside the default; held, that the notice of trial, though not regular, was sufficient to put the defendant's attorney on inquiry, as to the plaintiff's proceedings, and that he ought to have applied at the next term after the inquest was taken. *Hink v. Tubbs*, 10 J. R. 486.

504. An inquest was set aside for irregularity, where the defendant, in the vacation, after issue was joined, and before notice of trial, served the plaintiff with notice of a motion for a struck jury. *Nore v. Franklin*, C. C. 46.

XXVIII. Nonsuit.

505. After an award to answer, or a demurrer in law joined, the plaintiff or demandant, for not appearing, may be nonsuited. *Swift v. Livingston*, 2 J. C. 112.

506. A plaintiff may be compelled to be nonsuited (or without his consent) at the trial, when the evidence offered by him is not sufficient to support his action; there being no question of fact to be decided. *Pratt v. Hull*, 13 J. R. 334.

*XXIX. Demurrer to evidence. [*293]

507. Whatever conclusion the jury might legally have drawn from the testimony, is, on a demurrer to evidence, to be considered as admitted. *Patrick v. Ludlow*, 3 J. C. 10. *Forbes v. Church*, 3 J. C. 159. *S. P. Per Spencer, J. Steinbach v. Columbian Insurance Company*, 2 C. R. 133, 134. *S. P. Smith v. Steinbach*, 2 C. C. E. 158. *S. P. Patrick v. Hallett*, 1 J. R. 241.

508. On a demurrer to evidence, no question can arise as to the admissibility of the evidence. *Lewis v. Few*, 5 J. R. 1.

XXX. Reference; (a) When a cause may be referred; (b) Proceedings on a reference, and for what a report will be set aside.

(a) When a cause may be referred.

509. A reference will not be granted, where it appears that questions of law will arise. *De Hart v. Covenhoven*, 2 J. C. 462. *S. P. Adams v. Bayles*, 2 J. R. 374.

510. If, in cross suits, one has been referred,

in which all may be obtained that can be gained by a reference in the other, the Court will not refer such other, especially if there be a possibility that, by so doing, the report may be so apportioned as to throw the costs of both on one party, who, by a decision of the Court, seems to have a right to a verdict in his favor in one of the suits. *Codwise v. Hacker*, 2 C. R. 251.

511. A Circuit Court cannot order a cause to be referred; and an award, made under a rule granted at the circuit, will be set aside, but without costs. *Williams v. Green*, 3 C. R. 129.

512. To oppose a motion to refer, it will not be sufficient for the party to state in his affidavit that questions of law will arise, but he must state what the points of law are, to enable the Court to judge of the propriety of granting or refusing the application. *Lusher v. Walton*, 1 C. R. 149. *S. P. Salisbury v. Scott*, 6 J. R. 329. *Contra, Low v. Hallett*, 3 C. R. 82.

513. A notice of motion to refer must contain the names of referees. *Beale v. Willett*, 1 C. R. 7. *S. P. Lusher v. Walton*, *id.* 149. And they are to be taken from the county in which the venue is laid. *Sherwood v. Tremper*, 11 J. R. 406.

(b) *Proceedings on a reference, and for what a report will be set aside.*

514. Where the rule to refer requires the report to be made within a limited time, the authority of the referees expires with that time. *Brouer v. Kingsley*, 1 J. C. 334.

515. It is irregular for part of the referees to meet, and make their report, without notifying the others; and such report will be set aside. *Ibid.*

516. All the referees in a cause must meet and hear the allegations *and proofs [*294] of the parties, &c.; and a report by two of them, in that case, is valid. *McInroy v. Benedict*, 11 J. R. 402.

517. But where all are duly notified, and one of them does not attend, and the other two proceed to hear the parties, and make a report, it is erroneous, and will be set aside. *Ibid.*

518. If one of the parties, after being duly notified of the time and place of the meeting of the referees, does not attend, the referees may proceed to hear the proofs, in case of his absence, *ex parte*. *Ibid.*

519. On an affidavit of the defendant, of the absence of a material witness, the Court will postpone the meeting of the referees. *Bird v. Sands*, 1 J. C. 394. *S. C. C. C.* 105.

520. Proceedings in a cause before referees will be stayed, on affidavit of the absence of a material witness, who had gone out of the state, but was expected to return by a certain day. *Sudam v. Stuart*, 20 J. R. 476.

521. Referees have a reasonable discretion as to adjournments. *Forbes v. Frary*, 2 J. C. 224.

522. Where they unreasonably refuse to grant an adjournment, requested by a party, to enable him to produce witnesses, the report will be set aside. *Ibid.*

523. A party may have a reference put off,

on the ground of the absence of witnesses, on application to the Court; or, if the Court is not sitting, he may apply to a judge, at his chambers, for a stay of proceedings, until application can be made to the Court. *Combs v. Wyckoff*, 1 C. R. 147.

524. Where referees, instead of making a report, made a special return of facts, the Court granted a rule that they report. *Hawkins v. Bradford*, 1 C. R. 160.

525. The referees may meet in a county different from the one in which the venue is laid; the Court, however, will take care that the place of their meeting be not so chosen as to be oppressive to the opposite party. *Newland v. West*, 2 J. R. 188.

526. The proper course to compel referees to report, is by attachment. *Thompson v. Parker*, 3 J. R. 260.

527. Where a cause is referred by the Court, pursuant to the statute, and the plaintiff wholly neglects to bring the cause to a hearing before the referees, the defendant, after a term has intervened, is entitled to a rule, that unless the plaintiff notice the cause for a hearing, or elect to discontinue, within twenty days, the defendant shall have leave to notice the cause for a hearing; and in case of the neglect or default of the plaintiff, the referees may proceed to a hearing on the defendant's notice; and in case the plaintiff does not attend at the day appointed, the referees must report that nothing is due to the plaintiff, unless the defendant claims a balance due to him; and if the pleadings will admit of it, he may exhibit his proofs, and the referees may report such a balance as they shall think due to him from the plaintiff. *Bisell v. Lee*, 16 J. R. 45.

528. A motion to set aside the report of referees will be heard, though not filed, owing to the neglect of the party in whose favor it was made. *Thompson v. Tompkins*, 1 J. C. 238.

*529. A report of referees will [*295] be set aside, where the facts of the case are intricate and obscure, in order to let in new light, and to have the merits re-examined. *Allard v. Mouchon*, 1 J. C. 280.

530. A reference will not be set aside on the ground of objection to a referee, who was nominated by the party's attorney, and in whose appointment the party had acquiesced. *Combs v. Wyckoff*, 1 C. R. 147.

531. It will not be set aside on an affidavit, that the party "hoped to procure testimony which would at least diminish the damages against him." *Ibid.*

532. Where a suit by A. against B., and one by B. against A. and C., are referred, and the referees set off a balance found for the plaintiff in the one suit against a balance found for the plaintiff in the other, the report will be set aside, *Lyle v. Clason*, 1 C. R. 323.

533. After final judgment has been entered, it is too late to move to set aside a report. *Comstock v. Rathbone*, 1 J. R. 138.

534. Where a cause has been referred, without a rule of Court, pursuant to the statute, the Court will not interfere in setting aside the proceedings, but will regard it in the same light,

as a submission to arbitration. *Miller v. Vaughan*, 1 J. R. 315. *S. P. Stevenson v. Beecker*, *id.* 492.

535. Where the parties in *replevin*, in a Court of Common Pleas, agreed in writing to refer the cause to B., to be determined by him, upon legal principles; and, thereupon, a rule was entered, that the cause be referred to B., to be heard and determined by him, &c., and B. made his report to the Court below, on which the Court gave judgment; *held*, that this not being a case referable under the statute, but a mere voluntary submission to the arbitrament of B., it was a discontinuance of the suit; and the Court below having no jurisdiction afterwards, the judgment on the report and award was erroneous. *Camp v. Root*, 18 J. R. 22.

536. Where the cause is not referable under the statute, the Court will not interfere, even though the parties have, by consent, entered a rule for the reference in the book of common rules. *Johnson v. Parmely*, 17 J. R. 129.

537. And, in such a case, a judgment cannot be entered on the report of the referees, but the remedy is by *attachment* on making the submission a rule of Court. *Yates v. Russell*, in error, 17 J. R. 461.

538. But, if the parties in a suit not referable under the statute, by their written agreement, expressly consent and agree that a rule of reference be entered, and that a judgment may be entered on the report of the referees, all error is cured, or taken away, by such consent, and a judgment on the report of the referees, pursuant to such agreement, is as valid as if entered on a verdict. *Ibid.*

539. Where, by agreement of the parties, a cause was referred to three referees, who, or any two of them, were to report, and two only of the referees signed the report, which stated, that the *subscribers*, having heard the allegations and proofs of the parties, &c., on a writ of error brought on a judgment entered on this report; *held*, that it was to be presumed, that all the referees met and heard the [*296] parties, *though two only signed the report, nothing to the contrary appearing on the record. *Ibid.*

540. But, if the fact were otherwise, the objection should be raised in the Court below, on the coming in of the report, not in the Court of Errors, which can look only to the record. *Ibid.*

541. Costs will be allowed, where the report of referees is set aside for irregularity. *Brower v. Kingsley*, 1 J. C. 334.

542. No action lies upon a report of referees, made pursuant to a rule of a Court of Common Pleas, entered by consent of parties in an action of *assumpsit*, though the case might not have required the examination of long accounts; for it is not an *award*, and the party is concluded by the rule of reference, from alleging that the cause was not referable under the statute: and it being *assumpsit on contract*, there might have been long accounts, and the Court might give judgment on the report. *Harris v. Bradshaw*, 18 J. R. 26.

543. If the action in the Court below had

been *tort*; it seems, that the jurisdiction of the Court to order a reference, might have been objected to, on a writ of error. *Ibid.*

XXXI. Notices of motion.

544. Where it shall be intended that a default, nonsuit, verdict, inquisition, report, judgment, execution, or other proceedings, should be set aside, the matter shall always be brought before the Court on a notice of a motion for that purpose. *Reg. Gen. IV., January, 1799.*

545. An argument shall always be brought on to be heard in consequence of a notice for that purpose; and every notice of a motion or argument shall be for the first day in term, or for as early a day in term thereafter as the circumstances of the case will reasonably permit; and whenever a motion or argument shall go off from day to day, it shall still be entitled to be heard on the notice, without the necessity of a rule for enlarging the time to hear it. *Reg. Gen. V., January, 1799.*

546. All notices must be for the first day of term, unless an excuse can be offered. *Lusher v. Walton*, 1 C. R. 149. *S. P. Moyle v. Gillingham*, *id.* 73.

547. Misapprehension of a rule of practice is an excuse. *Lusher v. Walton*, 1 C. R. 149.

548. So, ignorance of a late decision. *Ibid.* *S. P. Schoonmaker v. Trans*, 2 C. R. 110.

549. So, where the attorney, through misapprehension of the practice, is not provided with proper affidavits, &c. on which to make the motion, the Court will permit him to give new notice for a subsequent day in term, on new affidavits. *Fink v. Bryden*, 3 J. R. 244, 245.

550. If there be sufficient excuse for not noticing a non-enumerated motion, for the first day of term, notice for any day in term will be good; but the motion will be heard only on a non-enumerated day. *Jackson, v. ———*, 2 C. R. 259. *S. P. Pintard v. Rosa*, 2 J. R. 186.

*551. Where the reason for not noticing for the first day of term ap- [*297] pears on the face of the record, no affidavit in excuse need be made. *Kane v. Scofield*, 2 C. R. 368.

552. Forgetting the commencement of the term, if the excuse be *bona fide*, is sufficient for not noticing on the first day. *Bayard v. Malcom*, 3 C. R. 102.

553. If a counsel has a known partner who transacts the attorney's business, an excuse arising from the personal conduct of the counsel, will be of avail, in a suit in which the partner's name only appears on the record. *Ibid.*

554. If a notice of argument is given for any day in term subsequent to the first, the party, who would object to it on that account, must appear and state such objection at the time when the motion is brought on; and if he does not, he will be deemed to have waived such objection. *Benninger v. George*, C. C. 85.

555. Counter affidavits may be read, as to the sufficiency of an excuse for not giving notice of a motion for the first day of term. *Quin v. Riley*, 3 J. R. 249.

556. A copy of the affidavit, on which a spe-

cial motion is founded, must be served on the opposite party. *Fitzroy v. Card*, 1 J. C. 30. S. C. C. 63.

557. The notice must state all the objects of the party's application, for he cannot extend his motion to any object not specified. *Alexander v. Esten*, 1 C. R. 152.

558. Notice of motion need not specify the place where the Court is to be held. *Bodwell v. Willcox*, 2 C. R. 104.

559. It is unnecessary to insert in a notice the words, "or as soon thereafter as counsel can be heard," and the motion may be brought on, any day in term, after the one for which it is noticed. *Anonymous*, 1 J. R. 143.

XXXII. Judge's order to stay proceedings, and certificate of probable cause.

560. A party intending to move to set aside any proceeding, may apply to a judge at his chambers, or to the recorder of *New-York*, for a certificate, (and which either of them may, in their discretion, grant,) certifying that there is probable cause for staying further proceedings until the order of the Court on the motion; and a service of a copy of the certificate, at the time of, or after the service of, the notice of the motion, shall thenceforth stay all further proceedings accordingly. *Reg. Gen. IV., January*, 1799.

561. But if such party shall neglect to bring on the motion to be heard during the term, then the proceedings shall not be longer stayed, and he shall, moreover, be liable to pay costs to the other party, for not having brought on the motion according to notice. *Ibid.*

562. Serving notice of a judge's order, is not sufficient to stay proceedings; a copy, at least, of the order should be served. *Cheetham v. Lewis*, 2 J. R. 104.

563. An order of a judge to stay proceedings, and a certificate of *probable cause, are the same, in effect, and require the same practice, as to the service of a notice of motion, and copies of affidavits, in order to prevent further proceedings. *Bailey v. Caldwell*, 3 J. R. 451.

564. To bring a party into contempt, for disobeying a judge's order, the original order must be shown at the same time that the copy is served. *Howland v. Ralph*, 3 J. R. 20.

565. The service of a certificate must be accompanied with notice of motion; otherwise it will not be a stay of proceedings. *Kirby v. Cogswell*, 1 C. R. 505.

566. After judgment has been entered on a verdict, the Court will not set it aside, or hear a motion for a new trial, unless the party has obtained an order to stay proceedings. *Van Rensselaer, v. Dole*, 1 J. C. 239. *S. P. Case v. Shepherd*, *id.* 245. S. C. C. 90.

567. After a verdict, unless a certificate or order of a judge be obtained, the party in whose favor the verdict is given, though a case be made, may proceed to enter up judgment. *Case v. Shepherd*, 1 J. C. 245. S. C. C. 90.

568. If the judge refuse to grant the order, the party may apply to the Court. *Ibid.*

569. The application for a certificate must,

in the first instance, be made to a judge, and not to the Court. *Bach v. Coles*, 3 C. R. 83.

570. A judge may grant an order to stay proceedings, and annul it, as well in term as in vacation, notwithstanding a rule for judgment be entered. *Radcliff v. Marine Insurance Company*, 3 C. R. 106.

571. If the judge granted the order on account of an improper item allowed by the jury, and he declares this to have been his only reason, the Court may, on such item being relinquished, vacate the order. *Ibid.*

572. Where a judge's order has been obtained, the plaintiff will, on no ground, be permitted to enter up judgment before the decision of the Court. *Bird v. Pierpoint*, 3 C. R. 106.

573. On an appeal from the decision of a judge refusing a certificate, the party appealing may deliver to the Court the points and authorities on which he relies, together with the case, but the Court will hear no argument. *Anonymous*, 1 J. R. 275.

574. If a judge's order cannot be obtained, the party may, notwithstanding, before the judgment is perfected, bring on the argument. *Neilson v. Columbian Insurance Company*, 1 J. R. 301.

575. As either party may notice a case, &c. for argument, a certificate will not be discharged, because notice of argument has not been given by the party obtaining it. *Kirby v. Cogswell*, 1 C. R. 484.

576. If judgment be entered before argument on a case made in the cause, a certificate to stay proceedings, through some misapprehension of the judge, not having been granted, the omission will not prejudice the party, but he may avail himself of the decision of the Court, if given in his favor. *Smith v. Cheetham*, 3 C. R. 57.

577. Where each party has a right to notice a case for argument, and neither brings it on, they are equally in default, and the judge's certificate does not expire with the term, but still continues a stay of the proceedings. *Jackson, ex dem. Colden, v. Brownell*, 3 C. R. 151.

*578. To get rid of the order, the party should give a counter notice, and when the cause is called on, demand judgment. *Ibid.* [*299]

579. But it is otherwise as to a certificate to stay proceedings upon a report of referees, and the Court will grant the motion to vacate the order, if the cause is not brought on. *Anonymous*, 3 C. R. 152.

580. The certificate amounts to an enlargement of the rule for judgment nisi, and a motion in arrest of judgment may be made at any time or term subsequent, as long as the certificate continues in force. *Bayard v. Malcolm*, 1 J. R. 310.

581. If the party obtaining a verdict gives notice of a motion to set aside the judge's certificate, and does not attend to argue, the opposite party will be allowed costs. *Brett v. Hood*, 1 C. R. 343.

582. It seems, that the Court will in no case hear an argument on a motion to set aside a judge's certificate to stay proceedings on a case made. *Ibid.*

583. A judge's certificate was discharged,

because the defendant had neglected to prepare his case within the two days allowed, although the judge left the place where the circuit was held so soon after an application to him, that it was not possible to have the case completed. *Newkirk v. Fox*, C. C. 133.

584. If the defendant, after verdict, tender the amount, with all the costs up to the time, the Court will order further proceedings to be stayed. *Hatfield v. Baldwin*, 1 J. R. 506.

XXXIII. Non-enumerated motions.

585. The days for non-enumerated motions are *Monday* and *Thursday*, in the first week of term, and *Friday*, in the second week. *Reg. Gen.*, November, 1803. 1 C. R. 494.

586. A non-enumerated motion must be on the ground of irregularity only; if merits are united, it becomes enumerated. *Kemsen v. Isaacs*, 1 C. R. 22.

587. A motion to set aside a verdict for irregular conduct in a jury, is non-enumerated. *Smith v. Cheetham*, 2 C. R. 381.

588. After the lapse of 20 years, no judicial proceedings can be set aside for irregularity. *Thompson v. Skinner*, 7 J. R. 556.

589. A motion to overrule a frivolous plea, and enter a default, has the same preference, as a motion on a frivolous demurrer. *Anonymous*, 2 C. R. 377.

590. A motion to set aside proceedings for irregularity, must be made at the next term after the irregularity happens. *McEvers v. Markler*, 1 J. C. 248. S. C. C. C. 93.

591. An affidavit, not served, cannot be read in support of a motion, though the facts were not known until the day of bringing it on; in such case, copies should be served, and the motion made the next day. *Bergen v. Boerum*, 2 C. R. 256.

592. If the party do not move for all the costs which he is then entitled to on his motion, he cannot move for them at a subsequent term. *Palmer v. Mulligan*, 2 C. R. 380.

*593. If there be a late decision, [*300] of which the counsel is not apprized, the Court will, in some cases, allow its being urged as an excuse for not making an earlier application. *Schoonmaker v. Trans*, 2 C. R. 110.

594. The distance of the residence of the attorney receiving a notice, from the place where the Court is to be held, is an excuse for not opposing it on the first day of the term. *Torrey v. Morehouse*, 1 J. C. 242.

595. Entering on the argument of a motion, is a waiver of every objection of irregularity in bringing it on. *Roosevelt v. Dean*, 3 C. R. 105.

596. When an affidavit does not state what ought to be alleged in favor of a motion, the presumption is that it could not be asserted. *Ibid.*

597. Affidavits may be adduced to establish the general reputation of a person whose character has been impeached; but nothing supplementary can be read to substantiate the ground of motion, unless copies have been served. *Clark v. Frost*, 3 C. R. 125.

598. When a third person makes an affidavit, a sufficient reason should be shown why it was not made by the party himself. *Ibid.*

599. The Court will not postpone hearing a motion until the next non-enumerated day, unless the party asking the indulgence can show some excuse for not being prepared. *Jackson, ex dem. Fisher, v. Ferguson*, 3 C. R. 127.

600. If a party shall not appear to show cause, or oppose a motion, or argue on his part, he shall be deemed to have renounced his right against the rule, motion, or judgment; and the party having served the rule, or given the notice, shall thereupon be entitled to his rule, motion, or judgment, equally as if the other party had appeared and consented thereto. *Reg. Gen.* VII., January, 1799.

601. Where no opposition is made to a motion, it is sufficient to read the notice and affidavit of service. *Codd v. Harrison*, 3 C. R. 82. *S. P. Hoyt v. Campbell*, C. C. 128. *Palmer v. Sabin*, *id.* 132.

602. But if they appear insufficient, the Court will deny the application, although unopposed. *Jackson, ex dem. Counter, v. Gile*, 3 C. R. 88.

When counter and supplementary affidavits are admissible on a motion. *See ante*, VI. 98—102.

XXXIV. Cases for argument.

603. Whenever it shall be intended to move to set aside a nonsuit or verdict, there shall be a case, to be prepared by the party intending the motion, and a copy thereof to be served on the opposite party, within two days after the trial; and which opposite party may, within four days thereafter, propose amendments thereto, and serve a copy on the party who prepared the case, and who may then, within four days thereafter, serve the opposite party with a notice to appear within convenient time, not less than four days, nor beyond *the first day of the [*301] then next ensuing term, before the judge who tried the cause, to have the case and amendments corrected; and the judge shall, thereupon, correct the same as he shall deem to consist with the truth of the facts. *Reg. Gen.* VI., January, 1799.

604. But if the parties shall omit, within the several times above limited, unless the same shall be enlarged by a judge, or the recorder of *New-York*, the one party to oppose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the case as prepared, and the latter to have agreed to the amendments as proposed. *Ibid.*

605. Where a verdict is taken by consent, subject to the opinion of the Court on a case to be made, the party is not limited by the sixth rule of *January* term, 1799, as to the time for preparing the case. *Beardsley's Executors v. Root*, 11 J. R. 406.

606. Where a verdict is taken for the plaintiff, subject to the opinion of the Court on a

case to be made, and the plaintiff does not make up the case according to the rules and practice of the Court, the defendant may give notice of a motion, at the next term, for judgment; and if no sufficient excuse is then shown, by the plaintiff, for not making up the case, the Court will order judgment to be entered for the defendant. *Jackson v. Case*, 12 J. R. 431.

607. When a verdict is taken subject to the opinion of the Court, no order for a stay of proceedings is necessary, and it does not come within the rule allowing either party to notice the case for argument, which presupposes that a case is already settled; but the defendant may move the Court for leave to enter judgment. *Ibid.*

608. The sixth rule of January term, 1799, as to preparing, amending and settling cases, extends to cases made subject to the opinion of the Court. *Reg. Gen.*, January 12, 1816. 13 J. R. 160.

609. The rules of practice relative to cases for argument, do not apply to bills of exceptions; and an order to stay proceedings is not necessary in such case, or it may be granted of course. *Hasbrouck v. Tappen*, 15 J. R. 182.

610. It seems, that the rule as to the service of a copy of the case, at or before the time of giving notice of the argument, does not apply to demurrer books. *Van Buskirk v. Burr*, 20 J. R. 275.

611. Where, after a verdict, a case is made and settled, the party whose right it is to make up the case, must serve a copy of it, as settled, on the opposite party, as early, at least, as the time allowed for noticing the cause for argument; and if the opposite party also notices the cause for argument, and has not been served with a copy of the case, as settled, he may take judgment. *Peck v. The Executrix of Peck*, 14 J. R. 219.

612. On a case subject to the opinion of the Court, the same conclusion will be drawn from the evidence, as the jury would have been authorized to make. *Whitney v. Sterling*, 14 J. R. 215. *S. P. Walden v. Sherburne*, 15 J. R. 409.

613. A point reserved by the judge at nisi prius, is in the nature of a special verdict, and the plaintiff must prepare the case, [*302] have it settled, and open the argument, and cannot move for judgment, because no case is made. *Eagle v. Alner*, 1 J. C. 332. *Percival v. Jones*, id. 393. *S. C. C. C. 104. Jackson*, ex dem. *Gansevoort*, v. *Murray*, 2 J. C. 219.

614. Where, after a verdict, and within the two days allowed for making a case, the defendant's attorney applied to the plaintiff's attorney for certain papers which had been read in evidence, and which were necessary to be put in the case, which were refused by the plaintiff's attorney, and the defendant's attorney could not, for that reason, make up the case; the Court ordered, that the plaintiff's attorney furnish the papers to the defendant's attorney, or permit him to take extracts, and that the proceedings should in the mean time be stayed. *Jackson*, ex dem. *Martin*, v. *Platt*, 2 J. C. 71.

615. Where there were cross causes, the plaintiff in each of which had obtained a verdict, subject to the opinion of the Court, on a case to be made, and, in the cases, material facts were omitted, the Court would not permit the plaintiff to enter up judgment, but ordered the case to be corrected. *Codwise v. Hacker*, 1 C. R. 74.

616. A case made with liberty to turn it into a special verdict, stays execution till the next term after the decision is given. *Van Dyck v. Van Beuren*, 1 C. R. 13.

617. On the making of a case, the defendant will not be compelled to pay into Court the amount of the verdict against him. *Shuter v. Hallet*, 1 C. R. 518.

618. The suit, in which the case is made, must be pending in the Supreme Court; and that Court will not give an opinion on a case submitted to it by consent, the cause still remaining in a Court of Common Pleas. *Strouell v. Vrooman*, 2 C. R. 107.

619. An admission in a case concludes the party making it. *Vandervoort v. Smith*, 2 C. R. 155.

620. A case concludes the parties making it, but is not conclusive as to third persons. *Neilson v. Columbian Insurance Company*, 1 J. R. 301.

621. A judge, in vacation, may enlarge the time for making a case. *Black v. Brown*, 9 J. R. 264. *Contra, Jackson*, ex dem. *Lou*, v. *Hornbeck*, 2 J. C. 115. *S. C. C. C. 127.*

622. The right of amending will not authorize the opposite party to substitute a new case. *Eagle v. Alner*, 1 J. C. 332. *S. P. Milward v. Hallett*, 1 C. R. 344.

623. Every amendment must be on the case made, or refer to the line or page in which it is proposed to be inserted. *Milward v. Hallett*, 1 C. R. 344.

624. A judge, in vacation, may enlarge the time for proposing amendments, and for giving notice of an appearance before the judge. *Jackson*, ex dem. *Lou*, v. *Hornbeck*, 2 J. C. 115. *S. C. C. C. 127.*

625. On an affidavit, stating, that the party's amendments to a case were prevented, by accident, from coming to the counsel's hands, who was employed to attend to settling the case, in due time, and that the case made by the opposite party did not set forth the merits of the cause as they appeared on the trial, the Court granted permission to amend. *Hun v. Bourne*, 1 C. R. 23.

*626. A case was allowed to be [*303] amended, on affidavit of the omission of a fact, through mistake of counsel. *Foot v. Colvin*, 2 J. R. 481.

627. After argument, and before judgment, at the instance of the defendant, the case was allowed to be amended, on paying the costs of argument, and giving to the plaintiff the election, afterwards, to be nonsuited, or to have a new trial. *Jackson*, ex dem. *Colden*, v. *Brounel*, 3 J. R. 140.

XXXV. Enumerated motions; noticing for argument, points and argument.

628. A motion for a new trial on the ground

of newly discovered evidence, is enumerated. *Chandler v. Trayard*, 2 C. R. 94.

629. An application for judgment on a frivolous demurrer, is an enumerated motion. *M'Cabe v. M'Kay*, 2 C. R. 100.

630. A motion to set aside a verdict for irregularity, and also on the merits, is an enumerated motion. *Foden v. Sharp*, 4 J. R. 183.

631. A motion to set aside the report of referees on the merits, is enumerated. *Clinton v. Elmendorf*, 3 J. R. 143.

632. A motion in arrest of judgment is an enumerated motion. *Reg. Gen.*, February, 1809, 4 J. R. 192. By the previous practice, such motion was non-enumerated. *Hough v. Stover*, 2 C. R. 221.

633. All motions to bring on to be argued a question arising on special verdict, case reserved at the trial, case agreed between the parties without trial, demurrer to evidence or pleadings, writ of error, or writ in the nature of a writ of error, comprehending the writ of *mandamus*, and all motions to set aside nonsuit, verdict, inquisition, or report, otherwise than for irregularity only, shall be heard according to the priority of the time when the question arose. *Reg. Gen.* I., January, 1799.

634. In cases of special verdict, demurrer to evidence, case reserved at the trial, and motion to set aside nonsuit or verdict, the question shall be deemed to have arisen on the day when the verdict in the cause was taken, or the nonsuit was granted. In cases of demurrer to pleadings or writ of error, or writ in the nature of a writ of error, the day when the joinder in demurrer or joinder in error was received by the party demurring or having assigned the errors; and, in case of return to any such writ, and no joinder in error on the record, or motion to set aside inquisition or report, the day when the writ, with the return, or when the inquisition, or report, was filed. *Reg. Gen.* III., January, 1799.

635. Cases intended for argument must be duly noticed before term to the clerk, so that he may enter them on the calendar. If not so noticed, they must go to the foot of the calendar, without regard to the date of their issues. *Anonymous*, 1 C. R. 24. *Reg. Gen.*, January, 1803, 1 C. R. 110. See post, 639.

636. Each cause shall be argued according to its standing on the calendar, if the party entitled to bring it on be ready, otherwise it shall lose its preference, and not be called again until all the others are disposed of. *Ibid.*

*637. The attorney of either party [*304] ty may give notice of the argument. *Ibid.*

638. If any cause be inserted on the calendar, during the term, it shall not take place, whatever be its date, of any that are on it at the opening of the Court. *Ibid.*

639. No cause can be entered on the calendar of *enumerated motions*, unless a note of the issue be filed in the clerk's office of the Court, in the place where the Court is to be held, before the *Friday* next preceding the term. *Reg. Gen.*, May 10th, 1816, 13 J. R. 303.

640. After a certificate of probable cause,

both parties may notice the case for argument. *Kirby v. Cogswell*, 1 C. R. 484.

641. The not entering and noticing a cause for argument by the party obtaining the certificate, is no ground for a motion to discharge the order. *Ibid.*

642. Causes noticed for argument, and not brought on, must be re-noticed to the clerk, as they will not be, of course, carried over to the calendar of the next term. *Livingston v. Rogers*, 1 C. R. 487.

643. Where both a case and a special verdict have been made, the party must elect on which he will proceed. *Sleight v. Rhinelandter*, 1 J. R. 192.

644. Either party may give notice of bringing on the argument of a cause, without waiting for a default on the other side. *Hoyt v. Campbell*, C. C. 128. *Palmer v. Sabin*, id. 132. *Bayard v. Malcolm*, 1 J. R. 316.

645. If a public officer inform the Court, that the situation of a county is such as to require, for the sake of the peace of the people, a decision in a cause, it will take preference of all others on the calendar. *Brandt, ex dem. Walton, v. Ogden*, 2 C. R. 377.

646. Where a bill of exceptions has been taken, and also a demurrer to evidence, the Court will not compel the party to elect which he will bring on to argument. *Lewis v. Fox*, 5 J. R. 1.

647. On moving to set aside a report of the referees on the merits, or for a new trial on newly discovered evidence, copies of the affidavits shall be furnished to each of the judges. *Reg. Gen.*, January, 1813, 10 J. R. 128.

648. On moving in arrest of judgment, copies of the pleadings, or of so much thereof as may be necessary, shall be delivered to each of the judges. *Ibid.*

649. The party demurring shall make up the paper books, and bring on the cause. *Littelfield v. Storey*, 3 J. R. 425. *Contra, Sable v. Hitchcock*, C. C. 103.

650. To every case there shall be added a note of the questions to be made, and to them the argument shall be confined. *Reg. Gen.*, January, 1803, 1 C. R. 110. *Main v. Newson*, 3 J. R. 542.

651. If, however, any facts in the case gave rise to other questions, those also may be argued, unless the adverse party object that they are facts not appearing material to a discussion of such new questions, in which case they shall be abandoned, or the case referred for amendment, if the Court shall think it necessary. *Ibid.*

652. The points must be delivered to judges and to the opposite party, at the time of bringing on the argument. [*305] *Henshaw v. Marine Insurance Company*, 2 C. R. 274.

653. And the argument cannot be brought on, unless the points are reduced to writing, and served. *Steinback v. Ogden*, 2 C. R. 378.

654. When the argument of a case is opened, the counsel must furnish the opposite side and the Court with the points relied upon. *Schmidt v. United Insurance Company*, 1 J. R.

63. *S. C. id.* 249. *S. P. Main v. Newson*, 3 J. R. 542.

655. Where a verdict is taken, subject to the opinion of the Court on a case stated, the counsel for the plaintiff opens the argument of the cause. *Jackson*, ex dem. *Gansevoort*, v. *Murray*, 2 J. C. 219.

656. Where a defendant, after a verdict, makes a case, and notices it for argument, if he does not appear at the time when called, judgment shall go against him; but when the plaintiff notices a case made on the part of the defendant, and the plaintiff is not ready, it shall go down to the bottom of the calendar. *Codwise v. Hacker*, 1 C. R. 74.

657. If the Court be equally divided, judgment must go according to the verdict. *Van Dyck v. Van Beuren*, 2 C. R. 103.

658. If the cases are not ready to be delivered to the judges, by the party whose right it is to make them up, when the cause is moved by the opposite party, the latter shall have judgment by default. *Malcolm v. Bayard*, 1 J. R. 316.

659. Affidavit of service of notice of argument, is sufficient to entitle the party to judgment, if the opposite party do not attend, without setting forth or producing the notice itself. *Overseers of New Windsor v. Belknap*, 3 C. R. 131.

660. An objection not taken at the trial, cannot be raised on the argument of the case at bar. *Suckley v. Furse*, 15 J. R. 338.

661. Where a case, demurrer, or special verdict, is noticed for argument, and the opposite party intends to object to the argument coming on, at the day, on any ground of irregularity, he must give notice of an application to the Court for that purpose, as in non-enumerated motions, to strike the case off the calendar of enumerated motions, otherwise the objection will not be heard, when the cause is called on to argument. *Delamater v. Smith*, 16 J. R. 2.

662. The decision of the Court, upon a summary application, is not final and conclusive; but a further discussion of the same subject will be admitted upon a more enlarged statement of facts. Per *Spencer*, *J. Simson v. Hart*, in error, 14 J. R. 63—76.

663. Where there is an issue at law and an issue of fact, it is most proper that the issue at law should be first determined; though the plaintiff has his election which shall be first tried; but he cannot nonsuit the plaintiff, for not proceeding to trial of the issue in fact, while the other issue at law is undecided. *Overseers of Pittstown v. Overseers of Plattsburgh*, 15 J. R. 398.

XXXVI. Special rules and orders.

664. Misprision of the clerk, in drawing up a rule, will be amended *on [*306] application to the Court. *Church v. United Insurance Company*, 1 C. R. 7.

665. After an order of the Court in a cause, a further order of a judge, at his chambers, is irregular. *Stansbury v. Durell*, 1 J. C. 396. *S. C. C. C.* 99.

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666. A rule, regularly obtained, will not be vacated at a subsequent term, on the ground of the absence of the counsel for the other party at the time the motion was made. *Hil-drith v. Harvey*, 2 J. C. 221.

667. A rule to show cause will not be enlarged, merely to give counsel an opportunity to consider of the propriety of expunging parts of an affidavit. *The People v. Freer*, 1 C. R. 485.

668. When the Court is not full, very slight reasons will induce them to refuse to vacate a rule granted, on argument, in full Court. *Day v. Wüber*, 2 C. R. 251.

669. Where a rule is granted on payment of costs, it is conditional, and is of no force, unless the costs be paid *instantly*; and the party who is to pay costs, must seek and tender them to the other party. *Pugsley v. Van Allen*, 8 J. R. 352. See *ante*, 455, 473.

670. And if the defendant neglect to pay the costs on their being regularly demanded of him, and the plaintiff issue an execution on the judgment which he has obtained, it will not be set aside. *Ibid*.

As to the distinction between common and special rules, see *ante*, VII.

XXXVII. Feigned issue.

671. On affidavit, that the bond and warrant of attorney, on which a judgment was entered up, were forged, the Supreme Court will award a feigned issue to try the fact of forgery. *King v. Shaw*, 3 J. R. 142.

672. To try an allegation of usury, against a judgment entered by confession, a feigned issue will be awarded, but the judgment will be in the mean time retained. *Wardell v. Eden*, 2 J. C. 258. *Gilbert v. Eden*, *id.* 280.

673. Where the consideration of a bond, on which judgment has been entered by warrant of attorney, is alleged to be usurious, the Court will award a feigned issue to try the fact, and stay execution until after the trial. *Starr v. Schuyler*, 3 J. R. 139. *S. P. Wardell v. Eden*, 1 J. R. 531. note.

674. It will not be awarded, unless the usury be denied, or the fact is put in doubt. *Hevitt v. Fitch*, 3 J. R. 250.

675. A feigned issue, to try the truth and validity of payments made on a judgment, depends on the sound discretion of the Court, and is only granted for the information of the Court, or where the party is otherwise without relief. *Wardell v. Eden*, 2 J. C. 258.

676. In ejectment, on a suggestion that the plaintiff's lessor had taken on the execution more land than he was entitled to by the verdict, which the other party denied, a feigned issue was awarded to try that fact. *Jackson*, ex dem. *Ostrander*, v. *Hasbrouck*, 5 J. R. 366.

677. If any difficulty arises in making up a feigned issue ordered *by the Court, it must be settled before a [*307] judge, at his chambers. *Richards v. Brown*, 7 J. R. 320.

See *ante*, XXVI. 437.

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XXXVIII. When taking a subsequent step in a cause cures a previous irregularity of the opposite party.

678. Appearance is a waiver of any irregularity in giving the defendant notice of the action. *Rowley v. Stoddard*, 7 J. R. 207.

679. If the defendant pleaded in chief, it is an admission of the due appearance of the plaintiff. *Schmerhorn v. Jenkins*, 7 J. R. 373.

680. Pleading in bar, is a waiver of any objection to the jurisdiction. *Smith v. Elder*, 3 J. R. 105.

681. Where there was an irregularity in the proceedings against the bail, and they suffered two terms to elapse without taking notice of it, they were not allowed, afterwards, to avail themselves of the objection. *Jones v. Dunning*, 2 J. C. 74.

682. Proceeding in the cause is no waiver of a previous irregularity in the opposite party, if that irregularity were, at the time, unknown. *Giles v. Caines*, 3 C. R. 107.

XXXIX. Rule for judgment, and entering, filing, and docketing judgment.

683. An interlocutory, or final judgment, cannot be entered in vacation, unless on a *cognovit actionem*. *Hogeboom v. Genet*, 6 J. R. 325.

684. The rule *nisi*, for judgment, after verdict, may be entered on any day in term. *Rose v. Rock*, 6 J. R. 330.

685. Where a judge's order has been obtained to stay proceedings on a verdict, the party in whose favor the verdict was given, may, nevertheless, enter a rule *nisi*, for judgment, on the fourth day of the next term. *Hackley v. Hastie*, 3 J. R. 252.

686. The plaintiff cannot move for judgment on a verdict in his favor, where a case is reserved, until the case be disposed of. *Eagle v. Alner*, 1 J. C. 332.

687. Where the plaintiff died, after verdict, and subsequent to the time that judgment might have been entered on the return of the *postea*, had it not been suspended by a case made: on a motion for a new trial, the Court ordered judgment to be entered for the plaintiff, *nunc pro tunc*, as of the term subsequent to the verdict. *Mackay v. Rhineland*, 1 J. C. 408.

688. It appearing that the original *nisi prius* record and issue roll could not be found, the plaintiff was, after a lapse of 6 years from the time of pronouncing judgment, permitted to file a new *nisi prius* record and *postea*, to enter judgment, and issue execution. *Jackson*, ex dem. *Smith*, v. *Hammond*, 1 C. R. 496.

*689. Where the appearance of [*308] the defendant, on process not bailable, has never been entered, the judgment will, notwithstanding, be good. *Ross v. Hubble*, 1 C. R. 512.

690. If the plaintiff, having obtained a verdict, does not make up the record, the Court will, on motion of the defendant, order him to do it in a given time, or that the defendant

have leave to do it for him. *Jackson*, ex dem. *Kemp*, v. *Parker*, 2 C. R. 385.

691. But where he has not, before notice of the application, requested the plaintiff to make it up, no costs will be allowed on either side. *Ibid*.

692. On a verdict for one mill damages, no judgment can be entered, either for the damages and costs, or for costs alone. *Brown v. Smith*, 3 C. R. 81.

693. Where an action of trespass, in which the title to land did not come in question, was brought in the Common Pleas, and referred by consent, and on the report of the referees being confirmed by the Court, the plaintiff, without saying any thing to the Court as to the question of costs, entered a rule for judgment for one dollar damages, and his costs of suit, and had his costs regularly taxed, and a record made up and filed; on which execution was issued, and the damages and costs collected and paid over to the plaintiff; and, on the return of the execution, at a subsequent term, the Court, on application of the defendant, adjudged costs in his favor against the plaintiff, on which a new record was made up, in which the judgment for costs was entered as of September term, 1810, when the report was confirmed, when, in fact, the judgment in favor of the defendant for costs was given in May, 1811; held, that the entry of the judgment by the plaintiff for the costs, without the knowledge or assent of the Court, being irregular, the Court of Common Pleas had power to set it aside; and that the entry of the judgment for costs in favor of the defendant, as of September term, 1810, could not be alleged as error, as the judgment for costs related back to the term in which judgment was given on the report of the referees. *Sag v. Annin*, 10 J. R. 302.

694. The judgment roll or record must not only be signed, but actually filed with the clerk, before the plaintiff can take out execution. *Barrie v. Dana*, 20 J. R. 307.

See ACTIONS (REAL.) AMENDMENT. ARREST. ATTACHMENT, II. ATTORNEY AND COUNSEL. AUDITA QUERELA. BAIL. BILL OF EXCEPTIONS. CERTIORARI. COMMISSIONER. COSTS. EJECTMENT, VI, &c. EXECUTION. JOINT DEBTORS. JUDGMENT. JURY. MANDAMUS. NEW TRIAL. PARTITION, II. PLEADING. SCIRE FACIAS. SET-OFF. SHERIFF. TRIAL. WRIT.

PRACTICE IN Chancery. See CHANCERY, LIV.

— on appeal from Chancery. See CHANCERY, V.

— in error. See COURT OF ERRORS. ERROR.

***PRESCRIPTION. [*309]**

Prescription will not, in any case, give a right to erect a building on another's land. *Cortelyou v. Van Brundt*, 2 J. R. 357.

PRINCIPAL AND AGENT.

- I. *Duty of agents, generally.*
- II. *Authority of agents; (a) How far the authority of an agent, general or special, express or implied, extends to affect or bind his principal; (b) When an authority is well executed or not.*
- III. *Rights of agents in regard to their principals.*
- IV. *Liability of agents; (a) Conduct of an agent, how regarded, and his general liability; (b) Liability of the agent to his principal, and when that liability is discharged by the assent or acquiescence of his principal; (c) Liability to third persons, either on his special undertaking, or where he exceeds his authority, or where he has received money to which his principal was not entitled.*
- V. *Agents of government; when personally liable.*
- VI. *Mercantile agents, factors, or consignees; (a) Authority of a factor; (b) Liability of a factor; (c) Liability of the principal to his factor; (d) Hire and commission of a factor.*

I. *Duty of agents, generally.*

1. An agent, acting with good faith, is bound to exercise ordinary attention and diligence only. *Lawler v. Keaquick*, 1 J. C. 174.

- II. *Authority of Agents; (a) How far the authority of an agent, general or special, express or implied, extends to affect or bind his principal; (b) When an authority is well executed or not.*

(a) *How far the authority of an agent, general or special, express or implied, extends to affect or bind the principal.*

2. The principal is liable for the acts of a general agent while acting within the scope of his authority. *Munn v. Commission Company*, 15 J. R. 44.

3. The principal is not bound by the acts of a special agent beyond his authority. *Ibid.* S. P. *Beals v. Allen*, 18 J. R. 363.

4. A company incorporated for the purpose of selling goods on commission, is bound by the acceptance of its general agent [*310] of a bill drawn on the company on account of goods deposited with them for sale on commissions. *Ibid.*

5. C., a clerk of L., a merchant, employed in his store at G., to keep his books and accounts, and to sell goods by retail, in the absence of L., gave an order on D., another clerk of L. at P., to deliver goods to B., a creditor of L., who received the goods, to the amount of his debt, not then due. The sheriff, who had an execution against L., seized the goods in the hands of B. and sold them, and applied the proceeds to satisfy the execution. In an action of trespass by B. against the sheriff; held, that C., the clerk of L., had no authority to deliver the

goods to B.; and though it did not appear that L. had ever disaffirmed the act of C., and a stranger could not object to the want of authority, yet the sheriff, acting in behalf of a judgment creditor, was not to be considered as a stranger, and might insist that the property in the goods was not changed by the delivery of them to B., for want of authority in C. *Beals v. Allen*, 18 J. R. 363.

6. A power to sell does not, of itself, convey a power to warrant the title. *Nixon v. Hyecroft*, 5 J. R. 58. S. P. *Gibson v. Coll*, 7 J. R. 390.

7. Where the owners of a ship authorized the master to sell the ship in the same manner as they themselves might or could do, and the master sold the ship, and at the time of sale, represented to the vendee that she was a registered ship, when, in fact, she only sailed under a coasting license; held, that the master being a special agent for the purpose of the sale, the owners were not answerable for the false representation of the master, who exceeded his authority. *Gibson v. Coll*, 7 J. R. 390.

8. It seems, that a general power to act relative to the management of an estate, does not authorize an attorney to put in an answer for his principal to a bill in chancery. *Rogers and wife v. Cruger and others*, 7 J. R. 557.

9. Acting as clerk to a merchant, does not authorize the signing of notes by the clerk, in the name of his master. *Terry v. Fargo*, 10 J. R. 114.

10. The authority of an agent, to discharge a person from execution without satisfaction of the debt, must be clearly proved and strictly pursued. *Crary v. Turner*, 6 J. R. 51.

11. An agreement by an agent having discretionary powers, to give part of the profits arising from the sale of merchandise intrusted to him, to a third person, as a compensation for his selling the merchandise, is obligatory on his principal. *Lyle v. Clawson*, 1 C. R. 323.

12. An act done by or to an agent of a matter resting *in pais*, is equivalent to its being done by the principal. *Anderson v. Highland Turnpike Company*, 16 J. R. 86.

13. An agent who makes a contract in behalf of his principal, whose name he discloses at the time to the person with whom he contracts, is not personally liable. *Rathbone v. Budlong*, 15 J. R. 1.

14. A third person cannot be affected by any private instructions from the principal to his agent; and if the agent acts within the general scope of his authority, the principal is liable for his acts. *Munn v. The Commission Company*, 15 J. R. 44.

*15. If a person deals with an [*311] agent, and gives him a receipt for a sum of money, which the agent had authority to pay; and on the faith of that receipt, the principal settles with his agent, and pays him a balance, the party giving the receipt is concluded from looking to the principal, in case of a mistake, unless he gave notice to him of the mistake, in the first instance, and before the settlement between the principal and agent. *Cheever v. Smith*, 15 J. R. 276.

(b) *When an authority is well executed or not.*

16. An authority must be strictly pursued; and an act substantially varying from it, is void. *Nixon v. Hyserott*, 5 J. R. 58. *Batty v. Carswell*, 2 J. R. 48.

17. A power to sell, and on such sale "to execute, seal, and deliver, in the name of the principal, such conveyances and assurances in the law of the premises to the purchaser, in fee, as should be needful or necessary according to the judgment of the attorney," does not authorize the latter to execute a deed with covenants so as to bind the principal. *Nixon v. Hyserott*, 5 J. R. 58.

18. Where an authority is confided to several persons, for a private purpose, all must join in the act. *Green v. Miller*, 6 J. R. 39.

19. *Aliter*, in matters of public concern. *Ibid.*

20. If A. authorize B. to sign his name to a note for a certain sum, payable in six months, and B. puts A.'s name to a note for that sum payable in sixty days, A. will not be liable. *Batty v. Carswell*, 2 J. R. 48.

21. An agreement made by an attorney in his own name, but as attorney for another, is void, and no action can be maintained on it. *Bogart v. De Bussy*, 6 J. R. 94.

22. A stranger cannot disaffirm an agreement made with an agent, on the ground that he had exceeded his authority. *Jackson*, ex dem. *McCarty, v. Van Dalsen*, 5 J. R. 43.

23. Where A. gave to B. a power of attorney, to survey and lay out into lots a certain tract of land, and to sell the same for the best price, so that no lot should sell for a less price than a proportionate share of 1,200 pounds for the whole tract, reserving a right to revoke the same, &c.: and B. had the tract surveyed and laid out into lots, and then sold the whole for the consideration of 1,200 pounds to C., who afterwards reconveyed it to B.; it seems, that this is a good execution of the power; or if not, yet as the principal may have been satisfied with the sale, and since ratified it, a stranger will not be permitted to invalidate it. *Ibid.*

24. Where a principal is informed by his agent of what he has done, the principal must express his dissatisfaction, in a reasonable time, otherwise his assent will be presumed. *Cairnes v. Blecker*, 12 J. R. 300.

25. As, where an agent who was authorized to deliver goods to a third person, on receiving sufficient security for the amount, informed his principal, by letter, on the 18th of July, of what he had done, and of the nature and amount of the security he had taken on delivery of the goods; and the principal did not answer the letter until the 20th *of

[*312] October following, though one party lived in Albany, and the other in New-York, it was held to amount to an acquiescence in, or approbation of the conduct of the agent. *Ibid.*

26. An agreement relating to the partition of land, made in 1764, executed by a third person in the name of one of the parties, who, it did not appear, had any authority for that purpose, was held to be ratified by the party by his subsequent acts under the agreement so exe-

cuted. *Jackson*, ex dem. *Klock, v. Richtmyer*, 13 J. R. 367.

See POWER. CHANCERY, LIIL.

III. Rights of agents, in regard to their principals.

27. A. applied to B. for advice how to draw a sum of money from Scotland, and according to B.'s advice, drew a bill of exchange on S. in favor of B., who endorsed and negotiated it for A., and the bill having been returned protested for non-payment, B. was compelled to pay the amount, with damages, charges, &c.; held, that B., having acted merely as the agent of A., was entitled to recover against him the amount of damages and expenses, as so much paid to his use. *Ramsay v. Gardner*, 11 J. R. 439.

28. Where an agent, acting *bona fide*, and without fault, in the proper service of the principal, is subjected to expense, or sued on any contract made by him, or for an act done pursuant to his authority, the law implies that the principal will indemnify and reimburse him for the expense; and *assumpsit* lies against the principal on such implied promise. *Powell v. Trustees of Newburgh*, 19 J. R. 284.

29. As where the trustees of an incorporated village, who were sued for an act done by them, *virtute officii*, in the faithful discharge of their duty as trustees and agents of the corporation, incurred necessary costs and charges in their defence of the suit; held, that they might maintain *assumpsit* against the corporation or their successors in office, for the costs and expenses so paid by them. *Ibid.*

See post, VI. (d)

IV. *Liability of agents; (a) Conduct of an agent, how regarded, and his general liability; (b) Liability of an agent to his principal, and when that liability is discharged by the assent or acquiescence of his principal; (c) Liability to a third person, either on his special undertaking, or where he exceeds his authority, or where he has received money to which his principal was not entitled.*

(a) *Conduct of an agent, how regarded, and his general liability.*

30. The conduct of an agent, on whom no fraud is chargeable, ought to receive a liberal and favorable construction. *Drummond v. Wood*, 2 C. R. 310.

31. An agent is liable for fraud or gross neglect; but while acting with good faith, he is bound to exercise ordinary attention and diligence only. *Lauder v. Keaquick*, 1 J. C. 174.

(b) *Liability of an agent to his principal, and when that liability is discharged by the assent or acquiescence of his principal.* [*313]

32. Where an agent of the insured is directed by his principal to settle with the insurers for a total loss, and he, through mistake, misapprehension, or negligence, adjusts the loss as an average loss, and cancels the policy, he substitutes himself in the place of the insurer

and is liable to his principal for the whole amount of the loss. *Rundle v. Moore*, 3 J. C. 36.

33. If A., not having any interest in the land, permits B. to use his name as a lessor of the plaintiff in ejectment, on condition that he should not be at any further expense, and B. employs an attorney to bring the suit in the name of A., without informing him of the condition annexed to the authority, and A. is compelled to pay costs, he has a remedy not only against B., but against the attorney, although the latter was ignorant of the condition. *Bradt v. Walton*, 8 J. R. 298.

34. Where an agent has, by his misconduct, rendered himself liable to his principal, the acquiescence of his principal in his acts will exonerate him. *Towle v. Stevenson*, 1 J. C. 110.

35. An agent received a bill of exchange to collect for his principal; and in order to enable the endorser to secure himself, surrendered it up to him, without receiving the money. The principal, with a knowledge of these circumstances, took upon himself to obtain payment from the endorser; *held*, that the agent was thereby exonerated. *Ibid*.

36. If an agent compromise a debt due his principal, with the knowledge of his principal, who makes no objection, the agent will be responsible for no more than the sum he receives; the silence of the principal amounting to assent, and a ratification of the act of his agent. *Armstrong v. Gilchrist*, 2 J. C. 424.

37. A master of a vessel having been guilty of a breach of orders, in pursuing voyages contrary to his instructions, was held to be exonerated from his liability, by his principal, making insurance, and taking to his own use the proceeds of freight earned during these voyages, without disavowing or disapproving the conduct of the agent. *Codwise v. Hacker*, 1 C. R. 526.

(c) *Liability to a third person, either on his special undertaking, or where he exceeds his authority, or where he has received money to which his principal was not entitled.*

38. An agent acting beyond the authority which he had only received from his principal, will be responsible to a third person. *Dusenbury v. Ellis*, 3 J. C. 70.

39. So, where an agent, having an authority to collect debts, draws a note in the name of his principal, he will be liable to the payee who received it, supposing that he had full authority to draw it. *Ibid*.

40. Where an agent received goods, upon condition to pay B. a certain sum out of the first proceeds thereof, which acceptance, so made, was afterwards approved by the principal, the agent was *held*, bound to pay B. the sum stipulated, notwithstanding the goods had been previously assigned by the principal to C., but without the knowledge of the agent. *Neilson v. Blight*, 1 J. C. 205.

41. An action may be maintained against an agent who has received money to which his principal has no right, if the agent has had notice not to pay the money over; and, in some cases, without such notice, if the money

has not been actually paid over. *Hearsey v. Pruyn*, 7 J. R. 179.

42. C. and D. claimed money in the hands of O.; C. brought a suit against O., who, at the request of D., defended it. The attorney of C. entered into a compromise with the attorney of D. and O., and the suit was discontinued; after which O. paid over the money in his hands to D.; C. afterwards, finding a defect in the securities delivered to him, as part of the conditions of the compromise, brought an action against O. for a breach of his promise that the securities were valid. *Held*, that O. was a mere stake-holder, and the agreement about the compromise must be considered as made between C. and D.; and that, having paid over the money to his principal, O. was no longer liable. *Carew v. Otis*, 1 J. R. 418.

43. Notice to the agent, not to pay over the money to his principal, is not necessary, where the payment is compulsory, and it is not made expressly for the use of the principal. *Ripley v. Gelston*, 9 J. R. 201.

44. A party who would excuse himself from personal responsibility, on the ground that he acted as the agent of another, must show that he communicated to the other party his situation as agent, and that he acted in that capacity, so as to give a remedy against his principal. *Mauri v. Heffernan*, 13 J. R. 58.

45. A person who seals a bond, as attorney for another, without authority, is personally liable, as if he had covenanted in his own name. *White v. Skinner*, 13 J. R. 307.

46. And where one seals a deed, or executes a covenant, in behalf of others, and relies on the fact of his being an agent, he must aver or set forth and prove the authority under which he acted; it is not enough to craveoyer of, and set forth the instrument executed by him. *Ibid*.

47. In an action against an agent for money alleged to be due to the plaintiff, the defendant may give in evidence a parol order of his principal not to pay the money. *Thorne v. Peck*, 13 J. R. 315.

V. Agents of government; when personally liable.

48. An agent of government, known as such, is personally liable on a contract made by him on account of government, unless it appears that he contracted in his official capacity, and on account of government, and that the other party gave the credit, and intended to look to government for compensation. *Sheffield v. Watson*, 3 C. R. 69. [This case is doubted by *Spencer, J.*, in *Walker v. Swartwout*, 12 J. R. 444. and seems contrary to the opinion of the Court in that case, [*315] as well as to that of the Supreme Court of the United States, in *Hodgson v. Dexter*, 1 Cranch, 345.]

49. There is no difference between the agent of an individual and of the government, as to their liability. The question in all cases is, to whom the credit is given. Per *Spencer, J.* *Rathbone v. Budlong*, 15 J. R. 1.

50. Therefore, if the agent, at the time of entering into the contract, makes known the

name of his principal to the party with whom he contracts, he is not personally liable. *Ibid.*

51. A public officer is liable on his express promise to pay for services rendered to government. *Gill v. Brown*, 12 J. R. 385.

52. Where a *quarter-master* of the *United States*, having obtained possession of a boat, which had been seized by a *collector* of the revenue, and made use of in the public service, agreed with the owner of the boat, that if he recovered possession of it from the marshal, he would purchase the boat, and pay for the previous use of it, and the owner accordingly obtained possession of the boat, on paying 400 dollars; and the *quarter-master* purchased and paid for the boat; *held*, that he was personally liable on his promise to pay, also, for the previous use of the boat. *Ibid.*

53. A public agent, in his known official capacity, employing a person to work on account of the government, is not personally liable for the wages. *Walker v. Swartwout*, 12 J. R. 444.

54. Where it does not appear that the agent, in making the contract, acted ostensibly, or expressly, as a public agent, it will be deemed a private contract. *Swift v. Hopkins*, 13 J. R. 313.

55. Where the plaintiff's vessel was employed by the defendant, a captain in the navy of the *United States*, in transporting ordnance and military stores, during the war; and by direction of the defendant, was sunk in the harbor of *O.*, to prevent the ordnance, &c. from falling into the hands of the enemy, who captured the place, raised the vessel, and carried her off; *held*, that the defendant was not liable to the owner for the value of the vessel so sunk and lost. *Bronson v. Woolsey*, 17 J. R. 46.

VI. *Mercantile agents, factors, and consignees*;
(a) *Authority of a factor*; (b) *Liability of a factor*; (c) *Liability of the principal to his factor*; (d) *Hire or commission of a factor*.

(a) *Authority of a factor*.

56. Although a factor cannot pledge the goods of his principal as his own, yet he may deliver them to a third person as security, with notice of his lien, and as his agent to keep the possession for him, in order to preserve that lien. *Urquhart v. McIver*, 4 J. R. 103.

57. Where a broker, who has an insurance effected, knows that his employer was acting as agent for a third person in obtaining the insurance, and not on his own account, he cannot retain money received from the insurer for a loss, for a debt due from such agent to himself. *Foster v. Hoyt*, 2 J. C. 327.

*58. Where A., for his own [*316] account and risk, carries on trade in the name of B., and B., in the course of such trade, sells goods, the promise to pay will be presumed to be made to B. *Allop and others v. Coines*, 10 J. R. 396.

59. And an action for goods sold was properly brought in the name of B. *Ibid.*

60. And B. may receive payment, and discharge the buyer. *Ibid.*

61. A factor, without special instructions to sell for cash alone, and not on credit, may sell on credit for the period usual in the market;

and in case he sells on credit in the usual manner, and uses due diligence to ascertain the solvency of the purchaser, he will not be responsible, should the vendee afterwards prove insolvent. *Van Allen v. Vanderpool*, 6 J. R. 69.

62. So, where a person receives goods to sell as a commission merchant, and, according to the usual course of trade, sells them on credit, to a person of credit, and takes his note, if the vendee becomes insolvent before the note falls due, and nothing can be recovered from him, the factor will not be liable. *McKinstry v. Pearsall*, 3 J. R. 319.

63. A factor, or consignee, apprizing his principal of the sale of goods consigned to him, may wait to receive directions as to the mode of remitting the net proceeds, and is not liable to an action, until a default on his part, in remitting or paying the proceeds, according to the orders of his principal. *Ferri v. Paris*, 10 J. R. 285.

64. The underwriter, and not a broker who effects insurance, is debtor to the insured for a loss, and he will not be affected by any agreement between the insurer and broker, as to the mode of payment, without his assent. *Bethune v. Neilson*, 2 C. R. 139.

(b) *Liability of a factor*.

65. A factor, or consignee, is liable only for fraud or gross neglect; and while acting with good faith, he is bound to exercise ordinary diligence and attention only. *Lansler v. Esquich*, 1 J. C. 174.

66. So, if goods are consigned to the master of the vessel on board of which they are laden, and on arriving at the port of destination, not being able to find a purchaser, he leaves the goods there and returns, he is not liable. *Ibid.*

67. A factor who is not particularly intrusted, but in whom a discretion is vested, is entitled to protection so long as he acts according to the best of his judgment, and is innocent of fraud and gross neglect. *Leotard v. Graves*, 3 C. R. 226.

68. A., of *New-York*, consigned a vessel to B., at *Amsterdam*, with orders for her to touch at *Hamburg*, there to receive directions from B.: at the time of the arrival of the vessel at *Hamburg*, *Amsterdam* was blockaded, which was a circumstance not provided for in A.'s instructions to B.: B. gave orders for the vessel to proceed from *Hamburg* to *Amsterdam*, and on her way thither she was captured and condemned for a breach of blockade. *Held*, that as the consignee was vested with discretionary powers as to the disposal of the vessel and cargo, and had [*317] good reason to suppose that this vessel, as had been done by others, might get in without molestation, and as the vessel in this instance could not have been legally condemned, but at most, ought only to have been turned away by the blockading force, the consignee was not liable. *Ibid.*

69. A consignee, to whom the disposal of goods is intrusted on particular terms, will not be liable, if, in case a compliance with those terms should be found impracticable, he, bona

fide, dispose of the goods in some other manner. *Drummond v. Wood*, 2 C. R. 310.

70. A factor, by neglecting to comply with the directions of his principal, renders himself liable. *Le Guen v. Gouverneur and Kemble*, 1 J. C. 437. n.

71. Where A., the factor of B., sold goods of B. to C., to receive payment here or in a port of France, at the option of A.; and B. directed A. to elect to have payment made in France; and to give him, B., an authority to receive the money there, from C.: on A.'s refusal he became liable to B., to the same extent that C. was liable by the original agreement, in whose place he had substituted himself. *Ibid*.

72. A factor who is sued by his principal for a breach of trust, or orders whereby he has substituted himself in the place of a vendee, may set up fraud or any other matter of defence, which the vendee could have done, if the suit had been against him. *Le Guen v. Gouverneur and Kemble*, 1 J. C. 436.

73. If the consignor inform his consignee or factor that he had made a consignment to him, and should anticipate the avails by drawing certain bills of exchange on him, the factor, by accepting the consignment, becomes bound to pay the bills; and, in case of non-payment, is bound to refund to the drawer the damages and costs which he may have been compelled to pay, by reason of his bills being protested. *Urquhart v. M'her*, 4 J. R. 103.

74. Where a consignee sells the goods of his principal, under an agreement, made without the consent of the principal, that the amount of the sale should be set off against a debt due from the principal to the vendee, the consignee, acting beyond the scope of his authority, is liable to the principal for the value of the goods; and if he had directions from the consignor to sell them only at a certain price, which price he obtained by making such agreement, and which was more than the ordinary market price, he will be liable according to the rates at which the goods were sold. *Guy v. Oakley*, 13 J. R. 332.

75. If a factor pledge the goods of the principal for his own debt, it is a conversion. *Kennedy v. Strong*, 14 J. R. 128.

76. The plaintiff, a merchant in New-York, consigned goods to the master of a vessel, bound to Havana, for sale. The master, on his arrival at H., delivered the goods to the defendants, who were commission merchants there, for sale; *held*, that the master having no authority to pledge the goods for his own account, the defendants, by receiving them, with the knowledge that they belonged to the plaintiff, became substituted, as factors or agents, in place of the master, and were accountable for the proceeds of the goods to the plaintiff; and could not retain them for any advances made by them to the

[*318] master, *or for the balance of account arising from transactions between them and the master. *Buckley v. Packard*, 20 J. R. 421.

Where M., a merchant abroad, consigned goods to T., for sale, on their joint account, and

T. sent the goods to the defendants for sale; *held*, that the defendants were bound to account to T. as their principal, and could not retain them, to satisfy a demand of their own against M.; and that T. might maintain the action in his own name. *Toland v. Murray*, 18 J. R. 24.

See CHANCERY, LV. *Principal and Agent*, 1948. vol. I. 371. PLEADING, I. vol. II. 187.

(c) *Liability of the principal to his factor.*

77. If the principal direct his factor to load a vessel with goods of a certain kind, and he loads her with goods of another description, the former is not bound to accept them, nor liable for any charges attending them. *Urquhart v. M'her*, 4 J. R. 103.

78. A. consigns a vessel to B., in Liverpool, and sends him a power of attorney to sell her, with directions to sell her in England, but if that could not be done, to send her to New York; to secure himself for his advances upon the vessel, B. executed, under the power from A., a bill of sale to C., in New-York, and sent the vessel to him, with directions to reconvey and deliver her to A., on his paying the balance due to B., otherwise to sell, appropriating the proceeds to the satisfaction of that balance, and paying the balance, if any, to A.: *held*, that by the sale to C., B. had not rendered the vessel his own, as she was intended as a security to B., who had a lien upon her for his advances, and that the assignment to C. being merely for the purpose of preserving that lien, and not an absolute sale, A. was bound to accept the ship, and pay the premium of insurance, and all the advances made by B. for repairs, &c. *Ibid*.

(d) *Hire or commission of a factor.*

79. Where a master is to receive a commission on the sale of goods laden on board his ship, on the investment of the proceeds, as factor for the owner, he will not be entitled to the commission for merely carrying and delivering goods, in pursuance of a previous agreement made for the sale of them, and the payment for which he does not receive. *Müller v. Livingston*, 1 C. R. 349.

80. A supercargo was to receive, as his compensation, a gross sum out of the proceeds of the return cargo, or a part of the cargo, to that amount, on arrival at the place where the cargo was to terminate; on the vessel's return voyage, she was compelled to put into a port of necessity, where the voyage was broken up, and the vessel and cargo sold; the supercargo cannot demand his compensation of his employers; but it is an insurable interest, and if a policy has been effected, there being a total loss, he may recover the whole from the underwriter. *Robinson v. New-York Insurance Company*, 2 C. R. 357.

See tit. CHANCERY, LV.

When an action shall be brought in the name of the principal or of the agent. See PLEADING.

Law agents. See PRACTICE.

Public agents. See OFFICE AND OFFICER.

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*PRINCIPAL AND SURETY.

- I. *Liability of a surety; (a) Extent of the liability of a surety; (b) What will discharge his liability.*
- II. *When a surety may call on his principal, or co-surety.*
- I. *Liability of a surety; (a) Extent of the liability of a surety; (b) What will discharge his liability.*

(a) *Extent of the liability of a surety.*

1. A surety cannot be held beyond the precise term of his agreement. *Walsh v. Bailie*, 10 J. R. 180.

2. And a Court of equity will not extend his liability beyond what he would be bound to at law. *Lullow v. Simond*, 2 C. C. E. 1.

3. A. and B., being jointly interested in a transaction, execute a bond, with C. as surety. E., at the request of A., and on his promise to repay him, pays the amount of the bond to the obligee; although *assumpsit* may lie against A. and B. jointly, for the money, yet no action will lie against the surety; for the request will not enure as his request. *Elmendorph v. Tappin*, 5 J. R. 176.

4. If a person engages to be responsible to A., for goods delivered to B., and A., instead of delivering the goods himself, gives B. a letter to C., requesting him to deliver them, who delivers them accordingly; the surety will not be liable for goods delivered by C. *Walsh v. Bailie*, 10 J. R. 180.

5. Where one person has guaranteed the debt of another, and the principal refuses payment, it will be sufficient for the creditor, in order to entitle himself to an action against the surety, to give him notice of the demand, and refusal of the principal, without having previously brought an action against the principal. *Bank of New-York v. Livingston*, 2 J. C. 409.

6. A letter of credit addressed by A. to B. to deliver goods to C., is not an assignable interest; and if B. deliver part of the goods himself, and procure other persons to deliver the residue, A. is responsible only for the goods delivered by B., and not for those which were delivered by the other persons. *Robbins v. Bingham*, 4 J. R. 476.

7. A. and B. addressed a letter of credit to C., saying, "If D. wishes to take goods of you, on credit, we are willing to lend our names, as security, for any amount he may wish;" this letter of credit does not extend beyond the first parcel of goods delivered by C. to D.; and if D., having obtained and paid for several parcels of goods, afterwards takes another parcel, and fails in the payment, A. and B. will not be liable. *Rogers v. Warner*, 8 J. R. 119.

8. Where a person gives a letter of credit to A., addressed to P. & Co., by which he authorizes A. to draw bills, to a certain amount, on P. & Co., and they having dissolved their

partnership, A. draws a bill on P., who accepts it, the guarantor is not liable to P. on the letter of credit; and P. is [*320] not precluded by it from maintaining a suit against A., for the amount of the bill, which he had accepted and paid. *Penoyer v. Watson*, 16 J. R. 100.

9. The defendant, being president of a manufacturing company, on being presented by the plaintiffs with their accounts against the company, wrote to the plaintiffs, and referred them for payment to the superintendent of the company, and stated that the superintendent would be furnished with ample means for punctual payment, and urged the plaintiffs to furnish the articles which they had engaged to make. He then added, "if, in addition to the foregoing explanation, you shall require an individual guaranty, I shall have no objection to give you that pledge." The plaintiffs, afterwards, furnished the company with goods, and more than two years from the date of the defendant's letter, when the company had become insolvent, called on the defendant for his guaranty; held, that the defendant's letter did not amount to a guaranty; but was merely an engagement to give a guaranty, in case the plaintiffs should be dissatisfied with the security of the company; and the plaintiffs not having expressed their dissatisfaction, until after the lapse of more than two years, it was to be inferred that they were satisfied, and did not mean to avail themselves of the defendant's offer. *Stafford v. Low*, 16 J. R. 67.

10. The defendant, on the 3d of October, 1815, wrote to the plaintiff, to whom J. H. and L. his partner were indebted, as follows: "you will get judgment against J. H., and it is hard for him to pay it from his own pocket; I wish you to show him some lenity, as much as you may think proper, for the collection of it from L., and I will, if you please, stand responsible for the payment of it, at the time you and J. H. may agree on." The plaintiff afterwards recovered judgment against J. H., and issued execution thereon, which was returned *nulla bona*. It did not appear that any notice was given to the defendant, that he was considered as a guarantor, nor of the nonpayment of the debt by J. H., until January, 1818; held, that the defendant's letter was not an absolute guaranty, but a proposition only to become guarantor, if the plaintiff would forbear and give J. H. time for payment; and that the defendant, therefore, ought to have had notice from the plaintiff, that he accepted the guaranty so offered; and that no such notice being shown until two years after the defendant's letter was written, and when J. H. and his partner had become insolvent, the defendant was not liable. *Beckman v. Hale*, 17 J. R. 134.

11. A., on the purchase of goods of the plaintiff, on a credit, agreed to give him a note with a good endorser, or satisfactory security, and brought to the plaintiff a note made by A., payable to the plaintiff or order, endorsed by the defendant in blank, and the plaintiff took the note, and delivered the goods to A. In an

action against the defendant, as a guarantor of the note, *held*, that as the blank endorsement was never filled up with an express guaranty, the defendant was not liable; and, there being no proof to the contrary, it was intended, that the defendant meant only to become a *second endorser*, with all the rights incident to that character. *Tyuman v. Wheeler*, 17 J. R. 326.

[*321] *(b) *What will discharge his liability.*

12. If an obligee does an act to the injury of the surety, or varies the terms of the obligation, or enlarges the time of the performance, without his consent, the surety will be discharged. *Rathbone v. Warren*, 10 J. R. 587.

13. A., by an agreement with B., was to ship goods belonging to B., and on his account, to C., at *Hamburg*; for the amount of which shipment, A. was to give his notes to B., which were to be reimbursed out of the proceeds; and, in case they fell short of the amount of A.'s advance, B.'s note, endorsed by D., was to be given for the balance. Part of the goods, on their arrival at *Hamburg*, were sent by C., the consignee, to *Rotterdam*, where they were sold; *held*, that as A. had affirmed the act of the consignee, in sending the goods to *Rotterdam*, and thereby extending the time which, from the terms of the agreement, must have been intended by the parties for the completion of the agreement, and as a place, different from the one mentioned in the agreement for the sale, had been substituted by the consignee, D., who was to be deemed a surety, was discharged from his liability. *Ludlow v. Simond*, 2 C. C. E. 1.

14. But if A. had immediately on notice of the disposition made by C., his agent, of the goods, disaffirmed it, and called upon B. for the deficiency, it *seems*, that the surety would be *held* to endorse a note, according to his stipulation. *Ibid*.

15. Where the nature of legal proceedings affords an opportunity of presenting the question, the same rule, as to what will discharge the liability of a surety, prevails, as well in law as in equity. *The People v. Jansen*, 7 J. R. 332.

16. Mere delay in calling on the principal, will not discharge the surety, but the *laches* of the plaintiff may be relied upon by the surety as a defence. *Ibid*. *S. P. Pain v. Packard*, 13 J. R. 174. *People v. Berner*, 18 J. R. 383. *Powell v. Waters*, 17 J. R. 176.

17. The negligence of the creditor in calling upon the principal for payment, does not exonerate the surety, unless he is damnified by such negligence. *People v. Berner*, 13 J. R. 383.

18. As where the defendants were sureties for the commissioners for loaning money of the county of S., who neglected to pay over the money received by them with interest; *held*, that the sureties were not discharged, by the neglect of the comptroller in not calling on the principals, after numerous defaults, unless injury had resulted to the defendants from his negligence. *Ibid*.

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19. In an action brought against a surety, on a bond given for the faithful discharge of the duty of a loan officer, under the act; (Sess. 9. c. 40.) *held*, that the surety might set up in his defence the *laches* of the supervisors, in not removing him from his office, and prosecuting the loan officer for his first default, but suffering him to continue, after repeated defaults, for upwards of ten years, when the loan officer became insolvent, and without prosecuting him as required by the act; and where no notice was taken of the default of the principal, until after the death of the surety, this *laches* of the supervisors was *held* to be a *good defence, especially in a suit against the heirs of the surety. *People v. Jansen*, 7 J. R. 332.

20. If an obligee, or holder of a note, who is requested by the surety to proceed, without delay, to collect the money of the principal, who is then solvent, refuses or neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be exonerated. *Pain v. Packard*, 13 J. R. 174. [This was considered by Ch. *Kent*, in *King v. Baldwin*, 2 J. C. R. 554. as a new principle; but the decree in the latter case was reversed in the Court of Errors, by the casting voice of the president. (17 J. R. 384.) Ch. *J. Spencer* admitted the rule that the surety might come into the Court of Chancery to compel the creditor to collect his debt of the principal, but he thought a Court of law might take notice of the same equitable obligation of the creditor, and enforce it by an act *in pais*. See *lit. CHANCERY*, LVI.]

21. A surety is not discharged by the plaintiff's giving time to the principal debtor, or even by his discontinuing a suit commenced against the principal, without the privity or consent of the surety, unless the surety has explicitly required him to proceed against the principal, or the plaintiff has, by some agreement with the principal, precluded himself from suing him. *Fulton v. Matthews*, 15 J. R. 433.

22. Though a debt due to the *United States*, on a bond given for duties, is not barred by the discharge of the principal obligor under the insolvent act of the state; yet the *preference* given to the surety on such bond by the act of Congress (5 Cong. c. 128. s. 65.) to regulate the collection of duties, &c., in case the principal obligor is insolvent, and the surety pays the bond, is only a right to be first satisfied out of the estate and effects of the insolvent in the hands of his *assignees*, and not a right to maintain an action against the insolvent himself, notwithstanding his discharge. *Aikin v. Dunlap*, 16 J. R. 77.

23. Therefore, where the surety brings an action against the principal, for money paid to the *United States*, on a bond for duties, the latter may plead his discharge under the insolvent law of the state. *Ibid*.

24. Where a surety for a commissioner of loans is sued on a bond given to the people, pursuant to the act passed April 11, 1808, (Sess. 31. c. 216.) for the faithful discharge of the duties of his office, it is no defence, that

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the commissioner, after a default, resigned his office, which was immediately accepted by the council of appointment, who appointed a successor, whereby the defendant was lulled into security, &c., for the 13th section of the act, in regard to its direction to the council of appointment, in this respect, is unconstitutional and void. *The People v. Foot*, 19 J. R. 58.

25. Where, in consideration that the plaintiff would sell and deliver goods to H., and take the promissory note of H., endorsed by D. and R., payable in six months, as collateral security, the defendant undertook and promised, "that the note was good and collectable after due course of law;" held, that the plaintiff was bound to prosecute the maker of the note, as well as the endorsers, with due legal diligence, before he could resort to the defendant on his guaranty; *and the [*323] plaintiff having neglected to sue the maker of the note, for seventeen months after it became due, when the maker had been discharged under the insolvent act; held, that the defendant was discharged from his guaranty. *Mockley v. Riggs*, 19 J. R. 69.

26. Where two guardians of an infant's estate are appointed by the Court of Chancery, and one of them dies, their surety will still be responsible for the acts of the surviving guardian. *The People v. Byron*, 3 J. C. 53.

27. Where a surety became bound, supposing himself responsible for the debt of a partnership, and it afterwards appeared, that not the partnership, but the individual partner only, was liable, the surety was held to be discharged. *Livingston v. Hastie*, 2 C. R. 246.

28. A vessel was consigned by A. to B., to be loaded, on A.'s account, with a cargo, to be purchased by B., for the price of which he was to draw bills of exchange on A. or C., and C. undertook to honor bills drawn on him on account of such shipment; held, that C. was responsible only for bills drawn directly on himself, and not for the payment of bills drawn on A. And B. having drawn several bills on C., which were all paid, afterwards, without consulting or advising C., drew two bills on A., which were protested for non-payment; and, nearly two years after the protest of those bills, drew bills on C. for the balance due on the transaction, including the two protested bills, damages and interest; held, that the bills drawn on C., after such a lapse of time, were without authority, the delay being a waiver of all right in B. to draw on C. *Lanuse v. Barker*, 10 J. R. 312. [Note. The judgment in this case was affirmed in the Court of Errors; but the cause was, afterwards, carried to the Supreme Court of the United States, where the judgment was reversed. See 3 *Wheaton's Rep.* 101.]

29. Where the plaintiff obtained judgment against the principal, and issued execution, which was returned *nulla bona*, but under circumstances which were supposed to make the officer liable for the debt; and, afterwards, brought an action against the surety, on his agreement to become responsible; held, that the proceedings of the officer, whereby he rendered himself liable, were no defence; and

that the plaintiff having proceeded against the principal to judgment and execution, without effect, was not bound to go further, and prosecute the officer for his supposed liability. *Leonard v. Giddings*, 9 J. R. 355.

II. When a surety may call on his principal, or co-surety.

30. A surety, *qua* surety, cannot call on his principal, at law, until he has actually paid the money. *Powell v. Smith*, 8 J. R. 249.

31. If judgment be obtained against the surety, who is taken in execution, and afterwards discharged under an insolvent act, he cannot maintain an action against his principal, without showing payment, or a promise to indemnify him from all damages and costs. *Ibid.*

32. When the surety has paid the money, the law implies an *assumpsit*, and the proper form of action is *indebitatus assumpsit* for money paid. *Ibid.*

*33. Charging the surety in execution, is not a satisfaction of the debt, so as to discharge the principal debtor. *Ibid.*

34. Where A. gave a note to B., for stock deliverable on the 1st of May, 1792, and C., having guaranteed the performance of the contract, compounded with B., in March, and took up the note, and, afterwards, brought his action against A. for the amount; held, that C. had a right to settle with B., and take up the note before it was due; and that A. was bound to pay him the amount of the shares, according to their value, on the 1st of May, 1792. *Armstrong v. Gluchrist*, 2 J. C. 424.

35. Where a person executed a note jointly with another, as his surety, on which note a judgment was recovered, and afterwards gave to the plaintiff his negotiable note expressly as a satisfaction of the judgment, and which operated as an extinguishment of the judgment debt, he may maintain an action against his principal, although there had been no satisfaction entered of record, and the note still remained unpaid. *Wilberby v. Mann*, 11 J. R. 518.

36. Where a contract has been broken, the surety may pay the money without suit, and recover the amount of his principal. *Mawi v. Heffernan*, 13 J. R. 58.

37. If the surety pays the debt, he can maintain his action only against the person whose legal liability is discharged, for the law does not imply a promise to other persons who may be benefited by the payment. *Tob v. Goodrich*, 2 J. R. 313.

38. As, if the surety of A. on a bond given for the benefit of A. and his partners, pay the amount, he can bring no action against the partners, but must look to A. alone. *Ibid.*

39. A surety, who pays a debt for his principal, is entitled to be put in the place of the creditor, and to all the means which the creditor possessed, to enforce payment against the principal debtor. *Clasen v. Morris*, 10 J. R. 524.

40. So, where C. and D. endorsed the note

of S., as security, to L., who sued S. on the note, and recovered judgment against him, and afterwards sued C. and D., as endorsers, and recovered judgment against them, and they paid L. the amount of the debt, and took an assignment of the judgment against S.; *held*, that C. and D. stood in the place of L., and might avail themselves of the judgment to recover from S. the money paid by them. *Ibid*.

41. And it seems, that Chancery would compel the creditor to assign to the surety the judgment against the principal creditor. *Ibid*.

42. Where an attachment had been obtained by the endorsee of a bill of exchange, against the drawers, as absent debtors, and the endorser afterwards paid the amount, the Supreme Court reversed the order of a judge for a *supersedeas*, and allowed the attachment to proceed for the benefit of the endorser, or surety, who paid the money. *In the Matter of M'Kinley and others*, 1 J. C. 137. S. C. C. C. 78.

43. A. and B., partners in trade, having dissolved their partnership, B. took the property, and engaged to pay off all the debts owing by the partnership, among which was a judgment against A. and B., at the suit of C.; B. having become insolvent, C. threatened to take out execution against A., who paid the amount of the judgment, and C. *agreed

[*325] that A. might have the benefit of the judgment, to recover the amount out of the property, in the name of C.; A. sued out execution against the land of B., which was bound by the judgment; B. assigned all his property to D. and others, for the benefit of his creditors; *held*, that A. was to be considered merely as a surety of B., and entitled to an equitable lien on the property of B., and that D. and others, to whom it was assigned, took it subject to such equitable lien. *Waddington v. Vredenberg*, 2 J. C. 227.

44. One surety on an administration bond cannot bring an action against his co-surety, for an alleged default in the administrator, before he has been damnedified in his character of surety. *The People v. Duncan*, 1 J. R. 311.

45. If a person becomes surety for another, as importer of goods, in a bond to the United States, for duties, but a third person is the real owner of the goods, and the surety pays the bond, he may maintain *assumpsit* against his co-obligor. *Sluby v. Champlin*, 4 J. R. 461.

46. And in such case, possession of the bond and the collector's receipt is sufficient evidence of payment by the surety. *Ibid*.

See *tit. CHANCERY, LVI.*

PRIVILEGE.

1. A member of assembly is not privileged from arrest, after he has reached home, although the 14 days may not have expired. *Colvin v. Morgan*, 1 J. C. 415.

2. The affidavit on which he moves to be discharged, must state the place where he was arrested. *Ibid*.

3. A member of Congress is only privileged while at Congress, or actually going or return-

ing from Congress. *Lewis v. Elmendorf*, 2 J. C. 222.

4. A person arrested while attending a reference was not discharged on motion, without notice to the plaintiff, but the Court granted a rule to show cause, and a stay of proceedings in the mean time. *Grover v. Green*, 1 C. R. 115.

5. A witness from another state, who attended the Court to prove a will, was arrested on his return home, by process out of the Mayor's Court, and the Supreme Court, on motion, discharged him from the arrest. *Norris v. Beach*, 2 J. R. 294.

6. A person, under recognizance to appear at a Court of General Sessions of the Peace, while attending on that Court, was arrested on a *capias* out of the Supreme Court, and held to bail, and that Court ordered him to be discharged, on filing common bail, unless the plaintiff elected to waive the arrest and take out new process. *Bours v. Tuckerman*, 7 J. R. 538.

7. A judge is not liable to arrest by process issuing out of his own Court, but must be proceeded against by bill. [*326] *In the Matter of W. Livingston*, 8 J. R. 351.

8. Whether after bail is put in, the arrest and proceedings may be set aside, on motion, for irregularity, must depend on the practice of the Court; and the Supreme Court will not interfere with the proceedings of an inferior Court in this respect. *Ibid*.

9. Though the common law privileges of the officers of Courts of justice cannot be taken away by the general words, yet they may, by the manifest intent of the statute. *In the Matter of Bliss*, 9 J. R. 347.

10. The privilege of officers of inferior Courts, from arrest, by process from the Supreme Court, does not extend beyond the time of their necessary attendance on those Courts. *Gibbs v. Loomis*, 10 J. R. 463.

11. An officer is not bound to take notice of the privilege of a defendant; yet if he does take notice of it, and neglects to arrest him, or suffers him to go at large after he has been taken, the defendant's privilege is a good defence in an action against the officer for an escape. *Ray v. Hogeboom*, 11 J. R. 433.

12. A privilege of being sued by bill, and not by writ, is personal merely, and a party may waive it by a subsequent agreement not to take advantage, in a suit against him, of its having been commenced by writ. *Leal v. Wigram*, 12 J. R. 88.

Privilege of attorneys, &c. See *tit. ATTORNEY AND COUNSEL.*

PRISONERS.

[See act, *Sees. 24. c. 66. and 36 Sees. c. 81. 1. N. R. L. 348.*]

I. *Prisoners in execution, how relieved.*
II. *Supersedeas.*

I. Prisoners in execution, how relieved.

1. A debtor imprisoned on execution is entitled to relief, if the amount with which he stands charged be under that limited by the act, though it would be above the sum specified, if the interest were added. *Ex parte Caskaden*, 1 C. R. 346.

2. A person taken by an attachment, for the non-payment of costs, before he has been committed for the contempt, cannot be discharged under the act, for the attachment is merely process to bring him into Court. *Jackson v. Smith*, 5 J. R. 115.

3. It is no objection to the petition that the sum for which the prisoner is charged in execution is not mentioned. *In the Matter of Williams*, 1 J. C. 416. S. C. C. C. 113.

*4. Nor that the inventory purports to be an inventory of his real and personal estate, when, in fact, no real estate is mentioned. *Ibid*.

5. A person residing out of the state, as to the service of a notice under the act, is to be considered as not to be found. *Ibid*.

6. Where the plaintiff, the creditor, resides out of the state, service of a notice of the petition on the attorney in the suit is sufficient. *Bates v. Williams*, 1 J. C. 30. S. C. C. C. 64.

7. The omission, by a prisoner, to insert in the account of his estate set forth in his petition certain debts due to him, will not prevent his discharge, if the omission appears to have arisen from his misapprehension, and not from any fraudulent intent, but the Court will permit the debts to be inserted in the account, when the debtor is brought up for his discharge. *Brodie v. Stephens*, 2 J. R. 289.

8. It is no ground of opposition to a defendant's obtaining his discharge, that in a schedule annexed to his inventory, his arms were not specified; or, that the inventory did not specify when the prisoner owned the articles mentioned in it; or that he was in custody in a suit for a breach of a promise of marriage, which is a tort. *Burns v. Baker*, 1 J. C. 134. S. C. C. C. 73.

9. Where the prisoner was not brought up, for his discharge, until the last day in term, and then the plaintiff swore that he expected to obtain a witness to prove the falsity of his inventory, the Court remanded him until the first day of the next term. *Marscraft v. Buller*, 2 C. R. 99.

10. The defendant may be brought up from a different county from that in which the Supreme Court sits, in order to be discharged. *Nichols v. Gregory*, 5 J. R. 359.

11. After the defendant's discharge, the plaintiff may issue a *f. fa.* against his goods, &c., after a year and a day, without reviving the judgment. *Gennigal v. Smith*, 6 J. R. 106.

12. A debtor in prison on execution, who has obtained his discharge under the "act for the relief of debtors, with respect to the imprisonment of their persons" (Sess. 24. c. 66.) passed the 24th of March, 1801, may, by virtue of the 7th section of the act "to amend the act for giving relief in cases of insolvency," passed the 8th of April, 1808, (Sess. 31. c. 163.) be

proceeded against by action of debt, though he was discharged in 1802, previous to the passing of the last act, which provides that he shall not be held to bail, or his body taken in execution, on any judgment obtained in such action; and such action is no infringement of the immunity vested in him, by virtue of his discharge under the first act. *Spencer v. Richardson*, 7 J. R. 116. See *Peebles v. Kittle*, 2 J. R. 363. which was before the passing of the last-mentioned act.

13. Under the act (Sess. 36. c. 81.) a person in prison on execution for costs only, not being a freeholder, was held entitled to his discharge, at the expiration of thirty days; but by the act (Sess. 36. c. 203. s. 49.) that construction of the act is expressly done away. *Cryder v. Rust*, 12 J. R. 372.

14. Where an action has been brought against a sheriff for the escape of a prisoner in execution, the plaintiff has thereby determined his election, and cannot [*328] afterwards oppose the discharge of the prisoner under the act, (Sess. 36. ch. 81.) *McElroy v. Mancius*, 13 J. R. 121.

15. It seems, that the Mayor's Court of Albany has no jurisdiction under the act, in case of debtors imprisoned in the county of Albany, under an execution out of the Supreme Court; but the Court of Common Pleas of the county has jurisdiction. *Ibid*.

16. Where a defendant taken in execution is discharged, under the act, (Sess. 36. ch. 81.) and is afterwards sued upon the original judgment, he must, if he intends to avail himself of his exemption from imprisonment, plead it; and his omission to plead it, is a waiver of his privilege; and if again imprisoned on another execution, in a suit founded on the original judgment, his discharge is no justification, in an action against the sheriff for an escape; and even if such subsequent execution was voidable, that cannot avail the sheriff. *Cable v. Cooper*, 15 J. R. 152.

17. It seems, that the *habeas corpus* act does not apply to cases of imprisonment on civil process. *Ibid*.

18. Where the defendant in execution is discharged from imprisonment under the act, (Sess. 36. ch. 81.) and is again imprisoned by virtue of an execution founded on the original judgment, a judge or commissioner has no authority to discharge him under the *habeas corpus* act; and a discharge under such circumstances is no protection to the sheriff. *Ibid*.

19. If the defendant be convicted of perjury in procuring his discharge, he is liable to be again imprisoned, either on the old judgment, or under a new judgment recovered, in an action of debt on the former; and if the discharge be pleaded, the plaintiff may reply such conviction for perjury, which will be a conclusive bar to his exemption. *Per Van Ness, J. S. C. Ibid*.

20. The second judgment, in such case, being regular, both in form and substance, authorized the execution issued upon it; and is a complete justification to the sheriff, in an action for false imprisonment. *Per Van Ness, J. Ibid*.

II. *Supersedeas*.

21. To an application for a *supersedeas*, for not having been charged in execution within three months after judgment, it is a good answer, that the defendant has been charged since the granting of the rule. *Manhattan Company v. Smith*, 1 C. R. 67. *S. P. Brantingham's case*, C. C. 42.

22. So, where the defendant has been surrendered by his bail, and having lain in prison three months, obtains a rule to show cause why a *supersedeas* should not be awarded; if the plaintiff, after service of the rule, and before the time assigned to show cause, charges the defendant in execution, he may show that for cause, and it will be sufficient to prevent a *supersedeas*. *Minturn v. Phelps*, 3 J. R. 446.

23. A defendant, once superseded for not having been charged in *execution [*329], cannot be imprisoned again on the same judgment. *Masters v. Edwards*, 1 C. R. 516.

24. A *ca. sa.* against a defendant who has been superseded in execution, is voidable only. *Reynolds v. Corp.*, 3 C. R. 267. *S. P. Reynolds v. Church*, 3 C. R. 274.

25. Where a prisoner has been superseded, no formal discharge from the sheriff is necessary, and he may depart without the permission of the sheriff, who cannot legally detain him. *Warne v. Constant*, 4 J. R. 32.

When prisoners may be admitted to the liberties of the gaol. See *SHERIFF*.

PRIZE.



1. The Prize Courts of a belligerent cannot exercise jurisdiction, nor can such Courts be erected by the belligerent, in a neutral country. *Wheelwright v. Depeyster*, 1 J. R. 471. *But see* 15 J. R. 172.

2. A Prize Court proceeds in *rem*, and cannot exercise jurisdiction, unless it have possession of the subject. *Ibid*.

3. It cannot adjudicate on a prize lying in a foreign port, or out of the jurisdiction of the captor or his ally. *Ibid*.

4. Although the decision of a Prize Court of competent jurisdiction is conclusive as to the ownership of the property, and a Court of common law has no jurisdiction of prize, yet, if the plaintiff claim goods as his property, which the defendant denies, on the ground of their having been condemned for prize, a Court of common law may inquire whether the condemnation was pronounced by a Court of competent authority. *Ibid*.

5. *American* goods were captured by the *British*, and carried into *Futa*, a *Swedish* island, but then in possession of the *British*, and completely under their control; *Sweden*, at that time, being at war with *G. B.*: the goods, while at *F.*, were proceeded against as prize, in the Court of Admiralty in *England*, and pending the proceedings, peace was concluded

between *Great Britain* and *Sweden*; and the goods were afterwards condemned, without ever having been in *Great Britain*; held, that the condemnation was legal, and devested the property of the owners. *Page v. Lenox*, 15 J. R. 172.

6. Whether a Court of Admiralty sitting in one country can adjudicate upon property captured as prize of war, and carried into a neutral territory, and never coming within the jurisdiction of the Court? *Quere. Ibid*.

7. But it may adjudicate upon a prize carried into the port of an ally. *Ibid*.

*PUBLIC LANDS. [*330]

1. The commissioners of the land office had a right to grant certain lots of lands reserved by the act of the 8th *February*, 1789, to make up certain deficiencies therein mentioned, where application for a compensation for such deficiencies was not made on or before the 1st of *January*, 1798; the lots so reserved, and not appropriated to make up such deficiencies before that time, being held to be unappropriated lands, and to be disposed of as such, pursuant to the acts of the legislature. *Jackson*, ex dem. *Hornbeck*, v. *Seaman*, 3 J. R. 495.

2. A person in possession of such a lot, against whom an action of ejectment was brought by a patentee, was held not entitled to any compensation for his improvements on the land. *Ibid*.

3. Where a trespass is committed on lands reserved by the state for the support of the gospel and schools, or on lands belonging to the state, the suit must be brought in the name of the overseers of the poor of the town in which the trespass was committed, in order to entitle the plaintiff to recover treble damages, under the act of the 25th of *April*, 1805. (Sess. 28. c. 94.) *Newcomb v. Butterfield*, 8 J. R. 342.

4. If the suit is brought by the supervisors, under the act of *February*, 1810, (Sess. 33. c. 5.) or the act passed the 11th of *April*, 1808, (Sess. 31. c. 18.) the plaintiff is not entitled to treble damages. *Ibid*.

5. In order to recover treble damages, in cases in which the party is entitled to them, the declaration should refer to the act, that the defendant may be apprized of the extent of his demand, and the jury must find him guilty of the trespass alleged, and assess the single value of the timber or trees cut; and this finding of the jury must be endorsed on the *postea*, on the return of which the Court will, on motion, treble the damages. *Ibid*.

QUO WARRANTO.

1. Where an office is already filled by a person who is in by color of right, a *mandamus* is never issued to admit another person; the

proper remedy is by an information in the nature of a *quo warranto*. *The People v. Corporation of New-York*, 3 J. C. 79.

2. The Supreme Court has a discretion to grant motions of this kind, or to refuse them, if no sufficient reasons appear for allowing them. *The People v. Sweeting*, 2 J. R. 184.

3. The Court will not allow the attorney-general to file an information, in the nature of a *quo warranto*, against an officer, when it appears that the time for which he was elected will expire before the inquiry can have any effect; but will leave the party to his remedy. *Ibid*.

*4. If a turnpike company open
[*331] a road through the land of a person, without making him a compensation pursuant to the direction of the act, the Court will not, at the relation of the party complaining, grant an information in the nature of a *quo warranto*; but will leave the party injured to his action of trespass. *The People v. Hillsdale and Chatham Turnpike Company*, 2 J. R. 190.

5. An information, in the nature of a *quo warranto*, lies against an incorporated company, for carrying on banking operations, without authority from the legislature. *The People v. The Ulica Insurance Company*, 15 J. R. 358.

6. Since the act to restrain unincorporated banking associations, (Sess. 27. c. 117.) passed April, 1804, and re-enacted April 6, 1813, (Sess. 36. c. 71.) the right or privilege of carrying on banking operations by an associated company, is a franchise which can only be executed under a legislative grant. *Ibid*.

7. An information, in nature of a *quo warranto*, for usurping a franchise, need not show a title in the people to the franchise; but it lies on the defendant to show his warrant for exercising it. *Ibid*.

8. The act to incorporate the *Ulica Insurance Company*, 2^d March, 1816, (Sess. 36. c. 52.) does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits, such powers not being expressly granted by the legislature, and not being within their intention as collected from the act of incorporation: and the company having assumed and exercised those powers; held, that they had usurped a franchise; and on an information in the nature of a *quo warranto*, being filed by the attorney-general, judgment of ouster was given against them. *Ibid*.

See CHANCERY, LVIII.

RECOGNIZANCE ON A PLEA OF TITLE IN A JUSTICE'S COURT.

1. In an action of debt on a recognizance taken in a Justice's Court, on a plea of title, it is incumbent on the plaintiff to prove the recognizance, and commencement of a suit before the next term of the Common Pleas. *Brown v. Van Duzen*, 11 J. R. 472.

2. And the defendant may enter into any

evidence to show that the writ was not issued with a *bona fide* intent to have it served, and that the commencement of the suit was collusive. *Ibid*.

3. Whether a mere delivery of a writ to the sheriff is a commencement of the suit? and whether the recognizance ought to be taken in the name of the people? *Quære. Ibid*.

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*REFORMED DUTCH CHURCH.

The *classis* of *M.* (one of the ecclesiastical tribunals of the *Reformed Dutch Church*) deposed *W.*, a minister of that church as *C.*, for immoral conduct; but on appeal to the *synod* (the highest tribunal of the church) the decision of the *classis* was reversed. The *classis*, afterwards, passed various resolutions, at one time, declaring that *W.* should be considered as restored, and, at another time, that he was deposed; but *W.*, in the mean time, continued to exercise ministerial functions, as usual; held, that the decision of the *synod* on the appeal was conclusive, and that the subsequent proceedings of the *classis* being irregular, could have no effect on that decision by which *W.* was restored to the ministry; and that the relation of minister and congregation not being dissolved, *D.*, who has subscribed a certain sum for the support of the minister of the church at *C.*, "as long as *W.* remained the regular minister," was liable to pay the amount of his subscription. *Dieffendorf v. The Trustees of the Dutch Reformed Church*, 20 J. R. 12.

RELATION.

1. A deed, executed in pursuance of an agreement for a conveyance, relates back to the time of the making of the contract, so as to render valid intermediate sales or dispositions of the land by the grantee. *Jackson, ex dem. New Loan Officers of Rensselaer, v. Bull*, 1 J. C. 81. S. C. 2 C. C. E. 301. *Johnson v. Sagg*, 2 J. R. 510.

2. And the grant will not be affected by an adverse possession, between the time of making the contract and of executing the conveyance. *Jackson, ex dem. June, v. Raymond*, 1 J. C. 85. note.

3. A lease for 19 years and 9 months, executed on the 1st August, 1795, pursuant to a prior parol agreement for a lease for 20 years, was considered as relating back to the 1st May, 1795, so as to make valid a demise, by way of mortgage, made by the lessee, on the 6th May, 1795. *Johnson v. Sagg*, 2 J. R. 510.

4. But a deed will not take effect by relation, except between the same parties, for the advancement of justice; it will not be extended so as to do wrong to strangers, by defeating intermediate encumbrances. *Jackson, ex dem. Grinsold, v. Bard*, 4 J. R. 230.

5. A stranger cannot be made a trespasser by relation. *Case v. De Goes*, 3 C. R. 261.

6. A patent for land, although it passes the great seal after its date, takes effect by relation, from the time of the date, and the patentee is entitled to an action for injuries committed by strangers subsequent to the date. *Heath v. Ross*, 12 J. R. 140.

7. But the doctrine of relation, being a fiction of law, is not admitted to the prejudice of third persons, not parties or privies, having any right. *Ibid.*

[*333] 8. The land of A. was sold under an execution at the suit of B. against A., on the 1st of March; on the 10th of March, a mortgagee of the same land filed a bill for foreclosure in Chancery against A. and B., and on the 19th March, the sheriff executed a deed for the land, to the purchaser under the execution; held, that the sheriff's deed related back to the day of sale, and the purchaser was not precluded from contesting the validity of the mortgage, in an action of ejectment, he not being a party to the bill of foreclosure, and his title having been acquired previous to notice of a *lis pendens* in Chancery, though not consummated until afterwards. *Jackson, ex dem. Noah, v. Dickenson*, 15 J. R. 309.

RELEASE.

1. A release, technically, operates only upon a present interest; but when there is a present right to take effect in *future*, such a right may be presently released. *Woods v. Williams*, 9 J. R. 123.

2. A release to a person as a joint trespasser, who is not, in fact, liable to the releasor, will not destroy his right of action as against those who are liable. *Wilson v. Reed*, 3 J. R. 175.

3. Where a creditor, by will, leaves a legacy to his debtor, it is not a release or extinguishment of the debt. *Rickets v. Livingston*, 2 J. C. 97.

4. If a holder of a note release one of several joint makers, excepting from such liability as he may be under to the endorsers, those endorsers cannot, in an action against them by such holder, set up such release in discharge. *Stewart v. Eden*, 2 C. R. 121.

5. Where the inhabitants of a place claim a right of fishery, as annexed to their inhabitaney, a release by one of them is inoperative, and will not prevent him from exercising the right. *Jacobson v. Fountain*, 2 J. R. 170.

6. A bond, conditioned not to sue, unless on a future contract, is a perpetual covenant, amounting to an absolute release of all existing causes of action. *Cuyler v. Cuyler*, 2 J. R. 186.

7. And if the obligor be the endorser of a note, of which the obligee is maker, payable after the execution of such bond, the amount of which note is paid by the obligor to the endorsee, he cannot maintain an action on such note against the maker. *Ibid.*

8. But he may bring an action for money paid as surety, for that cause of action will have

arisen subsequently to the execution of the bond. *Ibid.*

9. Where A. and B. gave a sealed note to C., and A., afterwards, gave a bond and mortgage to C. for the amount due on the note, and C. covenanted to procure and cancel the note; held, that though the bond and mortgage were not an extinguishment of the note, yet the *covenant with A. was for [*334] the benefit of A. and B., and a covenant not to sue, which amounted to a release of the note. *Phelps v. Johnson*, 8 J. R. 54.

10. A release of land to a person out of possession, is inoperative. *Bennett v. Irwin*, 3 J. R. 363.

11. A. conveyed land to B., in fee, and covenanted that he was well seised, &c., when, in fact, he was not well seised, and the covenant was broken; B. afterwards released the land to A. for a valuable consideration. In an action brought by B. against A., for the breach of the covenant of seisin; held, that the release of the land by B. to A. was not a bar to the action; for a release of an estate is not an extinguishment of a covenant of seisin previously broken. *Ibid.*

12. And whether, if B. had granted back the land to A., he might have pleaded it in bar? *Quære. Ibid.*

13. A release, under seal, by one partner, in the name of the firm, of a debt due to the partnership, is binding on all the partners. *Piereson v. Hooker*, 3 J. R. 68. *S. P. Bulkley v. Dayton*, 14 J. R. 387.

14. Where several plaintiffs must join in bringing a personal action, a release by one joint plaintiff is a bar to the action. *Austin v. Hall*, 13 J. R. 286.

15. So, in an action by tenants in common for a trespass on land, of which they are the co-heirs, a release by one of the plaintiffs is a bar to the action. *Ibid.*

16. A release by one of two joint covenantees, is binding on the other. *Ibid.*

17. A release to one of several obligors, whether they are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar. *Rowley v. Stoddard*, 7 J. R. 207. (*And see Harrison v. Close*, 2 J. R. 448.)

18. But if the obligee covenant with one of the obligors not to sue him, it does not amount to a release, but is a covenant only. *Ibid.* *S. P. Chandler v. Herrick*, 19 J. R. 129.

19. In order that the other obligors may avail themselves of it, it must be a technical release under seal. *Ibid.*

20. So, a receipt in full to one joint obligor, on his paying his proportion of the debt, is not a discharge of the others. *Ibid.*

21. A release given by a defendant in a cause, unconditionally, for the purpose of enabling the releasee to be a witness on the trial of a cause, if fairly obtained, is a discharge of the liability of the witness to the defendant, though he was not sworn at the trial, nor the release produced. *Pratt v. Crocker*, 16 J. R. 270.

22. A release by *parol* of the parties of one part of a contract under seal to perform certain work, from a further performance of their agreement, made by one of the parties of the

other part, is valid. *Lattimore v. Harsen*, 14 J. R. 330.

23. In debt for rent by tenants in common, a release by one is a bar to the action; but in a distress and avowry for rent, a release by one is not a discharge as to the others. *Decker v. Livingston*, 15 J. R. 479.

24. Where A. covenants with B. and C., to do a certain act, by a "certain day," [*335] and B., afterwards, by writing under seal endorsed upon the original agreement, releases A. from the performance within the time mentioned, or extends the time of performance, such release is a bar to an action of covenant, assigning as a breach the non-performance of the act, by the day mentioned in the agreement. *Fitch v. Forman*, 14 J. R. 172.

25. It is no objection to such a release, that it was endorsed on the agreement, and remained after the execution, with the plaintiffs; for if a formal delivery were necessary, it will be presumed to have been made, and that it remained with the plaintiffs, with the consent of the other party. *Ibid.*

26. A release, not by deed, and without consideration, after a breach of a promise, is void. *Crawford v. Millspaugh*, 13 J. R. 87.

27. As, if the holder of a note, after it is due, and after a suit has been commenced against the endorser, release the makers, by writing not under seal, and without consideration, it is void, and no defence in the action against the endorser. *Ibid.*

28. A. conveys land to B. with covenants, and B. conveys it to C., and takes a mortgage to secure the consideration money; the mortgage being unsatisfied, C. cannot release A. from the covenants in the deed; for, by the mortgage, the seisin was revested in B. *Kane v. Sanger*, 14 J. R. 89.

29. Where a person supplied stores to a ship, of which there were several owners, on the order of one of them, who acted as ship's husband, and took his note in payment, and gave a receipt in full, it is no discharge of the other owners. *Schemerhorn v. Loines*, 7 J. R. 311.

30. Where A. surrendered to B. the possession and right to certain premises, to have and to hold to him and his heirs and assigns forever, provided such release should be accepted by B., as a full discharge for all lands claimed of A. by B.; held, that admitting that the full discharge of the claim mentioned in the proviso, amounted to a sufficient consideration, and that the deed contained words sufficient to pass a fee, and yet it was void, and no bar to A.'s title unless B. showed a valid discharge, which could not be by *parol*, or by mere implication, arising from the fact of possession of the deed. *Jackson, ex dem. Bain, v. Pulver*, 8 J. R. 370.

See CHANCERY, LX.

REMAINDER AND REVERSION.

1. Where a precedent limitation, by any means whatever, fails, the subsequent limita-

tion takes effect. *Jackson, ex dem. Beach, v. Durland*, 2 J. C. 314.

2. A. devised lands to the use of his wife for life, and to B. in fee, and if he died before arriving at full age, then to the surviving brothers of B. in succession, if of full age, then to the first son of his niece M., and his heirs and assigns forever; and in default of such issue, remainder "over to his own right heirs; and directed that [*336] in case his wife should die before B. or his surviving brother should be of age, then his niece M. should take possession of the lands until his heirs should be of age. The wife and niece of the testator both died before B. came of age; the devise to the niece having failed, by reason of her husband being witness to the will; held, that the remainder to B. vested in possession, on the death of the widow. *Ibid.*

3. A., being seised of lands, by indenture, in consideration of natural love and affection, and for the better maintenance of the grantees, conveyed the premises by the words, "give, grant, alien, enfeoff, and confirm, to his daughter H., and B. her husband, to the use of H. for life, with a power to her to sell the same in fee; and in case H. should not sell the premises, then, after her death, he conveyed the same to B. for life, and after his death to the heirs of the body of H., and his, her, and their heirs and assigns forever, equally to be divided between them, share and share alike. Held, that H. took an estate for life, with a vested remainder in tail, and that the words *heirs of the body*, were words of limitation, and not of purchase, notwithstanding the words added, *and to his, her, or their heirs and assigns, &c.* which were to be rejected as repugnant to the estate created by the preceding words. *Brant, ex dem. Provoost, v. Gelston*, 2 J. C. 384.

4. Where the father takes an estate of freehold, under a devise with remainder to his eldest son in tail male, and dies leaving his wife *enfeint*, and a posthumous son is born, the son shall take the remainder as purchaser, as if born in the lifetime of his father. *Stedfast, ex dem. Nicoll, v. Nicoll*, 3 J. C. 18.

5. A. devised certain lands to his wife for life, and, after her death, to his son B., his heirs and assigns, forever; B. took a vested estate in remainder on the death of A., which, in case of his dying before his mother, would go to his heirs, if he had not otherwise disposed of it. *Wimple v. Finda*, 2 J. R. 288.

6. P. devised lands to his daughter C., "during the term of her life, and immediately after her death upto and among all and every such child and children as the said C. shall have, lawfully begotten, at the time of her death, in fee simple, equally to be divided between them, share and share alike;" by this devise, all the children of C., living at the time of the death of the deviser, take a vested remainder in fee, and if C. has any children afterwards born, the estate opens for their benefit, and the remainder vests in them and their heirs, in common with the children living

at the devisor's death. *Doe*, ex dem. *Barnes*, v. *Provoost*, 4 J. R. 61.

7. Neither a descent cast, nor the statute of limitations, will affect the right of a remainderman or reversioner, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because the right of entry does not then exist, and the laches of a tenant for life will not affect the party entitled in remainder. *Jackson*, ex dem. *Hardenbergh*, v. *Schoonmaker*, 4 J. R. 390.

8. The statute, (Sess. 36. c. 56. s. 33. 1 N. R. L. 527.) giving the reversioner or remainderman an action of waste or trespass, notwithstanding any intervening estate for life or years, does not authorize *the [*337] bringing either waste or trespass, at the discretion of the plaintiff, but gives the one action or the other, according as it is the appropriate remedy, that is, waste against a tenant, and trespass against a stranger. *Livingston v. Haywood*, 11 J. R. 429.

See DEVISE, I.

RENT.

1. Where the goods of a tenant, who had hired a house for a year, for a sum payable quarterly, are taken in execution, the landlord is not entitled to rent for the current quarter, but only to the rent due on the last quarter day. *Hazard v. Raymond*, 2 J. R. 478.

2. A plaintiff who levies a *fiery facias* is not bound to leave goods on the premises sufficient for the payment of the rent in arrear, without notice for that purpose from the landlord. *Alexander v. Mahon*, 11 J. R. 185.

3. If the sheriff, without such notice, has levied upon the goods of the tenant, the landlord cannot take them as a distress. *Ibid.*

4. In an action by the sheriff against the landlord, for distraining goods which had been levied upon, it seems, that the landlord cannot show, in mitigation of damages, that the rent was actually due. *Ibid.*

5. Though a landlord has a lien on the goods of his tenant taken in execution for rent due previous to the levy; yet he cannot claim it for rent subsequently accrued, while the goods remained on the premises, in the possession of the sheriff. *Trappan v. Morie*, 18 J. R. 1.

6. Where there is an express covenant for the payment of rent, the destruction of the premises by fire will not excuse the lessee. *Hallett v. Wylie*, 3 J. R. 44.

7. The remedy by distress is for the rent alone, and not for damages for the delay; and the lessor can distrain only for the amount of rent in arrear, and not for interest. *Lansing v. Rattoone*, 6 J. R. 43.

8. In a surrender by a lessee for one year, it was agreed that he should remain liable for the year's rent, and that the lessor might take all lawful means for the recovery thereof, ac-

cording to the lease: by the surrender, the relationship of landlord and tenant ceased; and the lessor cannot distrain for the rent, but his remedy is on the special agreement. *Bain v. Clark*, 10 J. R. 424.

9. The acceptance of a bond for rent, is not an extinguishment of it, and it makes no difference whether it is reserved by deed or by parol; for rent, issuing out of the realty, is of a higher nature than a simple contract. *Cornell v. Lamb*, 20 J. R. 407.

10. A landlord, therefore, who has received a sealed note for rent due on a parol demise, may maintain an action of *assumpsit* for use and occupation, on delivering up the note, at the trial, to be cancelled. *Ibid.*

11. Distress is a concurrent remedy for rent, and where the landlord *has distrained and sold the goods of [*338] the tenant, for part of the rent, he may maintain *assumpsit* to recover the residue. *Ibid.*

12. A breach of a covenant on the part of a lessor does not excuse from the payment of rent. *Watts v. Coffin*, 11 J. R. 495.

13. But to produce a suspension or apportionment of the rent, there should be an eviction of the whole, or a part of the thing demised. *Ibid.*

14. Land was leased in fee; the grantee covenanted to pay rent, and the grantor covenanted that the grantee should have common of estovers and pasture out of the other lands of the grantor; the grantor approved those lands, whereby the grantee was prevented from enjoying the common. In an action by the assignee of the grantor to recover the rent; held, that the covenant that the grantee should have common did not operate as a grant, but as a covenant, and that the common made no part of the premises granted, and on which rent was reserved; consequently, that the grantor's approving did not furnish a defence in an action for the rent, and that the grantee's remedy was by action on the covenant. *Ibid.*

15. If, in any case, the rent becomes suspended by the grantor's approving? *Quære. Ibid.*

16. A recovery on a covenant for the payment of rent is not, without actual satisfaction, an extinguishment of the rent; and the lessor may, notwithstanding such recovery distrain for the rent in arrear. *Chipman v. Martin*, 13 J. R. 240.

17. And the lessee cannot maintain an action against him for double damages, for taking a distress when no rent is due. *Ibid.*

18. In debt for rent, tenants in common must all join as plaintiffs; but in distress and avowry for rent, which savor of the realty, the tenants must not join. *Decker v. Livingston*, 15 J. R. 479.

19. Therefore, a release by one tenant in common, in an action of debt for rent, is a bar as to all; but a release of one plaintiff in avowry does not release the others. *Ibid.*

20. But one tenant in common, before distress and avowry, may receive the whole rent and discharge the lessee; for before avowry, the rent is only in personalty. *Ibid.*

21. A receipt for rent arising at a subsequent period, is presumptive evidence that all rent previously accruing has been paid. *Ibid.*

22. Where there is a lease at a certain annual rent, and the tenant holds over, after the expiration of the lease, without any new agreement as to the rent, the law implies that he holds from year to year at the original rent. *Abeel v. Radcliff*, 15 J. R. 505.

23. But if the rent reserved in the lease was merely a *ground rent*, or for the land exclusive of the buildings, and the landlord at the expiration of the term becomes entitled to the buildings erected by the tenant, as well as the land, then a different rule will be adopted, and the annual value of both the land and buildings is to be deemed the rent, or measure of damages. *Ibid.*

24. Where a person having hired a house for a year, lets out part of it to another person for the whole year, he cannot, there being no agreement to that effect, distrain upon his lessee for rent in arrear, although before the expiration of the year, and before making the distress, he hired the house for another year, and though there was a custom for lessors having no reversionary interest to distrain. *Prescott v. De Forest*, 16 J. R. 159.

25. The remedy, in such case, is by an action on the contract for the rent. *Ibid.*

26. If a lessor, having no reversionary interest, distrain upon his tenant, and sell his goods, the purchaser acquires no property in them, and the tenant may maintain trover for them. *Ibid.*

27. An action for rent reserved by indenture of lease, is not within the statute of limitations; but where more than twenty years have elapsed since the last quarter's rent became due, payment of the rent will be presumed. *Bailey v. Jackson*, 16 J. R. 210.

28. But this presumption may be rebutted by circumstances. *Ibid.*

29. Where rent is payable either in money or kind, and the lease is silent as to the place of payment, a tender of the rent by the lessee on the land is not good; he is bound to make a tender to the lessor in person. *Walter v. Dewey*, 16 J. R. 222.

30. Though a mortgagee, it seems, may distrain for rent due from a tenant of the mortgagor, on a demise made anterior to the mortgage; yet where a mortgagor in possession, subsequently to the mortgage, leases the land, the mortgagee cannot distrain upon or bring an action against the tenant for the rent, there being no privity of contract between them; and without such privity, there can be neither a distress nor an action for the rent. *McKircher v. Hawley*, 16 J. R. 289.

31. So, where land has been purchased under an execution against the mortgagor, and the purchaser brings an action against the tenant of the mortgagor, for rent accruing subsequently to the purchase, the tenant cannot plead, that after the demise to him, his lessor mortgaged the land, that the mortgage became forfeited, and the mortgagee distrained

upon him for the rent so claimed by the purchaser. *Ibid.*

See DISTRESS. LEASE.

REPLEVIN.

1. Replevin lies for any unlawful taking of a chattel, whether taken under pretence of a distress or not. *Pangburn v. Patridge*, 7 J. R. 140. *S. P. Cresson v. Stout*, 17 J. R. 116.

2. Possession by the plaintiff, and an actual wrongful taking by the defendant, are sufficient to support the action. *Ibid.*

3. The action of replevin is grounded on a tortious taking, and sounds in damages, like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return, and the plaintiff goes only for damages for the caption. Per *Kent*, Ch. J. *Hopkins v. Hopkins*, 10 J. R. 369.

4. Replevin lies for property taken by virtue of a warrant issued by a Court Martial of the United States, to the marshal of the district, to collect a fine imposed by the sentence of the Court on the plaintiff, as a private in the militia of the state of New York, for refusing to rendezvous and enter the service of the United States, in obedience to the orders of the commander-in-chief, &c. *Mills v. Martin*, 19 J. R. 7.

5. Replevin lies at the suit of the owner of a chattel against the sheriff, constable, or other officer, who has taken it from the servant or agent of the owner, while in his employ, by virtue of an execution against such servant or agent; the actual possession, in such case, being considered as remaining in the owner. *Clark v. Skinner*, 20 J. R. 465.

6. Replevin does not lie for goods deposited with the plaintiff by a stranger, who has no interest in them. *Harrison v. McIntosh*, 11 J. R. 380.

7. A plea of property in a stranger is good in bar or in abatement, and entitles the party to return without an avowry. *Ibid.*

8. Goods taken by a sheriff, on execution, from the possession of the defendant in the execution, being in the custody of the law, cannot be replevied; but if the officer, having an execution against A., undertakes to execute it on goods in the possession of B., the latter may bring replevin for them. *Thompson v. Button*, 14 J. R. 84.

9. Replevin will not lie against an officer, who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to return him the goods. *Gardner v. Campbell*, 15 J. R. 401.

10. Replevin does not lie for things fixed to the freehold. *Cresson v. Stout*, 17 J. R. 116.

11. But if, after the sheriff has levied on them, they are severed, they then become personal property, and may be replevied. *Ibid.*

12. Where the defendant justifies the taking of the beasts as a distress damage feasant, the

plaintiff may reply that the avowant, after making the distress, abused it, so as to render him a trespasser *ab initio*. *Hopkins v. Hopkins*, 10 J. R. 363.

13. As, if he impounded the cattle after making the distress, without having the damage previously assessed by the fence-viewers. *Ibid.*

14. And the plaintiff shall recover damages, as in trespass, for the unlawful taking. *Ibid.*

15. In replevin, where the defendant makes avowry, justification, or cognizance, if the same be found for him, or the plaintiff be non-suited, or otherwise barred, the defendant is entitled to damages under the act; (Sess. 36. c. 96. s. 4.) and the decrease in the value of the goods from the time of the replevin, and interest on their entire value, are a proper measure of damages. *Rowley v. Gibbs*, 14 J. R. 385.

16. Where the husband distrains and avows for rent arising from the land of his wife, without joining her in the proceedings, he must show affirmatively that the rent accrued after the marriage, for that cannot be intended; and if the fact be not shown, the objection may be taken at the trial. *Decker v. Livingston*, 15 J. R. 479.

17. On the return of *elongata* to a writ of *retorno habendo*, it is not necessary to sue out a *scire facias* against the pledges, but if insufficient pledges are taken, or no pledges at all, the plaintiff may have an action on the case against the sheriff. *Gibbs v. Bull*, 18 J. R. 435.

*18. Where the declaration [*341] against the sheriff under the eighth section of the statute, (Sess. 11. c. 5.) which applies only to distresses for rent, the plaintiff cannot claim damages beyond the value of the goods *eloigned*; for the security required by the section to be taken by the sheriff, is only for the prosecution of the suit, and for the return of the goods, &c. *Ibid.*

19. The declaration must allege, that a writ of *retorno habendo* has been issued, and *elongata* returned, or it is bad on demurrer. *Ibid.*

20. The declaration should pursue the words of the statute, and allege that the sheriff made deliverance, &c., without taking security, &c., "to prosecute the suit and to return the same goods, &c., if the return thereof shall be adjudged." *Ibid.*

21. Under the fourth section of the statute, the sheriff may take such security as he pleases, in his own name, and at his own peril. *Ibid.*

22. Though the fourth section does not provide that the sheriff shall assign the bond to the defendant in replevin, it seems, that the Court will compel the assignment of it for his benefit. *Ibid.*

23. No venue is necessary to a plea, or to a demise in an *avowry*, for a distress, &c. in replevin. *Davis v. Tyler*, 18 J. R. 490.

24. Judgment as in case of nonsuit is never granted in replevin. *Barrett v. Forrester*, 1 J. C. 247.

See PLEADING, XVII.

SALE OF CHATTELS.

I. What constitutes a sale, and what title vests in the vendee.

II. Delivery of goods sold.

III. Stoppage in transitu.

IV. Fraud and warranty; (a) Express warranty as to the soundness of the goods, and fraud; (b) Implied warranty of title.

I. What constitutes a sale, and what title vests in the vendee.

1. Independently of the statute of frauds, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy it, *in presenti*, for a specified price, would be a sale and transfer of the right to the chattel. *De Foncleur v. Shottenkirk*, 3 J. R. 170.

2. A. delivered to B., the master of a vessel, and joint owner with C., a quantity of wheat, to be carried to New-York, and sold there; and it was agreed between A. and C., that B. should appropriate the proceeds of the wheat to the use of C., in New-York, and that C. should make the same payment to A. as B. received; that is, if the wheat was sold on credit, and notes taken, [*342] C. should give his notes, of the same tenor, to A.; and if it sold for cash, then he was to pay the amount in cash to A. B. sold the wheat on a credit, in the usual course of trade, and took D.'s notes, payable in 90 days, in payment; and C. gave his note to A. for the amount, payable in 90 days; but, before the expiration of 90 days, D. failed, and became insolvent; and A., afterwards, brought an action against C. on his note; held, that the exchange of notes was for the accommodation of A., and that the property in the wheat was not vested in C., who was not legally nor justly responsible for the amount. *Herring v. Marvin*, 5 J. R. 393.

3. A person assigns all his interest in a crop growing on the land of C.; this is a complete sale or transfer of the property, and any action brought by the assignee must be in his own name. *Carter v. Jarvis*, 9 J. R. 143.

4. A purchase for a valuable consideration, and without notice, vests no higher title in the vendee than was possessed by the vendor, and does not protect the former from eviction by the rightful owner. *Wheelwright v. Depeyster*, 1 J. R. 471.

5. And if the purchase was made in a foreign country, unless some local law be shown which would affect the property, the general principle of law will apply to the case. *Ibid.*

6. The effect of a sale in market overt is not recognized by the law of this state. *Ibid.*

7. A sale of goods captured, by order of a Prize Court, established by a belligerent in a neutral country, does not change the property. *Ibid.*

8. A sale by a captor, even of property belonging to an enemy, does not divest the title of the original owner, unless it has been condemned by a Court of competent jurisdiction of the sovereign of the captor. *Ibid.*

9. A purchase of vessels or goods, wrecked or abandoned, at a sale made in conformity to the municipal regulations, in such cases, of the country where found, divests all previous titles, and changes the property. *Grant v. McLachlin*, 4 J. R. 34.

10. And it will make no difference if the goods were, previously to the abandonment, in the possession of pirates, or of captors, before adjudication. *Ibid.*

11. The presumption is in favor of the regularity and competency of such sales. *Ibid.*

12. The defendants, having received a quantity of leather from the plaintiff, gave him a receipt in these words: "Received the following leather, viz., &c., which we agree to pay for at the following rate; one shilling deduction to be made on each side of upper leather from the price above, and two shillings per pound from the sole leather, with the privilege of returning any quantity of the said leather which may remain on hand when a settlement is made;" *held*, that this was a sale to the defendants, and not a delivery to them to sell on commission; that parol evidence was inadmissible to explain the transaction, and that being a purchase, a destruction by fire was the loss of the defendants alone. *Marsh v. Wickham*, 14 J. R. 167.

*13. Where a debtor confesses [*343] a judgment, and, afterwards, fraudulently purchases and procures goods to be delivered to him, without paying for them, with intention to subject them to the execution of his judgment creditor, the title to the goods does not become vested in such purchaser, and they, therefore, cannot, be taken on execution against him. *Van Cleef v. Fleet*, 15 J. R. 147.

14. Where, after a sale of goods, some act remains to be done by the vendor before delivery, the property does not vest in the vendee, but continues at the risk of the vendor. *McDonald v. Hewett*, 15 J. R. 349.

15. Where a carriage was put into the hands of the defendant by a third person, to pay debts due to him and the plaintiff, and the defendant kept possession of the carriage for more than a year, and used it as his own, and never sold it; *held*, that the defendant having had a reasonable time to sell the carriage, which he ought to have done, at public auction, if it could not be sold at private sale, he might be regarded as the purchaser, and be chargeable with the amount of the debt due to the plaintiff; the carriage being of sufficient value to pay both debts. *Norton v. Squire*, 16 J. R. 225.

16. Whether a contract for the sale of chattels has been completed, is a question of fact for the jury, and the plaintiff ought not to be nonsuited, on the ground that the contract was not fully proved. *De Ridder v. McKnight*, 13 J. R. 294.

II. Delivery of goods sold.

[See Statute of Frauds, Sess. 10. c. 44. s. 15. 1 N. R. L. 75.]

17. When, on the sale of a specific chattel, the purchase money is paid, the property vests in the vendee, who, if he permit it to remain in the custody of the vendor, cannot call upon the latter for any subsequent loss or deterioration, not arising from negligence. *Lansing v. Turner*, 2 J. R. 13.

18. An actual delivery of goods, or of a part of them, is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. *Bailey v. Ogden*, 3 J. R. 399.

19. Those circumstances, however, which ought to be held tantamount to an actual delivery, ought to be so strong and unequivocal, as to leave no doubt of the intent of the parties. *Ibid.*

20. An agreement with the vendor about the storage of the goods, and the delivery, by him, of the export entry to the agent of the vendee, were *held* not to be sufficiently certain to amount to a constructive delivery, or to afford an *inducium* of ownership. *Ibid.*

21. Where goods are sold, and a promissory note given in payment, and the goods are suffered to remain in the possession of the vendor, who recognizes the property of the vendee, by showing them as his goods; this is tantamount to an actual delivery. *Hunn v. Bourne*, 2 C. R. 38.

*22. If the vendor give to the [*344] vendee an order on a third person, in whose possession the goods are, for their delivery, it is sufficient to take the case out of the statute of frauds. *Hollingsworth v. Napier*, 3 C. R. 182.

23. A delivery of the key of the warehouse, in which goods sold are deposited, is a sufficient delivery of the goods to transfer the property. *Wilkes v. Ferris*, 5 J. R. 335.

24. A delivery of the receipt of the storekeeper, for the goods, being the documentary evidence of the title, is tantamount to a delivery of the goods. *Ibid.*

25. After the property has become vested in the vendee, by the contract and part delivery, if he refuses to receive the residue, on a tender, and notice that the vendor will sell it, in case of his default, and hold him responsible for the deficiency, the vendor may abandon, or dispose of it *bona fide*, as agent of the vendee, to the best advantage, by a sale at auction, and hold the vendee liable for any deficiency between the amount actually received, and what he had agreed to pay for it. *Sands v. Taylor*, 5 J. R. 395.

26. The property in a vessel passes by delivery only, without a bill of sale. *Wendover v. Hogeboom*, 7 J. R. 308.

27. Where, on a sale of cattle, no earnest money was paid, nor any memorandum in writing made, and the cattle were to remain in the possession of the vendor, at the risk of the vendee, until he called for them; and the vendee

afterwards came and took away the cattle, without saying any thing to the vendor; *held*, that this was a sufficient delivery within the statute of frauds. *Vincent v. Germond*, 11 J. R. 283.

23. Where goods sold are to be delivered at one of two places, at the option of the vendor, he is bound to give the vendee notice of the place where he intends to deliver them. *Rogers v. Van Hoesen*, 12 J. R. 221.

29. And if he leave them at one of the places, without giving the vendee such notice, and the goods are lost, he is bound to bear the loss. *Ibid*.

30. After a delivery of goods sold, the vendor cannot, on account of any fraud in the contract, forbid the goods to be taken away, and bring an action of trespass against a person taking them away. *McCarty v. Vickery*, 12 J. R. 348.

31. Where, on the sale of land, the vendee also agrees to purchase certain ponderous articles on the premises, and then enters into possession of the land, the articles sold still remaining on the land, this is a sufficient delivery of them. *De Ridder v. McKnight*, 13 J. R. 294.

32. Where goods are to be paid for on delivery, if on delivery the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods. *Palmer v. Hand*, 13 J. R. 434.

33. And if, during the course of delivery, and before it is completed, the vendee sells or pledges the goods to a third person for a valuable consideration, without notice to the original vendor, the lien of *the [*345] latter will not be affected, and he may recover the goods from the subsequent purchaser. *Ibid*.

34. W., having married a daughter of the plaintiff, a widow, went to reside with her in her house, and took upon himself the management of the family as its head. Having become insolvent, W. broke up his establishment, sold his carriage, discharged his servants, &c., and resigned the management of the family to the plaintiff, who, afterwards, had the sole and exclusive direction of the household, and paid all the expenses. The furniture of W. continued to be used in the family except the plate, which was packed up in boxes. The plaintiff lent W. her notes, to a large amount, payable at different periods, to a creditor of W., and W. covenanted to pay the notes, when they became due; and in consideration of the notes of the plaintiff so given, executed a bill of sale to her, of the furniture and plate in the house, the value of which was much less than the amount of the notes. There was no other delivery of the furniture and plate. *Held*, that the possession of the furniture and plate was transferred to the plaintiff, and that the transaction was not fraudulent as against creditors. *Ludlow v. Hurd*, 19 J. R. 218.

What is a sufficient memorandum to take a case out of the statute of frauds. See FRAUDS, V.

III. Stoppage in transitu.

35. If the vendor give the vendee an order on a storekeeper, in whose possession the goods

are, for their delivery, his right of stoppage, *in transitu*, is determined. *Hollingsworth v. Napier*, 3 C. R. 182.

36. Where a vendee sells the goods to a bona fide purchaser, for a valuable consideration, the right of the vendor to stop them, *in transitu*, is determined. *Hunn v. Bowne*, 2 C. R. 38.

37. So, where A. sold goods to B., on a credit of 60 days, and took B.'s note, payable in that time; B. afterwards sold them to C., and gave him an order on A. for their delivery, which was not immediately presented, nor was A. informed of the sale. B. became bankrupt, and A. placed his note, together with the goods in the hands of D., as security for a debt due him from A. C., afterwards, demanded the goods from A., who refused to deliver them, alleging as a reason the bankruptcy of B., and the non-payment of his note; *held*, that C. might maintain trover against D. for the goods; the lien of A. not being sufficient to protect his assignee against a bona fide purchaser from the original vendee. *Ibid*.

And see ante, II.

*IV. Fraud and warranty; (a) Express warranty as to the soundness of the goods, and fraud; (b) Implied warranty of title. [*346]

(a) Express warranty as to the soundness of the goods, and fraud.

38. In a sale of goods, if there be neither warranty nor fraud, the purchaser buys at his peril; and no action will lie against the vendor, if the article afterwards turns out defective. *Seizas v. Woods*, 2 C. R. 48. *S. P. Snell v. Moses*, 1 J. R. 96. *S. P. Perry v. Aaron*, id. 129. *S. P. Defreeze v. Trumper*, id. 274. *S. P. Holden v. Dakin*, 4 J. R. 421. *S. P. Sweett v. Colgate*, 20 J. R. 196.

39. A fair price paid for the article does not imply a warranty of soundness. *Seizas v. Woods*, 2 C. R. 48. *S. P. Holden v. Dakin*, 4 J. R. 421.

40. A mere description of the articles in a bill of parcels, but not intended as a warranty, does not amount to one. *Ibid*.

41. A warranty does not extend to things which, from the senses, may be discerned to be otherwise. *Schuyler v. Russ*, 2 C. R. 202.

42. Where the vendee purchases a chattel, on sight, which the vendor affirms to be worth much more than its real value, no action lies, there being neither fraud nor warranty. *Davis v. Meeker*, 5 J. R. 354.

43. A. sold to B., who was a maltster and brewer, a cargo of Virginia wheat; and it was known to B. to be southern wheat, which is always more or less heated, but not so as to injure it when manufactured into flour, though it renders it unfit for malting. A sample of the wheat, taken in the usual manner from the cargo, was exhibited to B. before the purchase, which, on experiment, he found to malt. He received a part of the cargo, but finding some of it heated, and unfit for malting, he refused to receive the remainder, though it was good

merchantable wheat, and equal to any southern wheat. *Held*, that the sample exhibited to the vendee was a fair specimen of the article, and there being no deception or warranty on the part of the vendor, the vendee could not, after the contract had become consummated by part delivery, rescind the sale, and refuse to receive the residue. *Sands v. Taylor*, 5 J. R. 395.

44. Where, by a bill of sale, B. granted, bargained, and sold a negro woman slave, named, &c., "being of sound wind and limb, and free from all disease;" *held*, that these were not words of description, but an averment of a fact, and amounted to an express covenant or warranty as to the soundness of the slave. *Cramer v. Bradshaw*, 10 J. R. 484.

45. Where the vendor is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable for the damages; but the fraud must be proved, and cannot be presumed. *Fleming v. Slocum*, 18 J. R. 403.

46. Therefore, where, in the sale of a slave, without warranty as to his good qualities, &c., there was no other proof of a fraudulent representation, or a fraudulent concealment of facts, but what might *be

[*347] inferred from the circumstance that the vendee paid a *sound and full price* for a good and honest slave, but who proved to be bad and dishonest, and the vendor *knew* at the time that he was so; *held*, that this was not sufficient evidence to support an action against the vendor to recover damages for a fraudulent concealment. *Ibid*.

47. To constitute an *express warranty*, it is essential that the affirmation, at the time, should be intended as a warranty; otherwise, the affirmation is merely the judgment or opinion of the vendor. *Swett v. Colgate*, 20 J. R. 196.

48. As where the article sold, was considered and described by the vendor as *barilla*, and was examined by the vendee before the sale of it at public auction, and a sample exhibited at the sale, and the article was supposed to be *barilla*, and was purchased as such; but afterwards, the vendee, on using some of it, in the manufacture of soap, discovered that it was not *barilla*, but *kelp*, which greatly resembles it, but is of very little or no value; *held*, that, there being no *express warranty*, nor fraud, on the part of the vendor, no action would lie against him at the suit of the vendee, who had offered to pay for what he had used and return the residue; and that the bad quality of the article, therefore, was no defence to a suit brought by the vendor to recover the price for which it was sold. *Ibid*.

49. In the sale of provisions for domestic use, there is an implied warranty as to their soundness. The vendor is bound to know whether they are sound and wholesome; and if they are not, he is liable in an action on the case for deceit. *Van Bracklin v. Fonda*, 12 J. R. 468.

50. *Assumpsit* is the proper form of action on a warranty express or implied. *Executors of Evertsen v. Miles*, 6 J. R. 138.

51. But where the plaintiff grounds his

action on deceit or fraud in the sale, and not on a breach of contract, the deceit or fraud must be substantively alleged in the declaration, otherwise no proof of fraud is admissible. *Ibid*.

52. Where, after the sale of a chattel, it is agreed that the vendor may, within a reasonable time, return it, and receive back the price, if returned in as good condition as at the time of delivery, and the vendee afterwards rescinds the contract and returns the chattel to the vendor, who receives it without objection, and gives back the price, the latter is concluded by his own act from maintaining an action against the vendee for any deterioration of the chattel while in his hands, arising from a secret injury. *Lord v. Kenney*, 13 J. R. 219.

53. In an action on the case for falsely affirming that a chattel belonged to the defendant, whereby the plaintiff was induced to buy it, and was afterwards dispossessed by the rightful owner, it is unnecessary to set forth the contract between the parties, or any consideration moving between them, or the price paid, as that is only matter relating to the measure of damages. *Barney v. Dewey*, 13 J. R. 224.

54. A recovery by the rightful owner against the vendee, is conclusive evidence against the vendor. *Ibid*.

55. If the declaration states that the vendor gave evidence, at the trial, of the suit in which the recovery was had against the vendee, *that is tantamount to an [*348] averment of notice to the vendor of the pendency of the suit. *Ibid*.

56. In an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's recovery; or if the unsoundness produced only a partial diminution of the value, he may show that in mitigation of the damages claimed by the plaintiff. *Beecker v. Vrooman*, 13 J. R. 302.

57. So, if a promissory note is given for the price, and a suit is brought on the note, the defendant, under the general issue, may show deceit in the sale. *Sill v. Rood*, 15 J. R. 230.

58. And a fraudulent representation of the vendor renders such note void. *Ibid*.

59. The plaintiff sold to the defendant a quantity of *Leghorn* hats, of certain qualities, for a certain price, and engaged to deliver extra crowns, to match those delivered, free of charge, but the crowns sent did not match the hats delivered, whereby the defendant sustained a loss; *held*, that though the defendant had not returned or offered to return the hats, she might, in an action brought for the price, nevertheless, insist on a deduction from the sum originally agreed to be paid, in proportion to the diminished value of the goods. *King v. Paddock*, 18 J. R. 141.

60. Where A. transferred to B. stock in a turnpike company, which, at the time of the transfer, appeared, by the books of the company, to have been fully paid up by a credit of interest on the amount before paid in, pursuant to a resolution of the directors, and this resolution, after the transfer by A. was repealed

and the stockholders called upon to pay in the amount before allowed for interest, in consequence of which B. paid in the amount to the company, on the shares so transferred to him; held, that B. could not maintain an action to recover the amount so paid by him from A.; there being neither fraud, nor warranty. *Cunningham v. Spier*, 13 J. R. 392.

61. No custom or usage is admissible, to show that a sale of any particular article implies a warranty of the goodness of that article. *Thompson v. Ashton*, 14 J. R. 316.

62. To recover for a breach of a warranty in the sale, the action must be expressly founded on the warranty. *Ibid.*

63. Though, in an action founded on a warranty of the soundness of a chattel sold, it is necessary to prove the warranty; yet it is not necessary to show that it was made in express words; but any representation of the state of the thing sold by the defendant, or a direct and express affirmation by him of its quality and condition, showing his intention to warrant, is sufficient. *Chapman v. Murch*, 19 J. R. 290.

64. The allegations of fraud, or the warranty, must be proved precisely as laid. *Snell v. Moses*, 1 J. R. 96. *S. P. Perry v. Aaron*, *id.* 129.

65. Where there is a bill of sale, or agreement in writing respecting the sale, no action will lie on a parol warranty. *Mumford v. McPherson*, 1 J. R. 414. *S. P. Wilson v. Marsh*, *id.* 503.

*66. Where a bond is given for [*349] the consideration of a purchase, a false representation or warranty cannot be pleaded in discharge. *Vrooman v. Phelps*, 2 J. R. 177.

(b) *Implied warranty of title.*

67. In the sale of a chattel, a warranty of title is implied. *Defreeze v. Trumper*, 1 J. R. 274. *S. P. Heermance v. Vernoy*, 6 J. R. 5. *S. P. Swett v. Colgate*, 20 J. R. 196.

68. If a man sells a different interest from that which he pretends, and especially if the contract is founded in ignorance and fraud, the purchaser of the chattel may return it to the vendor, if he does so immediately after the discovery of the imposition, and thereby rescind the contract. *Kettledas v. Fleet*, 7 J. R. 324.

69. So, if the owner of a slave, after having given him a written promise to manumit him at a certain period, sell him, absolutely, without giving the vendee notice of the written agreement, the concealment is fraudulent, and the vendee, on becoming acquainted with the circumstances, may return the slave to the vendor, and rescind the contract. *Ibid.*

70. If the vendee has been evicted, he may, in an action by him against the vendor, on the implied warranty, give in evidence the record of the judgment obtained against him by the lawful owner of the thing sold, and which is conclusive to show a legal eviction. *Blasdale v. Babcock*, 1 J. R. 517.

71. If the vendee has once given notice to

the vendor that an action has been brought against him, it will be sufficient, and the vendor is bound to take notice of all the subsequent proceedings. *Ibid.*

72. A purchaser, with knowledge that the goods purchased are claimed by a third person, if he voluntarily pays the price of the goods to such person, cannot afterwards, in a suit brought by the vendor against him for the price, set up a want of title in the vendor, and that he had paid the price to the true owner, as a defence. *Vibbard v. Johnson*, 19 J. R. 77.

73. *Aliter*, if the purchaser was compelled to pay the price to another person, who claimed the property, and brought an action against him, and recovered. *Ibid.*

When a sale is fraudulent by reason of the possession continuing in the vendor. See FRAUDS, II. 27—41.

SALVAGE.

No salvage is allowable for recapturing a vessel which had been taken by a friendly power. *Peck v. Randall*, 1 J. R. 165.

*SCIRE FACIAS. [*350]

1. A *sci. fa.* is a new action, and requires a new warrant of attorney; so that if a different attorney from the one in the original suit issues it, a rule and notice to change the attorney, are not necessary. *Gonnigal v. Smith*, 6 J. R. 106.

2. A *fi. fa.* may be issued against the goods, &c. of a defendant, discharged under the act for the relief of debtors, with respect to the imprisonment of their persons, at any time, afterwards, without reviving the judgment. *Ibid.*

3. If a *fi. fa.* has been issued within the year, the plaintiff may, by continuing it on the roll, take out another execution, though of a different kind, without a *sci. fa.* *Ibid.*

4. Where a *habere facias possessionem* has been issued, and executed, but never returned, and a year and day intervened, the plaintiff may (the tenant having in the mean time retaken possession of the premises) issue a second execution, without a *scire facias*, as the first execution might have been continued down on the roll to the time of issuing the second, which, being merely matter of form, will be presumed to have been done. *Jackson, ex dem. Thompson, v. Stiles*, 9 J. R. 391.

5. If an execution issue after a year and day, without revival of the judgment, it is only voidable at the instance of the party against whom it issued. *Jackson, ex dem. McCrea, v. Bartlett*, 8 J. R. 361.

6. A *scire facias* cannot be issued to revive a judgment of more than ten years' standing, without a previous affidavit of the judgment being unsatisfied. *Lansing v. Lyons*, 9 J. R. 84.

7. And after a *scire facias* was issued, and returned *scire feci*, without such affidavit, the Court refused to allow it to be filed, *nunc pro tunc*; but quashed the *scire facias*. *Ibid*.

8. In a *scire facias* to revive a judgment, the venue must be laid in the same county in which it was laid in the original action. *McGill v. Perigo*, 9 J. R. 259.

9. There must be fifteen days between the *teste* of the first, and return of the second *scif.*, whether the suit were commenced by bill or original. *Little v. Woodman*, C. C. 54.

10. The rule to plead, in *scire facias*, is a rule of twenty days from the time that the same is entered, and the rule to appear is a rule of four days. *Reg. Gen. IV.*, April, 1796.

11. On a return of a *scire feci*, the plaintiff may enter a rule for the defendant to appear in four days, without giving him notice of the rule; but cannot enter his default till the four days have expired. *Spencer v. Webb*, 1 C. R. 118.

12. To a *scire facias* on a judgment, the defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the judgment. *McFarland v. Irwin*, 8 J. R. 77.

13. And it is the same, whether the judgment was entered up by confession on a warrant of attorney, or by default, or on a plea. *Ibid*.

*14. And where the judgment [*351] is by confession, the proper remedy is by an application to the Court for relief on motion. *Ibid*.

15. Where a judgment is revived by *scire facias* against the original defendant, it is not necessary to make the terre-tenants parties. *Jackson, ex dem. Sternberg, v. Shaffer*, 11 J. R. 513.

16. It is only necessary to join the terre-tenants where the original defendants are dead. *Ibid*.

17. Where a judgment creditor proceeds to enforce his lien on real estate, and it becomes necessary, for that purpose, to revive the judgment, he must make all the terre-tenants parties to the *scire facias*, in order that they may be compelled to contribute jointly to the payment and satisfaction of the debt. *Morton's Executors v. Terre-tenants of Croghan*, 20 J. R. 106.

18. If, in such case, some of the terre-tenants appear and plead, and others make default, and the plaintiff enters a *nolle prosequi* as to those who appeared and pleaded, and takes judgment by default against the others, it is a *discontinuance* as to all the defendants; and he must pay costs, as in case of discontinuance. *Ibid*.

19. *Aliter*, in actions of *tort*, where the plaintiff has his election to sue jointly or severally; or in *assumpsit*, or in *debt*, where one of the defendants pleads matter of personal discharge, which does not go to the action of the writ; as *bankruptcy* or *infancy*. *Ibid*.

20. A *scire facias*, issued on a judgment obtained against C., against A. and B. as terre-tenants of C., deceased, which was returned by the sheriff, that he had given notice to the

tenants of the land of which C. was seised, &c., to appear, &c. On the 5th of May, a rule was entered for the terre-tenants to appear. On the 9th of May, their defaults were entered, and on the 15th, the plaintiff entered final judgment; held, that the proceedings were regular, and the terre-tenants duly warned. *Whitney v. Camp*, 3 J. R. 86.

21. After judgment by default, the terre-tenants are too late to move to set aside the *scire facias* on the ground, that the heirs and personal representatives of the deceased had not been previously warned, or because they were not such terre-tenants as ought to have been previously summoned, especially when they disclosed no merits in behalf of themselves, or the representatives of the deceased. *Ibid*.

22. If the plaintiff, who sues out a *scire facias* to revive a judgment, does not proceed upon it within a year and a day, it is a discontinuance. *Vanderheyden v. Gardener*, 9 J. R. 79.

23. So, if he does not sue out execution on a judgment on *scire facias*, within a year and a day, he must revive it again. *Ibid*.

24. And if, after entering the defendant's default, he suffers more than a year and a day to elapse without entering judgment, it is a discontinuance, and a subsequent entry of judgment is irregular. *Ibid*.

25. A *scire facias* to revive a judgment, irregularly issued, or an execution issued after a year and a day, without a *scire facias*, is voidable only, and cannot be called in question, in a collateral action, so as to defeat the title of a purchaser, under the execution; and it seems, that after twenty years, it cannot be avoided on a direct application for that purpose. *Jackson, ex dem. Livingston, v. De Lancy*, in error, 13 J. R. 537. *S. C.* 15 J. R. 169. *S. C.* 16 J. R. 537. in error.

*26. Where A. devised lands in [*352] the county of Ulster, to C. for life, remainder to the heirs of A., and there being no actual occupant of the lands, a *scire facias* was issued on a judgment recovered against A., to the sheriff of the city and county of New-York, on which the heirs, but not the devisees of A. were warned to appear, and judgment was obtained upon the return of the *scire facias*, by default; held, that the heirs, not having appeared and pleaded to the *scire facias*, could not, afterwards, object that the tenant for life ought to have been summoned. *Ibid*.

27. Where a judgment is above ten, and under twenty years' standing, the plaintiff may apply to the Court for leave to issue a *scire facias*, supported by an affidavit of its being unpaid and unsatisfied. *Bank of New-York v. Eden*, 17 J. R. 105.

28. If the judgment is more than twenty years' standing, there must be a service of a notice of the motion, &c., or a rule to show cause. *Ibid*.

29. Where a judgment is above twenty years' standing, the Court have a discretion to grant or refuse a *scire facias*. *Ibid*.

30. Wherever there is a change of parties, by marriage, bankruptcy, or death, whereby

other persons become interested in the execution of the judgment, a *scire facias* is necessary to make such new person a party to the judgment. *Johnson v. Parnely*, 17 J. R. 271.

31. As where a *feme sole* plaintiff, after a report of referees in her favor, married, and a judgment was afterwards entered up on the report, and execution issued, without a *scire facias* having been issued to make the husband a party, the execution was set aside for irregularity. *Ibid*.

32. Where an execution is delayed for more than a year and a day, at the request, or with the consent of the defendant, or by an injunction from Chancery obtained by him, the plaintiff may take out execution without a previous *scire facias*. *United States v. Hinford*, 19 J. R. 173.

And see BAIL, VII. CHANCERY, LXL. PATENT, I. 8, 11.

SEARCH WARRANT.

1. A search warrant under the hand and seal of a justice, reciting information on oath, that certain goods, describing them, had been stolen by A. and B., and were concealed in the house of C., and commanding the officer, to whom it was directed, to enter the said house in the day time, and search for the articles stolen, and to bring them, with C., or the person in whose custody the goods should be found, before the justice, is a legal and valid warrant. *Bell v. Clapp*, 10 J. R. 263.

2. And a plea of justification under such a warrant need not state that it was in fact executed in the day time. *Ibid*.

3. The officer, in the execution of such a warrant, if the door be shut, may, [*353] after a demand and refusal to open it, break open the outer, or other door of the house. *Ibid*.

SET-OFF.

- I. In what actions, and against what plaintiffs, a set-off will be allowed.
- II. What demands may be set off.
- III. Plea and notice of set-off.

I. In what actions, and against what plaintiffs, a set-off will be allowed.

1. Dealings between the parties to the record only can be set off. *Prior v. Jacobs*, 1 J. C. 169.

2. It seems, that a set-off is not restricted to the parties on the record; but that if the plaintiff is merely an agent or trustee, the defendant may set off a debt due from the principal or cestui que trust. *Caines v. Brisbane*, in error, 13 J. R. 9.

3. But it seems, that if the agent had a lien on the demand of his principal, prior to the time when the defendant's right of set-off accrued, the latter is precluded from his set-off. *Ibid*.

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4. The words *mutual debts*, in the English statute of set-off and dealing together and being indebted to each other, in our act, are expressions of the same import, and the decisions on the former will equally apply to the latter. Per Kent, Ch. J. *Gordon v. Bourne*, 2 J. R. 150—155.

5. Set-offs of judgments are not within the letter of the statute; but Courts of law, in allowing them, proceed on the equity of the statute. Per Spencer, J. *Sinason v. Hart*, in error, 14 J. R. 63.

6. In an action for a tort, the defendant cannot set off. *Keeler v. Adams*, 3 C. R. 84.

7. To allow a set-off, the plaintiff's cause of action must be specific and certain, and of such a nature, that it could be set off by a defendant, if it existed in him. Per Kent, Ch. J. *Gordon v. Bourne*, 2 J. R. 150. *S. P. Burgetts v. Tucker*, 5 J. R. 105.

8. No set-off is admissible in an action on an open policy of insurance, although the demand be for a total loss, as the damages are uncertain and unliquidated. *Gordon v. Bourne*, 2 J. R. 150.

9. But, where one of three joint-owners of a vessel effected insurance on the freight in his own name, for account of the owners, by a valued policy, on which there was a total loss, and notice of abandonment duly given, but no adjustment made; held, that he might set off this loss, in an action brought against him by the insurers for premiums due to them on other policies of [*354] insurance. *Columbian Insurance Company v. Black*, 18 J. R. 149.

10. In an action on a policy of insurance, brought by an agent, who had the insurance effected in his own name, but for the benefit of a third person, which circumstance was known to the insurer, he cannot set off a debt due him from the plaintiff. *Gordon v. Church*, 2 C. R. 238.

11. If a person purchase goods of a factor, knowing him to have made the sale in that capacity, in an action by the factor for the price of the goods, the defendant cannot set off a demand which he may have against the plaintiff. *Bourne v. Robinson*, 2 C. C. E. 341.

12. Where a suit by A. against B., and one by B. against A. and C., are referred, and the referees set off a balance found for the plaintiff in the one suit against the balance found for the plaintiffs in the other, the report will be set aside. *Lyle v. Clason*, 1 C. R. 323.

13. In *assumpsit* for goods sold and delivered by A. and B. against C., C. pleaded, that at the time of the sale, &c., one R. carried on trade by the plaintiffs, and in their name, for his own account and risk; and that R., by the plaintiffs, under their name, &c., sold the goods, &c., and that B., as agent for the plaintiffs, assigned the debt or demand against C. to one F., to be collected and applied by him to pay a debt due to him from R., and that, before the assignment, and before the suit by A. and B. against C., R. was indebted to C. to a greater amount, &c., and was the person really, ultimately and beneficially interested in the suit. Held, that the action was properly

brought by A. and B. in their own names; and admitting R. was the *cestui que trust*, for whose benefit the goods were sold, the plea alleging also that F., as a *cestui que trust*, had brought the suit in the name of the plaintiffs, a Court of law could not recognize and settle such interfering and complicated trusts; and that the statute allowing set-offs did not apply to the case; besides, the defendant, instead of pleading in bar, ought to have pleaded the general issue, and given notice of the set-off, according to the directions of the act. *Alsop v. Caines*, 10 J. R. 396.

14. Where A. assigns securities to B., to receive the amount, and apply the same, for certain specified purposes, and hold the balance subject to his order, and A. afterwards directs B. to pay the balance to C., in an action of money had and received by C. against B., to recover such balance, B. cannot set off a demand which he may have against A. *Heston v. Barker*, 12 J. R. 276.

15. The defendant having made a promissory note, afterwards promised the assignee of the note to pay it; held, that he could not, in an action brought against him by the assignee, in the name of the payee, set off demands against the nominal plaintiff, prior to the making of the note, merely upon proof of such demands, without further explanation; as it was to be presumed from the fact of his giving the note, coupled with his promise to the assignee to pay it, that the subject of the set-off had been previously satisfied. *Gould v. Chase*, 16 J. R. 226.

16. The statute of set-off is not to be restricted to bonds for the payment of money alone. *Burgess v. Tucker*, 5 J. R. 105.

17. A set-off may be good as to one part of the condition of a bond, and not as to another. *Ibid.*

*18. In an action on an award, [355] a set-off is allowed. *Ibid.*

19. So, where the action is brought on the submission bond, for the sum awarded. *Ibid.*

20. In an action on a bond, the defendant's set-off is not against the penalty, but the sum actually due. *Ibid.*

21. Notwithstanding a set-off allowed in an action on an arbitration bond, the penalty of the bond remains a security for all future breaches of the condition. *Ibid.*

II. What demands may be set off.

22. A demand, to be set off, must have existed at the time of the commencement of the suit. *Carpenter v. Butterfield*, 3 J. C. 145. *S. P. Jefferson County Bank v. Chapman*, 19 J. R. 322.

23. So, if the defendant, after process was issued, but before the arrest, knowing that process had been issued, takes an endorsement of a promissory note made by the plaintiff, he cannot set it off. *Ibid.*

24. But where the *capias* was served after the term in which it was returnable, and the defendant endorsed his appearance, the plaintiff, in whose name the suit was brought, but for the benefit of an assignee, and without notice to the defendant of the assignment, was not permitted, on an affidavit stating a parol agreement that the proceedings should relate back to the previous term, to enter the

defendant's appearance as of that term, thereby to preclude him from making a set-off that he otherwise would have been entitled to. *Gordon v. Boune*, 1 C. R. 513.

25. Where, on receiving notice from the assignee of a bond of its assignment to him, the obligor paid to the assignee 100 dollars, and promised to pay the residue, without mentioning any demand or set-off that he had against the assignor, in an action afterwards brought on the bond; held, that the defendant could not set off any demand against the assignor, existing prior to the execution of the bond; and that it was to be presumed, from the promise made to the assignee, and the silence of the defendant, as to any set-off, that his demand against the assignor had been satisfied. *Henry v. Brown*, 19 J. R. 49.

26. Unliquidated damages are not a subject of set-off. *Brown v. Cuming*, 2 C. R. 33.

27. In an action by assignees of a bankrupt, for money due the bankrupt as supercargo of a ship, the defendant cannot set off a demand against the bankrupt for not keeping his vessel fully insured, the same being then unliquidated. *Ibid.*

28. A bond executed by the plaintiff, and assigned to the defendant by the obligor, before the commencement of the action, may be set off. *Tuttle v. Babes*, 8 J. R. 152.

29. An award for the payment of money may be set off. *Burgess v. Tucker*, 5 J. R. 105.

30. The penalty of a bond cannot be set off. *Ibid.*

31. S. signed a writing, by which, for value received, he promised to paint the house of L. in a particular manner, specified in the writing, and B. endorsed on the paper a promise that the agreement should be executed in a workman-like manner. [356]

In an action of *assumpsit* by S. in a Justice's Court, against L., he pleaded the agreement by way of set-off, and claimed damages for its non-performance: it was held to be a valid contract between S. and L., which might be set off. *Locks v. Smith*, 10 J. R. 250.

32. A note made by an insolvent, and purchased by the defendant after it became due, cannot be set off in an action brought by the assignees of the maker. *Johnson v. Bloodgood*, 1 J. C. 51. *S. C. 2 C. C. E. 302.*

33. In an action by an endorser of a promissory note against the maker, the latter will not be allowed to prove a set-off against the original payee, unless he previously show, that the note was transferred after it became due, or for the purpose of defrauding the maker of his set-off. *Hendricks v. Judah*, 1 J. R. 319.

34. So, a note endorsed after it has become due cannot be set off, in an action brought against the endorsee by the assignee of the maker. *Anderson v. Van Allen*, 19 J. R. 343.

35. In an action brought by the assignees of a bankrupt, the defendant cannot set off a check issued by the bankrupt, payable to bearer, and dated before the bankruptcy, unless he prove further, that the check came to his hands prior to the bankruptcy. *Ogden v. Conley*, 2 J. R. 274.

36. Whether a previous demand of pay-

ment of a bank note at the bank, is requisite, to enable the holder to set off such note in a suit brought against him? *Quære. Jefferson County Bank v. Chapman*, 19 J. R. 322.

37. The refusal of a bank to pay in *specie*, and the consequent stoppage of the payment of its bills, will not prevent a *bona fide* purchaser or holder of its bills, after that time, from setting off such bills, in a suit brought against him by the bank. *Ibid.*

38. Where the defendant purchased a judgment against O., who then held, as payee, the note of the defendant; and after the note became due, O. transferred the note to the plaintiff; *held*, that in a suit brought against the defendant on the note, he might set off the judgment. *Ford v. Stuart*, 19 J. R. 342.

39. In an action by an administrator for a debt due to the intestate, the defendant cannot set off a debt due from the intestate, purchased by the defendant after the death of the intestate. *Root v. Taylor*, 20 J. R. 137.

40. In several suits between the same parties, if the defendant has judgment in some, and the plaintiff recovers damages in others, the costs on the judgments for the defendant may be set off against the damages recovered by the plaintiff, but not against the costs. *Cole v. Grant*, 2 C. R. 105. *S. P. Devoy v. Boyer*, 3 J. R. 247.

41. Where the plaintiff, in the Supreme Court, recovers less than 50 dollars, the defendant may set off his costs against the amount recovered. *Spence v. White*, 1 J. C. 102. *S. P. Porter v. Lane*, 8 J. R. 357.

42. A judgment recovered in the Common Pleas, may be set off against a judgment in the Supreme Court. *Schermerhorn v. Schermerhorn*, 3 C. R. 190.

43. Where a judgment of reversal has been obtained in the Supreme Court of a judgment in the Common Pleas, and a restitution awarded, and afterwards a second judgment obtained by the same plaintiff against the same defendant, in the Common Pleas, that Court may set off the judgment of reversal against the second judgment, but the Supreme Court will not do it. *Brewerton v. Harris*, 1 J. R. 144.

III. Plea and notice of set-off.

44. In an action on a promissory note, by the endorsee against the maker, the defendant pleaded *non-assumpsit*, and payment, as to all except 40 cents, and payment of the 40 cents to the payee of the note before it was endorsed; and gave notice of a set-off of large sums of money paid to the payee, and other sums due to him from the payee for goods sold and delivered; *held*, that the defendant cannot set off more than the sum pleaded. *Prior v. Jacks*, 1 J. C. 169.

45. If the action had been debt, the plaintiff might have entered a *nolle prosequi* as to the 40 cents, and prayed final judgment for the residue; and in this action he might have made the like entry, and prayed interlocutory judgment, and he would have been equally entitled to the residue, on an assessment of damages. *Ibid.*

46. It seems, that a set-off cannot be pleaded, but that notice of it must be given in evidence under the general issue. *Caines v. Brisbane*, in error, 13 J. R. 9.

47. Where the defendant offers to set off a demand against the plaintiff which accrued more than six years before the suit, it is not necessary that the defendant, in his notice annexed to his plea, should state a promise to pay within six years. *Martin v. Williams*, 17 J. R. 330.

48. Nor is it an objection, that the demand offered to be set off was not originally due to the defendant, but had been assigned to him; the assignment being before the commencement of the suit. *Ibid.*

See CHANCERY, LXII.

*SHERIFF. [*358]

- I. Duty and authority of a sheriff.
- II. Privilege of a sheriff, and how he is to be imprisoned.
- III. Liability of a sheriff; attachment against him; and action on the bond given by him under the statute.
- IV. Deputy sheriff and gaoler.
- V. Sheriff's fees.
- VI. Bond, &c. for ease and favor, and colors *offici*.
- VII. Gaol liberties; (a) When the liberties of the gaol are to be granted, and on what security; (b) What is an escape from the gaol liberties for which the sheriff is liable; (c) Action for the escape, and evidence and defence therein; (d) Sheriff's remedy over.
- VIII. Change of the sheriff, and its consequences.

I. Duty and authority of a sheriff.

1. The sheriff is, *ex officio*, a conservator of the peace; and it is not only his right, but his duty, to arrest all persons, with their abettors, who oppose the execution of process. *Coyles v. Hurtn*, 10 J. R. 85.

2. The sheriff may take the power of the county, if necessary, after resistance, to execute process; and every man is bound to be aiding and assisting, upon order or summons, in preserving the peace, and apprehending offenders, and it is punishable if he refuses. *Ibid.*

3. Where the sheriff is endeavoring to make an arrest, or preserve the peace, and has commanded others to assist him, he is, although absent in some other place, if such absence be for the purpose of furthering the design, to be deemed constructively present, so as to justify his assistants. *Ibid.*

4. A sheriff cannot, with his own money, pay the plaintiff on an execution, and afterwards levy the execution out of the property of the defendant. *Reed v. Pruyn*, 7 J. R. 426.

5. Nor can he take a bond or other security, and detain the execution in his hands, and use it, afterwards, to enforce the payment of the money advanced by him. *Ibid.*

6. By the statute, (Sess. 36. ch. 67. s. 5.) on the death of a sheriff, the powers of the under sheriff to act in the name of the sheriff, survive for the benefit of the parties interested in the execution of the process delivered to the sheriff before his death; and though the under sheriff himself be appointed sheriff, he may proceed, under the provision of the statute, as under sheriff. *Ward v. Storey*, 18 J. R. 120.

7. And where there were several judgments docketed at different times, on some of which executions were delivered to the old sheriff before his death, and other executions on other judgments prior in time, were subsequently issued and delivered to the new [*359] sheriff, who took and sold the property of the defendant, under all the executions in his hands, the Supreme Court ordered that the several plaintiffs should be paid out of the moneys in the hands of the sheriff, according to the priority of their several judgments. *Ibid.*

8. A sheriff, in order to arrest a debtor or to levy an execution, may break open a warehouse, or store, or barn, not annexed to a dwelling-house, or forming any part of the curtilage, as well as the inner doors of a dwelling-house, trunks, chests, &c. *Haggerty v. Wilber*, 16 J. R. 287.

9. The sheriff, before the return day of the execution, ought to make an actual levy on the goods, by taking an inventory of them. *Ibid.*

10. Though an inventory may not be necessary in all cases; yet to make a valid levy, the sheriff must have the goods within his view, and under his power. *Ibid.*

11. Merely seizing a few articles outside of a warehouse or store, and proclaiming a levy on the goods locked up in the store, and not within view, is not a good and valid levy; but the sheriff ought, if necessary, to break open the store, and actually seize the goods and take an inventory of them. *Ibid.*

12. A sheriff cannot take notice of the privilege of an attorney, nor discharge him from arrest, even though he produces a writ of privilege; and if he does discharge, he is liable, as for an escape, for the amount of the debt, interest, &c. *Secor v. Bell*, 18 J. R. 52.

13. It is the duty of the sheriff to pay over to the plaintiff, without demand or request for that purpose, the money collected on execution; and if he neglects to do so, he will be liable to an attachment. *Brewster v. Van Ness*, 18 J. R. 133.

14. It is not sufficient that the sheriff returns to the execution, that he has the money in his hands, subject to the plaintiff's order. *Ibid.*

15. A deputy sheriff, having a *f. fa.* in his hands, agrees with the defendant in the execution to delay the sale, and to join with the defendant in making a note on which to raise the money and satisfy the execution, provided he should retain the execution in his hands, for his own indemnity, in case he was called on to pay the note. The money was accordingly raised on the note and paid over to the agent of the execution creditor, who was informed by the deputy, that the execution was still to

be kept alive for his own indemnity. The deputy being, afterwards, called on to pay the note, sold the defendant's property under the execution; held, that the payment to the judgment creditor not being a conditional payment, was a satisfaction of the judgment; and, therefore, the execution was spent, and could not be used by the deputy sheriff to enforce his agreement with the debtors; besides, such an agreement is illegal as tending to oppression and abuse; and the defendant in the execution may maintain an action of trespass against the officer, for taking the goods. *Sherman v. Boyce*, 15 J. R. 443.

*II. *Privilege of a sheriff, and how [*360] he is to be imprisoned.*

16. The sheriff is not privileged from arrest and imprisonment for debt. *Day v. Brett*, 6 J. R. 22.

17. And when arrested, the coroner is bound to find some other place within the county than the county gaol, for his imprisonment; this being a *casus omissus* in the statute book, and the coroner is left to the rule of the common law, by which a sheriff might make his own house, or any other place, a prison. *Ibid.*

18. If the coroner place him in the county gaol, it is an escape; for it is absurd to suppose that the sheriff can be committed to a gaol of which he has the custody, and of which he appoints the keeper. *Ibid.*

III. *Liability of a sheriff; attachment against him; and action on the bond given by him under the statute.*

19. If a sheriff levy an execution after the return day, he is liable to an action of trespass. *Vail v. Lewis*, 4 J. R. 450.

20. If the sheriff deliver goods seized, and sold under an execution, without receiving the money, he is liable for the amount. *Denton v. Livingston*, 9 J. R. 96.

21. *Assumpsit* lies against the sheriff for the amount of goods sold by him, though the purchaser, to whom they are delivered, refuses to pay for them. *Ibid.*

22. A sheriff is not liable to an attachment for not acting on an execution which never came to his personal knowledge, nor was lodged in his office, but was merely delivered to the deputy. *The People v. Waters*, 1 J. C. 137. S. C. C. C. 76.

23. A rule for an attachment against a sheriff, for not returning an execution delivered to his deputy, was granted, though twelve years had elapsed since the execution was issued. *Brockway v. Wilber*, 5 J. R. 358.

24. But the sheriff, when brought up on this attachment, was discharged, it appearing that the execution had been delivered to his deputy 14 years ago, and that the deputy was dead. *The People v. Gilleland*, 7 J. R. 555.

25. An action on the case lies against the sheriff for not returning an execution, or the plaintiff may proceed by attachment at his election. *Burk v. Campbell*, 15 J. R. 456.

26. In an action against the sheriff for not levying and returning a writ of *f. fa.*; a plea that the sheriff had never been ruled to return

the writ, is bad; for the sheriff is bound to return a writ, without being ruled for that purpose, and he cannot avail himself of his own neglect of duty to defeat the plaintiff's action. *Ibid.*

27. According to the true construction of the act concerning sheriffs, (Sess. 36. ch. 67. a. 6.) if the sheriff neglects to return an execution, the plaintiff, or party aggrieved by such default, in order to entitle himself to have the bond given by the sheriff, according [*361] to the statute, for the faithful performance of the office, put in suit against the sheriff and his sureties, must have previously recovered a judgment against the sheriff in an action against him grounded directly on such default. *The People v. Spraker*, 18 J. R. 390.

28. It is not enough that the plaintiff has proceeded by attachment against the sheriff for his default, and that a judgment has been recovered in the name of the people, against the sheriff, on his recognizance to appear on the return of the attachment. *Ibid.*

29. The statute is to be strictly construed in favor of sureties, who are not to be held responsible beyond the terms and scope of their undertaking. *Ibid.*

30. Where a sheriff's bond is sued at the instance of a party who has obtained a judgment against the sheriff, for his default, in an action on his bond, another party who has also obtained a judgment against him for his default, on application to the Court, is not entitled to have the amount of such judgment levied on the execution to be issued on the judgment recovered against the sheriff and his sureties on their bond, without having given previous notice to them of his motion to the Court for that purpose. *The People v. Birdsell*, 20 J. R. 297.

31. Interest on the judgment recovered by the party against the sheriff may be levied, together with the debt, and damages and costs, if the judgment be such as carries interest under the statute. *Ibid.*

32. The party, at whose instance a sheriff's bond is sued, may, after judgment against the sheriff and his sureties on their bond, move the Court to have the amount of the original judgment, with interest and costs, levied on the execution against the sheriff and his sureties, without any previous notice of the motion for that purpose. *The People v. Matthewson*, 20 J. R. 300.

Liability for the acts of his deputy. See post, IV.

IV. Deputy sheriff and gaoler.

33. Deputy sheriff and under sheriff, are used as synonymous terms; and while the sheriff is in the execution of his office, the under sheriff has no more power than any other general deputy. Per *Kent*, Ch. J. *Tillotson v. Cheekham*, 2 J. R. 63.

34. All writs of inquiry may be executed by a deputy of the sheriff, except where the sheriff is directed by statute, or the writ itself, to execute it in person. *Ibid.*

35. So, he may execute a deed, in the name of the sheriff, to a purchaser under a *fi. fa.* *Jackson*, ex dem. *Masten*, v. *Bush*, 10 J. R. 223.

36. It is not necessary to show a special authority from the sheriff for that purpose. *Jackson*, ex dem. *Randall*, v. *Davis*, 18 J. R. 7.

37. No deputy can transfer his general powers, but he may constitute a servant or bailiff to do a particular act; hence, an under sheriff may depute a person to serve a writ. *Hunt v. Barrell*, 5 J. R. 137.

*38. The embezzlement of [*362] moneys received by the under sheriff, is a breach of the condition of the bond, for his executing his office according to law, and without fraud. *Hughes v. Smith*, 5 J. R. 168.

39. On the renewal of the sheriff's commission, or his re-appointment, there being no intermediate time during which he was not sheriff, no new appointment of the under sheriff is necessary, neither need his bond be renewed, but he continues under sheriff, and the bond stands as security against subsequent breaches. *Ibid.*

40. An action lies against the sheriff for the act of his deputy, in taking more fees, on levying an execution, than are allowed by law; and whether the sheriff recognized the act of his deputy or not, need not be shown. *M'Intyre v. Trumbull*, 7 J. R. 35.

41. Where the deputy gives the sheriff a bond to indemnify him for, touching, and concerning, the execution and return of all processes, writs, &c. which might be executed by the deputy; and the deputy having taken insufficient bail, the sheriff had, in consequence, been attached for not bringing in the body; in an action by the sheriff on the bond, it is no defence that the bail taken by the deputy were, at the time of executing the bail bond, good and sufficient; for the liability of the defendant is not to be confined to cases where the deputy has failed in good faith and due discretion, but to all risks which the law attaches to the execution of the process, one of which is the permanent responsibility of the bail to the arrest. *Stevens v. Boyce*, 9 J. R. 292.

42. Although an action will not lie against an under sheriff, for a breach of duty, yet his promise, upon request, to pay money which he had collected for the plaintiff, will make him personally responsible; but it must be a clear and absolute promise. *Tuttle v. Love*, 7 J. R. 470.

43. The declaration and confessions of a deputy sheriff, made to the attorney of the plaintiff, in answer to inquiries relative to an execution delivered to such deputy to be executed, and while the execution was in force, are admissible evidence to charge the sheriff. *Mott v. Kip*, 10 J. R. 478.

44. It seems, that a special action on the case will not lie against a gaoler, at the suit of the sheriff, for a negligent escape; but that, if the sheriff has omitted to take a bond of indemnity, the gaoler is answerable to him only in *assumpsit*, on his implied undertaking to serve the sheriff with diligence and fidelity. *Kain v. Ostrander*, 8 J. R. 207.

V. Sheriff's fees.

45. Where a sheriff levies under a *fi. fa.*, and, before the sale, the parties compromise, he will, notwithstanding, be entitled to poundage on the sum directed to be levied. *Hildreth v. Ellice*, 1 C. R. 192.

46. The sheriff is entitled to his poundage on a *ca. sa.*, immediately on taking the defendant's body. *Adams v. Hopkins*, 5 J. R. 252.

47. Where a defendant has been taken under a *ca. sa.*, and discharged from the custody of the sheriff, on the ground [*363] that no previous *fi. fa.* had been issued on the judgment, (there being no special bail in the action,) the sheriff is, notwithstanding, entitled to poundage, as he has incurred the risk of being made liable for the escape, in an action for which, he could not have availed himself of such irregularity as a defence. *Scott v. Shaw*, 13 J. R. 378.

48. And it makes no difference that the defendant, after being so discharged, confessed a new judgment to the plaintiff for the amount of the former judgment on which satisfaction had been entered, and that on *ca. sa.* regularly issued on the second judgment, the sheriff had been paid his poundage. *Ibid.*

49. And he is not obliged to resort to the plaintiff, but may demand his poundage of the attorney. *Adams v. Hopkins*, 5 J. R. 252.

50. And in all cases, the attorney is liable to the sheriff for his fees. *Ousterhout v. Day*, 9 J. R. 114. *Adams v. Hopkins*, 5 J. R. 252.

51. Admitting that the sheriff may look to the client, in the first instance, for his fees, yet, if he sues the attorney, without demanding them of the client, he thereby determines his election, and cannot afterwards resort to the client. *Ousterhout v. Day*, 9 J. R. 114.

52. The sheriff, on levying a fine, cannot demand his fees of the party; but the practice is for him to charge them in his account. *Gilbert v. Brazier*, 1 C. R. 13.

53. If, after a jury has been summoned for the circuit, but before the return day of the *venire*, the sheriff goes out of office, he is entitled to the fees for summoning the jury, but not for returning the *venire*. *Woods v. Gibson*, 6 J. R. 125.

54. A sheriff is entitled to his reasonable fees and expenses for bringing up a former sheriff, on an attachment for a contempt in not returning process. *Smith v. Birdsall*, 9 J. R. 328.

55. If the sheriff arrest a person while privileged from arrest, such service being irregular and void, he is not entitled to any fees. *Wragg v. Swart*, 10 J. R. 93.

56. A sheriff is entitled to three dollars *per diem*, for going to, and returning from the Supreme Court, when compelled to attend. *Bryan v. Seely*, 13 J. R. 123.

VI. Bond, &c., for ease and favor, and colore officii.

[Sess. 36. c. 67. a. 13. 1 N. R. L. 423.]

57. A bond at common law, to the sheriff, conditioned that the party will remain a true

and faithful prisoner, is good. *Dole v. Bull*, 2 J. C. 239.

58. A bond taken by the sheriff to induce a less rigorous confinement, (as a bond to permit the prisoner to go at large within the walls of the prison,) if the indulgence be such as he may grant consistently with his duty, is not a bond for ease and favor. *Ibid.*

59. A bond to indemnify the sheriff against an escape already suffered, is good. *Given v. Driggs*, 1 C. R. 450.

*60. But a bond to indemnify a [*364] sheriff for not taking to prison a person against whom he held a *ca. sa.*, is void, being a bond to indemnify against an escape then in contemplation. *Love v. Palmer*, 7 J. R. 159.

61. The Supreme Court said, that they were inclined to think that a bond given by a prisoner in execution to the sheriff or gaoler, for the amount of the debt and additional charges, (in order to procure his release,) was a bond for ease and favor, and by color of office. *Richmond v. Roberts*, 7 J. R. 319.

62. If a sheriff, on arresting a defendant, take from him the promissory note of A., endorsed by the defendant in blank, as security, the assignment or transfer is illegal and void, being contrary to the statute concerning sheriffs. *Strong v. Tompkins*, 8 J. R. 98.

63. And in an action against the maker, by the sheriff as endorsee, the defendant may avail himself of that fact to defeat the action. *Ibid.*

64. Any contract, or even a promise to save harmless, is within the statute, and void, although the act speaks only of an obligation. *Ibid.*

VII. Gaol liberties; (a) *When the liberties of the gaol are to be granted, and on what security;* (b) *What is an escape from the gaol liberties, for which the sheriff is liable;* (c) *Action for the escape, and evidence and defence therein;* (d) *Sheriff's remedy over.*

[Sess. 36. c. 69. 1 N. R. L. 429.]

(a) *When the liberties of the gaol are to be granted, and on what security.*

65. The act is imperative on the sheriff to grant the liberties, on tender of a sufficient bond. *Holmes v. Lansing*, 3 J. C. 73.

66. The sheriff is not bound to take a bond until the liberties are defined according to law. *Bissell v. Kip*, 5 J. R. 89.

67. A prisoner in execution under an attachment for costs, is entitled to the liberties. *Jackson, ex dem. Green, v. Billings*, 1 C. R. 252.

68. A defendant who has been surrendered by his bail, is in custody on civil process, and is entitled to the liberties, and his bond is assignable within the act, Sess. 32. c. 148. *Kellogg v. Manro*, 9 J. R. 300.

69. The bond under the statute may be taken in double the amount of the execution, together with the sheriff's fees for poundage. *Dole v. Moulton*, 2 J. C. 205. *S. P. Smith v. Jansen*, 8 J. R. 111.

70. A warrant of attorney given to the sheriff, to confess judgment on a bond for the lib-

erties of the prison, is void. *Dole v. Moulton*, 1 J. C. 129.

71. The bond is merely for the sheriff's indemnity, which he may waive, and grant the liberties without taking security. *Holmes v. Lansing*, 3 J. C. 73. *Peters v. Henry*, 6 J. R. 121.

72. In the condition of a bond taken by the sheriff, on suffering a prisoner in [*365] execution to go at large within the gaol liberties, the sheriff added to the condition authorized by the statute, the following words: "that the prisoner should, at the request of the sheriff, again surrender himself to the prison," &c.; held, that the bond was void, as taken *colore officii*, and in terms not authorized by the statute. *Sullivan v. Alexander*, 19 J. R. 233.

(b) *What is an escape from the gaol liberties, for which the sheriff is liable.*

73. For a mere involuntary escape on the part of the prisoner, as by accidentally or inadvertently going beyond the liberties which were bounded by an imaginary line, and returning immediately before action brought, the sheriff is not liable. *Dole v. Moulton*, 2 J. C. 205. *S. P. Ballou v. Kip*, 7 J. R. 175. *Kip v. Babcock*, *id.* 178.

74. If the prisoner go beyond the liberties, knowingly, and voluntarily, on the pretence of avoiding a bank of snow, which obstructed his usual walk, it is an escape, the cause assigned being insufficient. *Bissell v. Kip*, 5 J. R. 89.

75. Where the liberties were not defined by visible marks or boundaries, and the prisoner went beyond them into a building which was supposed to be within the limits, and staid one hour, and then returned, it is an escape for which the sheriff is liable. *Ibid.*

76. But if the defendant had averred that the prisoner returned before suit brought, it would be a good defence; and without such an averment, the plea is bad in admitting the escape without a justification, and it will be intended that the plaintiff commenced his suit pending the escape, and before the return. *Ibid.*

77. If a prisoner, admitted to the liberties, without giving security, go beyond the limits, but return before suit brought, the sheriff is not liable for an escape. *Peters v. Henry*, 6 J. R. 121.

78. The act regulating the liberties of gaols is to be considered as enlarging the prison to the assigned limits, and as long as the prisoner is within those limits, he is to be considered in prison. *Holmes v. Lansing*, 3 J. C. 73. *S. P. Peters v. Henry*, 5 J. R. 121. See *post*, 89.

79. The prisoner is bound, at his peril, and at the risk of his sureties, to keep within the liberties: and if the lines are in any part vague and indefinite, he should confine himself within places where they are not so. *Kip v. Brigham*, 7 J. R. 168.

80. The liberties having been appointed, it is the duty of the sheriff to take the bond;

but it is not his duty, but that of the prisoner, to ascertain the lines, and to observe them. *Ibid.*

81. Where the limits of the liberties, as described in the map and survey on record, are uncertain and contradictory, it seems that the reputed limits are the best evidence of the actual liberties of the gaol. *Ballou v. Kip*, 7 J. R. 175.

(c) *Action for the escape, and evidence and defence therein.*

82. In an action on a bond for the liberties, the suggestion of the "breach generally, in the words of the condition, is sufficient, without alleging the particular damages. *Smith v. Jansen*, 8 J. R. 111.

83. The plaintiff, in a suit on the bond, is, *prima facie*, entitled to recover the whole debt due in the original suit, and, at least, as much as he has actually lost by the escape. *Kellogg v. Mauro*, 9 J. R. 300.

84. In order to charge the sheriff with the escape, it is sufficient evidence, *prima facie*, on the part of the plaintiff, that the prisoner was seen at large, walking in the street. *Steward v. Kip*, 7 J. R. 165.

85. Where a bond, taken by a new sheriff for his security in granting the liberties of the gaol to a prisoner in execution, stated the amount of the execution for which he was in custody, it was held conclusive as to the fact, so that the sheriff, in an action afterwards against him for an escape, could not allege that it was not the true sum, or that he had not notice of the true sum before the escape. *Tallmadge v. Richmond*, 9 J. R. 85.

86. The bond given to the sheriff is intended as an indemnity for his liability to the plaintiff, but, technically, it is not a bond of indemnity, and *non damnicatus* is not a good plea. *Woods v. Rowan*, 5 J. R. 42.

87. It does not justify an escape, that the liberties were undefined by visible boundaries or monuments. *Bissell v. Kip*, 5 J. R. 89.

88. The sheriff, in an action against him, cannot take advantage of error in the execution. *Ibid.*

89. By the act relative to gaols, (Sess. 24. c. 91.) passed 30th March, 1801, the liberties are merely an extension of the walls of the prison; and if the prisoner, who has given a bond to the sheriff for the liberties, voluntarily goes beyond the limits, his bond is forfeited, and the sheriff may retake him on fresh pursuit, and recommit him to close custody, or bring an action on the bond. *Jansen v. Hilton*, in error, 10 J. R. 549. *S. P. Barry v. Mandell*, 10 J. R. 563.

90. And where such prisoner goes beyond the liberties, without the privity or consent of the sheriff, and an action is brought against the sheriff for an escape, he may plead (as at common law) a recaption on fresh pursuit, or voluntary return before suit brought, in bar of the action, in the same manner as if there had been no liberties established, and the escape had been from the walls of the prison. *Ibid.*

91. And the duty of sheriffs, as to escapes, and their defence of recaption and voluntary return before suit brought, remain the same as before the statute relative to gaol liberties, and before the act of the 5th April, 1810. (Sess. 33. c. 187.) *Ibid.*

92. The bonds given to sheriffs for the liberties are for their indemnity only; and neither the sheriff nor his assignee (in case of an assignment, by virtue of the act of the 28th March, 1800, sess. 32. c. 148.) can recover on such bond, without showing that he is injured or damaged. *Barry v. Mandell*, 10 J. R. 563.

93. And to an action on such bond by the sheriff or his assignee, it is a good plea in bar, that the prisoner voluntarily returned before suit brought. *Ibid.*

*94. But even if this construction of the act of the 28th March, 1800, is not well founded, yet the act of the 5th April, 1810, is so far a virtual repeal of the provisions of former acts; for the recaption on fresh pursuit, or voluntary return before action brought, being a good defence to the sheriff, is an action against him for the escape, it is equally a good defence for the prisoner and his sureties, in a suit against them by the sheriff or his assignee, on the bond. *Ibid.*

95. But see the cases of *Tilman v. Lansing*, 4 J. R. 45. *Dash v. Van Kleeck*, 7 J. R. 497. *Mandell v. Barry*, 9 J. R. 234. in the Supreme Court. In *Tilman v. Lansing*, it was held, that neither recaption nor voluntary return before suit brought, purged an escape by a prisoner who had given a bond for the liberties, such escape being neither a voluntary nor a negligent escape, and the sheriff having no power to retake. By the act of the 5th April, 1810, (Sess. 33. c. 187. s. 2.) passed after the decision in *Tilman v. Lansing*, sheriffs were permitted to plead recaption or voluntary return, as at common law: but in *Dash v. Van Kleeck*, it was held, that the act had not a retrospective operation, so that a sheriff could not avail himself of these pleas, in actions commenced before that statute was passed; and in *Mandell v. Barry*, (reversed, *ut supra*, in the Court of Errors,) it was held, by the Supreme Court, that the act was intended only for the relief of the sheriff, and was no protection in an action by the assignee of the sheriff's bond against the original debtor and his sureties.

96. Where a prisoner, on execution, admitted to the liberties of the gaol, went beyond the limits on Sunday, and the plaintiff, on the same day, before the prisoner's return, filled up a *capias* against the sheriff for the escape and delivered it to the coroner; held, that the process being issued on Sunday, was void, and, therefore, not such a commencement of a suit as would prevent the sheriff from pleading a voluntary return before suit brought. *Van Vechten v. Paddock*, 19 J. R. 178.

97. A debtor in execution left the gaol liberties on Sunday, and went to the plaintiff's house, and obtained his written permission to go at large until nine o'clock the next morning; held, that the permission was no defence in an action for the escape against the sheriff, espe-

cially as the debtor obtained the license fraudulently, supposing that the judgment would be thereby discharged. *Sweet v. Palmer*, 16 J. R. 181.

98. An action against the sheriff for an escape is not well commenced by handing a writ to a person, with directions to go and see the prisoner off the limits of the gaol liberties, and then to deliver the writ to the coroner. *Vischer v. Ganssvoort*, 18 J. R. 496.

99. The writ must be actually delivered to the coroner, or left at his office, or be issued and sent to him, with the absolute, positive and unequivocal intention to commence the suit while the prisoner is off the limits. *Ibid.*

100. To support the action, the fact of the prisoner being beyond the limits of the gaol liberties, must be affirmatively and satisfactorily shown, by direct and positive proof. Nothing will be intended or inferred. *Ibid.*

*101. Where a *capias ad respond.* against a sheriff for an escape, was [*368] delivered to the wife of the coroner,

at his dwelling-house, (the coroner being then absent,) while the prisoner was actually beyond the limits of the gaol liberties, though he immediately after returned, it is a sufficient commencement of an action against the sheriff before the return of the prisoner, within the liberties, so as to make the sheriff liable for the escape. *Brown v. Earl*, 17 J. R. 63.

102. If the jury, in an action for an escape, find that the prisoner voluntarily returned before suit brought, but that the defendant had not filed, with his plea, an affidavit that the escape was without the knowledge or consent of the defendant, the finding as to the want of an affidavit, may be rejected as surplusage, being matter not in issue, but belonging exclusively to the Court. *Richmond v. Tallmadge*, in error 16 J. R. 307.

103. Whether, under the statute concerning sheriffs, (Sess. 33. c. 418.) a plea of a voluntary return before suit brought, need be verified by affidavit; the words of the act applying only to a plea of retaking on a fresh pursuit? *Quære. Ibid.*

104. If the plea of a voluntary return of the prisoner, before suit brought, is not verified by affidavit, the plaintiff may treat the plea as a nullity, or move the Court to set it aside, or if the general issue be pleaded with notice of such defence, he may move the Court to strike out the notice. *Ibid.*

105. But if he accepts the plea, without affidavit, and goes to trial, he cannot make the objection at the trial. *Ibid.*

106. A promise to indemnify the sheriff for a voluntary escape already made, is valid. *Doty v. Wilson*, 14 J. R. 376.

107. Though a previous contract of a creditor, that his debtor in execution, may leave the liberties of the gaol, will excuse the escape and discharge the judgment; yet an agreement subsequent to the escape that the debtor may remain out of the limits, is no discharge; for a right of action for the escape, having once accrued, can only be defeated by a release under seal, or an agreement for a valuable consideration. *Sweet v. Palmer*, 16 J. R. 181.

(d) *Sheriff's remedy over.*

108. Where an action is brought against the sheriff for an escape, the Court will stay execution on the judgment, to allow the sheriff time to bring his action on the bond. (Sess. 31. c. 148. s. 2.) *M'Intyre v. Woods*, 5 J. R. 357.

109. The sheriff is not liable to pay interest during the time the proceedings are so staid. *Ibid.*

110. After a recovery against the sheriff, in an action by him, on the bond against the sureties, he is entitled to recover the costs of defending the suit against himself for the escape, as part of the damages. *Kip v. Brigham*, 7 J. R. 168.

111. In an action against a sheriff for an escape, he gave notice of the suit to the prisoner's sureties, who, in conjunction with the sheriff, defended it, and judgment was given against the sheriff; in an action by the sheriff, against the sureties, on the bond for his indemnity, the former judgment is conclusive evidence, and the defendants cannot

[*369] *controvert the fact of the escape. *Kip v. Brigham*, 6 J. R. 158. S. C. 7 J. R. 168.

112. Where a verdict has been recovered against the sheriff, in an action by him, afterwards, on the bond, the *postea*, without the judgment is evidence to prove the recovery and actual damages, at least, if not the escape. *Kip v. Brigham*, 7 J. R. 168.

113. Where a bond is given to the sheriff for the gaol liberties, and the debtor escapes, but is afterwards taken into custody, and a new bond, with new sureties, is given to the sheriff, this does not take away the sheriff's right of action against the surety on the first bond, in consequence of the sheriff's being sued for the escape. *Leal v. Wigram*, 12 J. R. 88.

114. In an action on a bond given to a sheriff for the gaol liberties, the judgment is for the plaintiff for the whole penalty; but he cannot have execution for more than the original debt, with interest and costs. *Sprague v. Seymour*, 15 J. R. 474.

115. Where judgment has been obtained against the sheriff for the escape of the prisoner on execution, who has given a bond for the gaol liberties, the sureties are entitled to prosecute a writ of error in the name of the sheriff, to reverse the judgment against him; a recovery against the sheriff being, in effect, a recovery against them; and if the sheriff release errors in the judgment, it will be set aside in equity. *Lyon v. Tallmadge*, in error, 14 J. R. 501.

VIII. *Change of the sheriff, and its consequences.*

116. If, after the arrest, and before the defendant has given bail, he is delivered over by the sheriff, by whom he is arrested, to his successor, the assignment will not affect his right to be discharged on giving bail. *Richards v. Porter*, 7 J. R. 137.

117. After the old sheriff is out of office, he cannot return a writ executed by him. *Ibid.*

118. The old sheriff should deliver the writ to his successor, who ought to return it in to

Court, with the former sheriff's return thereon. *Ibid.*

119. And if the new sheriff, before the return day of the writ, let the defendant to bail, he should add to the former sheriff's return, stating the fact. *Ibid.*

120. If the former sheriff does not deliver the writ to the new sheriff, but returns it himself, *cepi corpus in custodia*, and the new sheriff lets the defendant to bail, he will not be liable to the plaintiff for not giving him notice; for the irregularity was in the old sheriff, in not handing over the writ. *Ibid.*

121. If a writ, delivered to the old sheriff, is not specified in the indenture of assignment, the new sheriff is not bound to take or detain the defendant thereon. *Ibid.*

122. And whether, without a delivery of the writ to the new sheriff, he is responsible for a prisoner taken by the old sheriff, and transferred to him before the return day? *Quære. Ibid.*

123. Where a new sheriff is appointed, the prisoners remain in *custody of the old sheriff, until they are delivered [*370] to his successor. *Hempstead v. Weed*, 20 J. R. 64.

124. If, therefore, the old sheriff omits to assign over to the new sheriff, a prisoner on execution who has been allowed to go within the gaol liberties, on giving security for that purpose, this is not an escape, for which the old sheriff is liable, as long as the prisoner remains within the limits of the liberties. *Ibid.*

125. The right of the old sheriff to assign over to his successor in office, prisoners on civil execution, being for his own security and benefit, may be waived by him; but the prisoners not delivered over, are to be deemed, to all intents and purposes, in his custody; and, in case of actual escape, he will be liable. *Ibid.*

126. Where an indenture of assignment of prisoners, from the old to the new sheriff, specified a suit by the title of *A. B. & Co. v. C.*; held, that this was sufficiently certain, without giving the names of all the plaintiffs at large: it was a sufficient notice to the new sheriff of the execution against the prisoner. *Tallmadge v. Richmond*, 9 J. R. 85.

See tit. CHANCERY, XXIII. LXIII.

SHIPS AND SEAMEN.

I. *Owners of ships or vessels, and their liability.*

II. *Authority of masters of ships.*

III. *Liability of masters.*

IV. *Charter party and affreightment*; (a) *When freight is due*; by whom to be paid, and of the lien on the goods; (b) *Pro rata freight, and return of freight*; (c) *Demurrage*; (d) *Expenses attending goods*; (e) *Of the dissolution of the contract of affreightment*; (f) *Action for the non-delivery of the goods, and damages.*

V. *Seamen*; (a) *Hiring and wages*; (b) *Liability for embezzlement of cargo*; (c) *Sureties for seamen.*

1. Owners of ships or vessels, and their liability.

1. If the owner of a vessel charter her for a voyage, retaining, however, the management of her, and hiring and paying the master and crew, and furnishing them with provisions, the hirer does not become owner, *pro hac vice*, but the original ownership continues. *M'Intyre v. Bourne*, 1 J. R. 229.

2. If the owner of a vessel charters her to the master for a certain period of time, the master covenanting to virtual and man her at his own cost, he is to be deemed the owner *pro hac vice*. *Hallet v. Columbian Insurance Company*, 8 J. R. 272.

3. The register of a ship is not evidence of the ownership of the *person in whose [*371] name it stands. *Leonard v. Huntington*, 15 J. R. 298. *S. P. Sharpe v. United Insurance Company*, 14 J. R. 201.

4. Where a vessel, under the charge of a pilot, while the master is on shore, runs against and injures another vessel, (the master being held not to be responsible,) whether the owners are liable for the conduct of the pilot? *Snell v. Rich*, 1 J. R. 305. (See *Bussy v. Donaldson*, 4 Dall. 206.) (See *PILOT*.)

5. The owners of a vessel, as well as the master, are responsible for the goods which they have undertaken to carry, if stolen or embezzled by the crew, or any other person, though there be no fault or negligence imputed to them. *Schieffelin v. Harvey*, 6 J. R. 170.

6. Where goods were shipped at *New-York*, to be delivered at *London*, and on the arrival of the ship the goods were refused admission, being prohibited by the laws of *England*, and the consignee and master agreed that the goods should remain on board, and be returned to the shippers in *New-York*, at their risk, they paying the freight from *London*, and an endorsement was made on the bill of lading to that effect; held, that the ship owner was responsible for the embezzlement of any part of the goods between the time of their first shipment at *New-York* and their return thither, though *English* custom-house officers were on board during the time the vessel was in *London*, and though they may have embezzled the goods, and not the master or crew, or any person with their knowledge. *Ibid*.

7. The owner, as well as the master, is liable for repairs done to a vessel. *Marquand v. Webb*, 16 J. R. 89.

8. Where a person supplied stores to a ship on the order of one of several owners, who acted as the ship's husband, and took his note in payment, and gave a receipt in full; held, that all the owners were liable, the note not being paid. *Schemerhorn v. Loines*, 7 J. R. 311.

9. A mortgagee of a ship, out of possession, is not deemed the owner, so as to be liable for repairs or necessities furnished the ship, not a charge or lien on the ship itself. *M'Intyre v. Scott*, 8 J. R. 159.

10. A mortgagee of a ship in possession is liable to the master for his wages, if the voyage be performed for the benefit of the mortgagee. *Champlin v. Butler*, 18 J. R. 169.

11. But where the master made a special agreement, as to his wages, with M., the mortgagee, or real owner of the vessel, and with full knowledge of a private agreement between M., and the defendant, who had no interest in the voyage, but merely lent his name to cover the voyage for the benefit of M., and without receiving the freight or profit; held, that the plaintiff was bound by his special agreement, and could not waive it, and sue the defendant as owner. *Ibid*.

12. Where a contract was entered into for the sale of a vessel, the possession of which was immediately taken by the purchaser, but it was agreed, that a bill of sale was not to be given, until the whole of the purchase money was paid; and, in the mean time, the register stood in the name of the original owner, who, however, exercised no control, in any respect, over the vessel; held, that he was not liable for repairs made by direction of the master, as agent for, and on the credit of the purchaser of the vessel, between the time of the execution *of the contract, and [*372] its final consummation, by delivery of the bill of sale; but that the person furnishing the repairs must look to the purchaser for payment. *Leonard v. Huntington*, 15 J. R. 298.

13. In an action by the master for his wages against the owner of a ship, who held an absolute bill of sale from M., as well as a register of the ship in his own name, the defendant may prove by parol, that the bill of sale was given by him merely as collateral security, by way of mortgage. *Champlin v. Butler*, 18 J. R. 169.

14. Where a ship is not put up as a general ship, but is employed by the owner on his own account, and the master receives the goods of another person on board, as a part of his privilege, taking to himself the freight and commission, the owner of the ship is not liable in case of embezzlement, or for the conduct of the master in relation to the goods. *King v. Lenox*, 19 J. R. 235.

II. Authority of the master.

15. A master, who is both owner and consignee, bears the former character alone during the voyage, and of which he cannot divest himself. *Kendrick v. Delafield*, 2 C. R. 67.

16. The master may borrow money, on the credit of his owner, for necessary expenses and repairs. *Milward v. Hallett*, 2 C. R. 77.

17. It seems, that the master may borrow money to pay the export duty on the return cargo, it being done in good faith, and for the benefit of his owner. *Ibid*.

18. But if the owner receives the cargo, it is an affirmation of the master's act, and he is exonerated. *Ibid*.

19. The authority of the master, as such, to appropriate the cargo to repairs on the vessel, determines by his arrival at the port of destination. *United Insurance Company v. Scott*, 1 J. R. 106.

20. In case of necessity, the master may sell a part, or hypothecate the whole of the cargo,

for the necessary repairs of the ship; but he cannot mortgage or hypothecate the ship for the benefit of the cargo. *Fontaine v. Columbian Insurance Company*, 9 J. R. 29.

21. The master of a vessel may inflict moderate correction on his seamen, for sufficient cause; if he exceeds the bounds of moderation, and is guilty of unnecessary severity or cruelty, he will be liable as a trespasser. *Brown v. Howard*, 14 J. R. 119.

III. Liability of masters.

22. A master of a vessel signs bills of lading for goods laden on board his vessel, one of which he keeps, accompanied with proofs of the neutrality of the property; the vessel is captured, and the cargo, among which were the goods in question, libelled; the master puts in his claim, and, in his answer to the interrogatories, states that he had signed no bill of lading for these goods, on which account they are condemned, but the residue of the cargo is libelled; the master, acting *bona fide*, in this case, is not liable to the owner, [*373] for he might have forgotten *that he had signed a bill of lading, his papers having been taken from him by the captors, and his answer was not sufficient to justify a condemnation. *Cheviot v. Brooks*, 1 J. R. 364.

23. An action will not lie against the master of a vessel, for running his vessel against and injuring another, the master himself being ashore, and a pilot on board. *Snell v. Rich*, 1 J. R. 305. [See *Pilot*.]

24. The master of a ship is responsible for the goods which he has undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to him. *Schieffelin v. Harvey*, 6 J. R. 170.

25. Where goods are embezzled or lost during the voyage, the master is bound to answer for the value of the goods missing, according to the clear nett value of the goods of like kind and quality, at the port of delivery. *Watkinson v. Loughton*, 8 J. R. 213.

26. But whether he is liable to pay interest from the time when the goods ought to have been delivered, or not, depends on the circumstances of the case; but if no fraud or misconduct is imputable to the master, interest will not be allowed. *Ibid*.

27. A master of a vessel having signed a bill of lading to deliver goods at *Norfolk*, to N. T., who was a transient person, not resident there, and having no agent there; on his arrival, not being able to find the consignee, he delivered them to a third person for him; having acted *bona fide*, and according to the usage of trade, the master is not liable to the consignor. *Mayell v. Potter*, 2 J. C. 371.

IV. Contract of charter party and affreightment; (a) *When the freight is due, and by whom it is to be paid, and of the lien on the goods for the freight*; (b) *Pro rata freight, and return of freight*; (c) *Demurrage*; (d) *Expenses attending the goods*; (e) *Of the*

dissolution of the contract of affreightment; (f) *Action for the non-delivery of goods, and damages*.

(a) *When the freight is due, and by whom it is to be paid, and of the lien on the goods for the freight*.

28. No freight is due for goods which perish by perils of the sea, during the course of the voyage. *Früh v. Barker*, 2 J. R. 327.

29. So, where several hogsheads of sugar were shipped, and, during the voyage, the ship leaked, owing to tempestuous weather, and the sugar was washed out of some of the hogsheads, which, in consequence, arrived empty at the port of destination; no freight was due for the empty hogsheads. *Ibid*.

30. This rule will not apply to the case of an article lost by other causes than the perils of the sea, such as internal decay, leakage, evaporation, and the like. Per *Kent*, Ch. J. *Ibid*.

31. Whether the shipper may abandon goods deteriorated by the perils of the sea to the ship owner? *Quere. Ibid*.

32. Where goods are carried to the place of destination, though spoiled so as to be of no value, the owner cannot abandon the goods for the freight, but the master is entitled to his full freight for the *trans- [*374] portation of the goods. *Griswold v. New-York Insurance Company*, 3 J. R. 321.

33. Where the vessel is disabled in the course of the voyage, and the cargo remains, the captain is authorized to forward it by another vessel, thereby to earn the freight. If the shipper will not consent to this, the captain will be entitled to his full freight; and if he cannot, or will not forward the goods, the freighter is then entitled to receive them without paying anything. *Bradhurst v. Columbian Insurance Company*, 9 J. R. 17.

34. Whether the owner of a vessel, hired by the month, is entitled to freight during her detention by an embargo? *Quere. Penny v. New-York Insurance Company*, 3 C. R. 155.

35. If the ship be injured by perils of the sea, but is capable of being repaired in a reasonable time, the owner ought to repair her, and continue his voyage, so as to claim his freight. *Herbert v. Hallett*, 3 J. C. 93. *S. P. Griswold v. New-York Insurance Company*, 1 J. R. 205.

36. If the ship be in a capacity to proceed on her voyage, and the goods are damaged, the owner will be entitled to his freight, if he offer to carry them on, unless the goods are physically destroyed. *Herbert v. Hallett*, 3 J. C. 93.

37. Where the whole of a vessel is chartered to take a cargo, at certain specified rates per ton, square foot, &c., if the shipper does not furnish a full cargo, the owner of the vessel is entitled to freight not only for the cargo actually put on board, but also for what the vessel could have carried, had a full cargo been furnished. *Duffie v. Hayes*, 15 J. R. 327.

38. Where a vessel is chartered for a voyage, out and home, for an entire sum of money,

to be paid on her return home, her return is a condition precedent to entitle the owner to freight; and if she is lost before commencing the homeward voyage, the owner can neither recover on the charter party, nor on an implied *assumpsit* for the freight of the outward voyage; nor if the shipper had accepted the outward cargo, would the owner be entitled to a *pro rata* freight. *Penoyer v. Hallett*, 15 J. R. 332.

39. The defendant hired the vessel of the plaintiffs, to carry a cargo from *New-York* to *P.*, to be delivered there, and return with a cargo for the defendant to *New-York*. And for the hire of the vessel, the defendant covenanted to pay the plaintiffs "1400 dollars on the delivery of the cargo at *P.*, and 1400 dollars on the delivery of the return cargo, on the arrival of the vessel at *New-York*." The vessel proceeded from *New-York* with a cargo, and arrived in sight of *P.*, but the place being strictly blockaded by a *Portuguese* squadron, she was forbidden to enter the port, and, not being instructed, in such event, to proceed elsewhere, the master returned to *New-York* with the cargo; and the plaintiff offered to carry it back to *P.*, or to any port in its vicinity, as the defendant might direct; but having abandoned the cargo to the underwriters, who accepted it, the defendant declined the offer, and the cargo was afterwards demanded and recovered by the underwriters, who, as well as the defendant, refused to pay freight; *held*, that the plaintiffs were not entitled to any freight under the charter party, [*375] the voyage not having been performed, for the cargo delivered according to the conditions of the contract, on the performance of which the payment of the freight depended. *Burrill v. Cleeman*, 17 J. R. 72.

40. The defendant being the owner of goods, shipped them on board of the plaintiff's vessel, to be carried from *New-York* to *Liverpool*, and there delivered to C., the consignee, "he paying freight for the same, with primage," &c., according to the bill of lading signed by the master, who, on his arrival at *L.*, delivered the goods to the consignee, without receiving the freight at the time, though he afterwards demanded it, when the payment was refused; *held*, that the plaintiff might maintain an action for the freight against the consignor. *Barker v. Havens*, 17 J. R. 234.

41. It seems, that where the goods are not owned by the consignor, nor shipped for his account and benefit, the carrier is not entitled to call on him for the freight, on such a bill of lading. *Ibid*.

42. It is the duty of the master, in all cases, to endeavor to get the freight of the consignee. *Ibid*.

43. The right to retain goods for the freight grows out of the usage of trade, and does not exist where the parties have, by their agreement, regulated the time and manner of paying the freight; especially where the cargo is to be delivered before the time fixed for the payment of freight. *Chandler v. Belden*, 18 J. R. 157.

44. Where a charter party was executed by the plaintiff and defendant, under their hands and seals, for the transportation of goods from *Virginia* to *Cadiz*; and the parties, on the same day, (January 26, 1813,) made an agreement on a separate paper, not under seal, referring to the charter party executed by them, and stipulating that the owners of the vessel should have on board a *Sidmouth* license, for the protection of the ship and cargo; *held*, that these were several and distinct contracts; and though the supplementary agreement was illegal, it did not affect or vitiate the charter party. *Ogden v. Barker*, 18 J. R. 87.

(b) *Pro rata* freight, and return of freight.

45. If a vessel, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute the voyage, and the goods are there received by the owner, he must pay freight according to the proportion of the voyage performed. *Williams v. Smith*, 2 C. R. 13. *S. P. Robinson v. Marine Insurance Company*, 2 J. R. 323.

46. No *pro rata* freight can be recovered, unless the goods have been accepted at a place short of the port of destination. *Scott v. Lobby*, 2 J. R. 336.

47. So, where a vessel chartered, on arriving near her port of destination, was turned away, by reason of its being blockaded, and returned back to the port of delivery, freight is due neither on the charter party, nor *pro rata* time. *Ibid*.

48. To form the basis of a new contract to pay a ratable freight, there must be a voluntary and unconditional acceptance by the owner, "at the intermediate port. [*376] *Marine Insurance Company v. United Insurance Company*, 9 J. R. 186.

49. So, where a vessel was captured, carried into *Hadifaz*, and libelled; and A., in *Hadifaz*, obtained an appraisement of the vessel and cargo, and, on giving a bond for the amount, received the property, which he sent, consigned to his agent in *New-York*, with directions to deliver the cargo to the owner, on his indemnifying A. for his bond, and all expenses, but which the owner refused to do; *held*, that no *pro rata* freight was due. *Ibid*.

50. Where the master is also the consignee, and a joint owner of the cargo, his selling it at a port of necessity, where the voyage was broken up, will be deemed a reception of the goods there by him, as owner, and a *pro rata* freight is earned. *Williams v. Smith*, 2 C. R. 13.

51. If an entire sum be payable as freight, by the terms of a charter party, on delivery of the cargo, and the vessel, during the voyage, is abandoned by her crew, but is brought into port by persons who claim, and recover part of the cargo as salvage, and the other part is delivered to the affrighters, no action lies against them, on their covenant, for any part of the freight, the delivery of the cargo, which is a condition precedent, not having been performed. *Post v. Robertson*, 1 J. R. 24.

52. But, it seems, that in case of accident

the vessel, and salvage taken out, if the affreighters receive the residue, they will be liable in *assumpsit* for a *pro rata* freight. *Ibid.*

53. A vessel was chartered for the outward and return voyage, for an entire sum, payable within a certain time after delivering the return cargo; having delivered her outward cargo, on her return home, the vessel was captured and carried in, and the cargo labelled, which was ordered to be retained for further proof, subject to the lien of the ship owner for the freight; the vessel returned without her cargo, and the goods were afterwards ordered to be restored, but neither they, nor the proceeds of them, ever came to the hands of the owners, or insurers, who had paid as for a total loss; no freight is, in this case, due; for the outward and homeward voyage being but one entire voyage, the freight depended on the entire performance, and the master ought to have waited until the decision of the Court of Admiralty, that in case of restitution, he might have completed his voyage with the cargo, or in case of condemnation, have recovered the freight from the captor. *Barker v. Cheriol*, 2 J. R. 352.

54. In one case of *pro rata* freight, the rule adopted for ascertaining the amount of freight earned, was to ascertain how much of the voyage had been performed, when the disaster happened which compelled her to seek an intermediate port. *Robinson v. Marine Insurance Company*, 2 J. R. 323.

55. In the case of the *Marine Insurance Company v. Lenox*, decided in the Court of Errors in 1801, the rule adopted was, to ascertain how much of the voyage had been performed, when the goods arrived at the intermediate port; because that is the extent of the voyage performed, as it respects the interest of the shipper; which appears to [*377] be the *better rule, where the case affords data by which to ascertain the difference. *Per Kent*, Ch. J. *Ibid.*

56. The plaintiff takes his passage on board a vessel, to be provided with provisions and accommodations during the voyage, and pays freight in advance; the vessel is compelled, by necessity, to put into an intermediate port, where the owner has a better vessel provided for the voyage, in which he offers to convey the passengers, but the plaintiff, without making any objection to the change, does not proceed in the vessel which had been substituted; here can be no apportionment of the freight, and the plaintiff is not entitled to recover back any part of the money which he had paid. *Detouches v. Peck*, 9 J. R. 210.

57. Where freight is paid in advance, on a contract for the carriage and delivery of goods, and the vessel is shipwrecked, and the voyage broken up, the shipper is entitled to a return of the freight; the consideration, that is, the carriage and delivery, having failed. *Watson v. Dryden*, 3 J. R. 335.

58. But where the agreement was, that the ship owner, in consideration of freight paid immediately, should permit the shipper to proceed, and go in his vessel as a passenger, and to load on board certain goods for trans-

portation; held, that the receiving on board was the consideration, and, consequently, that, in case of accident on the voyage, the ship owner would not be liable to refund. *Ibid.*

(c) Demurrage.

59. A vessel was chartered to Cadiz, and two other ports in Europe, or either of them, at the option of the affreighters, and they were allowed 40 days for loading and unloading in Europe, after which, if they detained the vessel, they were to pay demurrage; the vessel arrived at Cadiz, but was refused an entry, in consequence of a permanent regulation of the government of the country, but was not restricted from leaving the place; she was, notwithstanding, detained by the agent of the affreighters, who, after repeated applications, obtained permission for her to enter; the affreighters were held liable for demurrage, after the expiration of 40 days, commencing from the time that the master was refused permission to enter. *Duff v. Lawrence*, 3 J. C. 162.

60. Where it was agreed between A. and B., in writing, that A. should carry a certain quantity of goods for B., from New-York to Surinam, and bring a certain quantity back, and that the vessel should lay 35 days at Surinam to unload and reload; and the master of the vessel waited at Surinam beyond the stipulated time, at the request of B.'s consignee; held, that as the written contract contained no stipulation to pay demurrage, and as no implied *assumpsit* could arise from the act of the consignee, whose authority did not extend to bind B. to pay demurrage, A. could not recover a compensation for the detention of the vessel. *Robertson v. Bethune*, 3 J. R. 342.

* (d) Expenses attending the goods. [*378]

61. Where the vessel is stopped before her arrival at the place of delivery, in pursuance of a quarantine law, and the cargo ordered to be unladen and stored, the freighter must pay all expenses on the goods after they are landed. *Rice v. Clendinning*, 3 J. C. 183.

(e) Of the dissolution of the contract.

62. A contract of affreightment is not dissolved by a hostile blockade of the port of departure: the performance of it is merely suspended; and the ship owner or master may detain the goods, until he can prosecute the voyage with safety, or the freighter may demand his goods, on tendering the freight. *Palmer v. Lorillard*, 16 J. R. 348. in error. *S. P. Ogden v. Barker*, 18 J. R. 87. *Contra*, 15 J. R. 14.

63. It is only when the voyage is broken up, on the part of the ship owner or master, or the completion of it becomes unlawful, that the contract is dissolved. 16 J. R. 348. *Contra*, S. C. 15 J. R. 14.

64. The plaintiffs, in January, 1813, shipped goods on board of a vessel of the defendants, to be transported from Richmond, in Virginia, to New-York; in February, 1814, the vessel

proceeded on her voyage, as far as *Hampton Roads*, but finding the *Chesapeake* blockaded by a hostile squadron, and that it would be impossible to put to sea, without being captured, went into *Norfolk*, and finally returned to *Richmond*. In September following, the plaintiffs demanded their goods, in order to transport them by land to *New-York*; but the master refused to deliver them, unless he was paid half freight; and in a few days afterwards, in consequence of a violent storm, the vessel sunk at the wharf, with her cargo, and without any default of the defendants or their agents, the goods were wholly spoiled and lost; the blockade having continued to that time. The plaintiffs brought an action of *assumpsit* against the defendants on the bill of lading, averring a loss by negligence; *held*, that if the plaintiffs had a cause of action, they could not recover in that form of action, as the jury, by their special verdict, had negatived the gravamen alleged, to wit, the negligence of the defendants; and that the Court of Errors could not look to any other facts than those found by the jury. *Ibid*.

65. But the plaintiffs had no cause of action, since the contract was not dissolved, and the defendants had a right to retain the goods, until he could proceed on his voyage, or the plaintiff tendered the freight, or the contract was rescinded by mutual agreement. *Ibid*. (See *Stoughton v. Rappulo*, 3 Sergt. & Rawle's Rep. 559.)

66. A blockade of the port of delivery, dissolves the charter party, and all claim for freight is gone. *Scott v. Libby*, 2 J. R. 336.

(f) *Action for the non-delivery of the goods, and damages.*

67. In an action for the non-delivery of goods, pursuant to a contract of affreightment, the measure of damages is the value of the goods at the port of destination; but without interest, unless there has been fraud or gross misconduct on the part of the defendant. *Amory v. M'Gregor*, 15 J. R. 24.

68. The legal property in goods passes by a bill of lading, and an assignment thereof, *bona fide*, for a fair consideration, vests the legal interest in the assignee, though the assignment be made immediately after the arrival of the vessel in port. *Chandler v. Belden*, 18 J. R. 157.

69. And, where a ship owner not having a lien for the freight, after the bill of lading had been assigned, sold the goods at auction to pay the freight, it was *held* to be a conversion of them, and that trover would lie against him, at the suit of the assignee of the bill of lading. *Ibid*.

V. *Seamen*; (a) *Hiring and wages*; (b) *Liability in case of embezzlement of the cargo*; (c) *Sureties of seamen.*

(a) *Hiring and wages.*

70. Where freight has not been earned, wages are not due. *Dunnell v. Tomhagen*, 3

154. *S. P. Icard v. Gould*, 11 J. R. 279.

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71. And it makes no difference that there has been a salvage of part of the cargo; for, as it was not delivered by the ship, no freight was earned. *Ibid*.

72. Where the crew, on abandoning a vessel from necessity, took some boxes of merchandise, part of the cargo, in the long boat with them, and which were, in this manner, preserved; *held*, that though the seamen might have had a valid lien on the goods saved, for an equitable compensation, in the light of salvage, yet it gave them no right of action on their contract for wages. *Ibid*.

73. But where the voyage is lost by the act of the master or owner, and whether, as it seems, that act be wrongful or fraudulent, or not, the seamen are entitled to their wages. *Hoyt v. Wildfire*, 3 J. R. 518. *S. P. Sullivan v. Morgan*, 11 J. R. 66.

74. So, where a seaman was hired for a voyage from *New-York* to *Bombay*, and back, and the vessel was loaded with naval stores; and the master, on his route to *Bombay*, under a false pretence of want of water, deviated, in order to put into the *Isle of France*, and was captured by a British vessel on her way thither, and the ship condemned; *held*, that a seaman might, on his return, recover his wages, according to the contract, from the time he shipped on board until his arrival in *New-York*, deducting such wages as he had received in his absence. *Ibid*.

75. Where a vessel was compelled, in consequence of springing aleak, to put back for repairs, and the seamen made no application for repairs under the law of the *United States*, but the owners voluntarily caused repairs to be made; and the vessel, after the repairs, was, in the opinion of the master carpenter, and three ship builders, perfectly seaworthy; though seven journeymen carpenters were of opinion that she was not seaworthy, and, on that ground, the crew refused to proceed on the voyage; *held*, that no freight having been earned, and the loss of the voyage not being imputable to the master or owners, the seamen were not entitled to wages; and that they could not set up the opinion of the journeymen workmen to excuse their breach of contract, and justify their demand of wages. *Porter v. Andrews*, 9 J. R. 350.

76. A seaman signed articles, without reading them, for a voyage from *New-York* to *Archangel*, and back to *New-York*, which was represented to him as different from that expressed in the articles. The vessel went to *Sicily*, *Sardinia*, and *Messina*, at which places she disposed of her outward cargo, and at the latter place, where she lay seven months, took in a return cargo. She left *Messina* for *Gottenburgh*, and on her voyage thither, was captured, carried in, and condemned; *held*, that the seaman was entitled to wages unto, and during his stay at *Messina*; but not from *Messina*, that being a new intermediate voyage, and the capture put an end to the freight, as well as wages, for that voyage. *Murray v. Kellogg*, 9 J. R. 227.

77. The seaman, in this case, brought his

action in an inferior Court, which allowed him wages up to the capture; and, on *certiorari*, the Supreme Court refused to reverse the judgment on that account, the excess being trifling, and there was no evidence as to the time between the departure from Messina and the capture, but some evidence of collusion between the master and captors. *Ibid.*

78. The master is chargeable for wages only on his special contract, in hiring the seamen; and the owners from the implied contract which they are supposed to make through their agent, the master. *Wysham v. Rossen*, 11 J. R. 72.

79. Where seamen are shipped for a voyage, and, during the outward passage, the vessel is captured and carried into a port of the captor, where the master leaves her, and she is afterwards released, and instead of prosecuting the original voyage, returns home with the same crew, under the command of A., who had been subsequently appointed by the owners to take charge of the vessel, this is a new and distinct voyage, and A. is liable only for the wages arising while he was master, and not for the wages which had accrued while the vessel was under the former commander. *Ibid.*

80. Whether, if A. had prosecuted the original voyage, he would be deemed to have assumed the contract of the seamen with the former master? *Quere. Ibid.*

81. Insurance of freight is for the indemnity of the owner only, and does not enure to the benefit of the seamen's wages, which cannot be insured directly or indirectly. *Icard v. Gould*, 11 J. R. 279.

82. Where a vessel is captured and condemned, though the owner afterwards recovers the freight from the insurers, the seamen are not, therefore, entitled to their wages. *Per Spencer, J. Percival v. Hickey*, 18 J. R. 257.

83. So, where a neutral vessel is run foul of and sunk, by a belligerent cruiser, through negligence, and the owner, in an action of trespass against the commander of the vessel, recovers the full value of the vessel [*381] and cargo so sunk and lost, the seamen are not entitled to their wages.

Ibid.

84. No action can be maintained by a seaman discharged by his own consent, in a foreign country, under the act of Congress, (Cong. 7. s. 2. c. 62. sec. 3.) against the owner of the vessel, to recover two thirds of the three months' wages directed by that act to be paid by the master of the vessel, to the American consul, over and above the wages due to such seaman at the time of such discharge. *Ogden v. Orr*, 12 J. R. 143.

85. Where a ship, captured during the voyage, and her crew taken out and detained as prisoners of war, was afterwards recaptured, and (the master having hired a new crew) proceeded on her voyage, and arrived at her last port of delivery, and earned freight; *held*, that the seamen who were taken out, though never restored to the ship, were entitled to wages for the whole voyage deducting only their proportion of the salvage paid to the recaptors. *Welmere v. Henshaw*, 12 J. R. 324.

86. Where a seaman who had signed shipping articles, by which he engaged not to absent himself from the vessel without leave, until the voyage was ended, and the vessel discharged of her cargo, on the vessel's arriving at her last port of discharge, and being there safely moored, refused to remain on board and assist in discharging the cargo, but absented himself, without leave; *held*, that by such desertion, he had forfeited his wages. *Webb v. Duckingfield*, 13 J. R. 390.

87. Though the master has no right to insert in the shipping articles, any stipulation or agreement repugnant to the laws of the United States, yet he may add any provisions consistent with the laws relative to seamen. *Ibid.*

88. The contract with a seaman continues in force, until the cargo is finally discharged, and if he leaves the ship before that is done, he forfeits his wages. *Ibid.*

89. Where a crew has been shipped for a voyage, and articles have been regularly entered into, fixing the rate of wages, if the crew, at an intermediate port of the voyage, compel the master, by threats of desertion, to enter into new articles for a higher rate of wages, such articles are void, and not binding on the master, being contrary to the policy of the act of Congress; and if established, would be holding out an inducement to a violation of duty and of contract. *Bartlett v. Wyman*, 14 J. R. 260.

90. Nor are such new articles binding on the owners of the vessel, the master having no authority to make them, the owner being bound by the first articles. *Ibid.*

91. And any such promise is void for want of consideration, the seamen having no right to abandon the voyage. *Ibid.*

92. The written agreement or shipping articles, made at the port of departure, are the only legal evidence of the contract, and the mariner can recover no more than what is stipulated in such articles. *Ibid.*

93. If, during a voyage, a seaman is compelled to leave the ship, on account of ill usage and cruel treatment by the master, or through his agency, and for fear of his personal safety, it is not a case of *a [*382] voluntary desertion, and he is entitled to recover his full wages for the whole voyage. *Ward v. Ames*, 9 J. R. 138.

(b) *Liability in case of embezzlement of the cargo.*

94. Where the crew of a vessel were permitted by the first mate, in the absence of the master, to go on shore, and the second mate was ordered to return and take care of the vessel at night, but neglected to do so, and some part of the cargo was stolen out of the vessel; *held*, that the crew were not liable to contribute out of their wages to make good the loss. *Lewis v. Davis*, 3 J. R. 17.

95. *It seems*, that where the loss or embezzlement can be traced to a particular seaman, the rest of the crew ought not to contribute. *Ibid.*

(c) *Sureties for seamen.*

96. Where a person becomes surety to the owners of a vessel, that certain seamen, shipped

on board the vessel, shall proceed on the voyage, and the seamen, thereupon, receive wages in advance, which they pay to their surety for his indemnity, in case they desert before the commencement of the voyage, the owner cannot maintain an action for money had and received against the surety, to recover back the wages so advanced, and paid to the surety, on the ground of the desertion of the seamen. *Dodge v. Lean*, 13 J. R. 508.

97. Where a person has signed his name in the shipping articles, under the column headed "sureties," but there is no explanation added as to the extent of his undertaking, it is not a sufficient writing within the statute of frauds, and the contract is, therefore, void. *Ibid*.

See BOTTOMRY. COMMON CARRIERS. CHANCERY, LXIV. INSURANCE, I. XI. PILOT.

SLANDER.

- (a) *For what words an action of slander lies;*
(b) *Action and evidence.*

(a) *For what words an action of slander lies.*

1. In case the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, then the words will be, in themselves, actionable. *Brooker v. Coffin*, 5 J. R. 188.

2. Words, in themselves actionable, will not support the action, if, at the time of speaking, they are explained by a reference to a known and particular transaction, not amounting to the charge which the words would otherwise import. *Van Rensselaer v. Dole*, 1 J. C. 279.

*3. "You have perjured yourself, as one of the overseers of the town of W." is actionable. *Hopkins v. Beedle*, 1 C. R. 347.

4. But not, "You have sworn to a lie." *Ibid*.

5. Though the words, "you have sworn to a lie," are not, in themselves, actionable; yet, if it be averred in the declaration, that the words were spoken of, and concerning the plaintiff; and of and concerning a trial, and the evidence given by the plaintiff, in a cause pending in a Court, it contains a sufficient cause of action. *Crookshank v. Gray*, 20 J. R. 344.

6. When the words charged to be slanderous, are proved to have been spoken in relation to a part of the evidence given by the plaintiff, as a witness in a cause, as to a particular fact, not material to the point at issue in the cause, they are not actionable. *Ibid*.

7. In slander, for charging the plaintiff with perjury, it will be presumed to have taken place before a Court of competent jurisdiction; the defendant must show it to be otherwise. *Green v. Long*, 2 C. R. 91.

8. "You swore to a lie, for which you now stand indicted," is equivalent to a charge of perjury, and actionable. *Pelton v. Ward*, 3 C. R. 73.

9. But "he swore false before squire A., and I can prove it," without a colloquium,

of its being in a cause pending, is not actionable. *Stafford v. Green*, 1 J. R. 505.

10. So, to say of a person, "He has sworn falsely; he has taken a false oath in squire Jamison's Court;" or, "he has falsely and maliciously charged upon me the crime of perjury," is not actionable. *Ward v. Clark*, 2 J. R. 10.

11. These words: "she was hired to swear the child on me; she has had a child before this, when she went to Canada; she would come damned near going to the state prison," are not actionable. *Brooker v. Coffin*, 5 J. R. 188.

12. To say to a witness, while giving his testimony to a material point in a cause, "that is false," is actionable, if spoken maliciously; for the words import a charge of perjury. *M'Claghry v. Wetmore*, 6 J. R. 82.

13. To say of a person, "he has sworn false," or, "has taken a false oath," without a colloquium, concerning a proceeding in a Court of competent jurisdiction, is not actionable. *Vaughan v. Havens*, 8 J. R. 109. *S. P. Chapman v. Smith*, 18 J. R. 78.

14. It is actionable to say, "my watch has been stolen in M.'s bar room, and I have reason to believe that T. took it, and that her mother concealed it." *Miller v. Miller*, 8 J. R. 74. *S. C. id.* 77.

15. Where words, spoken of a magistrate, have no relation to his official character, they are not actionable; as "squire Oakley is a damned rogue." *Oakley v. Farrington*, 1 J. C. 129.

16. An action lies for words spoken of a sheriff, charging him with malpractice in his office. *Dole v. Van Rensselaer*, 1 J. C. 330.

17. An action does not lie for charging a married woman with adultery, without showing a special damage; notwithstanding the act relative to divorcees. *Buys v. Gillespie*, 2 J. R. 115.

18. To say of a woman, that "she is a common prostitute," is not "actionable," although such women are punishable under the act concerning disorderly persons, (Sess. 11. c. 31.) *Brooker v. Coffin*, 5 J. R. 188.

19. If words, actionable in themselves, be spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie; and the jury are to decide whether there be malice or not. *Jarvis v. Hatheway*, 3 J. R. 180.

20. Words, spoken of a professional man, are only actionable when they charge him with ignorance, or want of skill, in general, or a want of integrity, either in general or in particular; but not when they charge him with ignorance in a particular case. *Foot v. Brown*, 8 J. R. 64.

21. So, to say of an attorney or counsellor in a particular suit, F. "knows nothing about the suit; he will lead you on until he has undone you," is not actionable, without alleging and proving special damage. *Ibid*.

22. It seems, that to say of a merchant, "you keep false books, and I can prove it," is actionable. *Backus v. Richardson*, 5 J. R. 476.

23. To say of a blacksmith, in relation to his business and trade, "he keeps false books, and I can prove it," is actionable. *Burck v. Nickerson*, 17 J. R. 217.

21. In an action for slander, the words charged were "you are a thief,"—"you are a damned thief." The words proved were "you are a thief; you stole hoop-poles and saw-logs from *Delancey's* and judge *Meyer's* land." The judge, before whom the cause was tried, left it to the jury to decide whether by the words proved, the defendant meant to charge the plaintiff with taking timber or hoop-poles, already cut down, in which case it would be a charge of felony; or whether they were meant only to charge the plaintiff with cutting down and carrying away timber to make hoop-poles, in which case it would amount to a trespass only, and the words would not then be actionable; and the jury having found a verdict for the defendant, the Court refused to set it aside. *Dexter v. Taber*, 12 J. R. 239.

25. To say of a woman, "she procured or took medicines to kill the bastard child she was like to have, and she did kill or poison the bastard child she was like to have," &c., is actionable. *Widrig v. Oyer*, 13 J. R. 124.

26. Charging the plaintiff with having kept a bawdy house, is actionable of itself, that being an indictable offence, and involving moral turpitude. *Martin v. Stillwell*, 13 J. R. 275.

27. An action of slander lies for charging the plaintiff with a crime committed in another state, though the plaintiff would not be amenable for it in this state. *Van Ankin v. Westfall*, 14 J. R. 233.

28. So, an action lies for charging the plaintiff with a crime, the prosecution for which is barred by the statute of limitations; and in such action, the defendant may justify and prove the truth of his allegation, notwithstanding the criminal prosecution is barred. *Ibid.*

[*385] * (b) Action and evidence.

29. Although the meaning of the words cannot be enlarged by an *innuendo*, yet they may be aided by the plea, so as to support the declaration; as if the defendant, in his plea of justification, allege or confess that he spoke the words by reason of a false oath taken by the plaintiff in a Court of competent jurisdiction; it will aid the want of a *colloquium* concerning a proceeding in a Court of competent jurisdiction. *Vaughan v. Havens*, 8 J. R. 109.

30. But a notice of justification, with the general issue, will not help the declaration. *Ibid.*

31. If the defendant attempt to justify a charge of felony, he must justify as to the specific charge laid, and cannot set up a charge of the same kind, but distinct as to the subject matter. *Andrews v. Vanduzer*, 11 J. R. 36.

32. In an action of slander for charging the plaintiff with having stolen the defendant's shingles, a justification stating that the plaintiff had sold the defendant's shingles without authority, and afterwards denied that he knew any thing respecting them, without alleging that the plaintiff took them privately or feloniously, does not amount to a charge of larceny, and is bad as a justification; nor can those facts be given in evidence in mitigation of damages. *Shepard v. Merrill*, 13 J. R. 475.

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33. It is sufficient to prove the substance of the words; and the sense as well as manner of speaking them, must be the same. *Miller v. Miller*, 8 J. R. 74.

34. Where the words charged to have been spoken, impute to the plaintiff the crime of *perjury*, without any qualification or explanation, the defendant, to make out a justification, must prove that the plaintiff, in giving evidence, *wilfully and corruptly* swore false. *McKinty v. Rob*, 20 J. R. 351.

35. It is not enough to prove that the facts sworn to by the plaintiff were not true, though it proceeded from mistake and misapprehension. *Ibid.*

36. The truth of slanderous words cannot be given in evidence, under the general issue, without notice, either in justification, or mitigation of damages. *Shepard v. Merrill*, 13 J. R. 475.

37. The truth of the words spoken is not admissible in mitigation of damages. *Van Ankin v. Westfall*, 14 J. R. 233.

38. If words are charged to be spoken in the third person, and the proof be of words in the second person, the proof will not support the declaration; there being a difference between words spoken in a passion to a man's face, and deliberately behind his back. *Miller v. Miller*, 8 J. R. 74.

39. It is not necessary, in order to render words actionable, that there should be the same certainty in stating the crime imputed as in an indictment for the crime. *Ibid.*

40. Where the words are not actionable of themselves, the proof of damage must be confined to the particular damage alleged in the declaration; the plaintiff cannot give evidence of a general loss of reputation *by reason of the slander. *Herrick v. [*386] Lapham*, 10 J. R. 281.

41. The defendant cannot give in evidence, under the general issue, matter which might have been pleaded. *Andrews v. Vanduzer*, 11 J. R. 36.

42. Or give evidence of *any* other crime than the one charged, either in bar or in mitigation of damages. *Ibid.*

43. Where the declaration states a *colloquium* with G., of and concerning the children of G., and of and concerning C., one of the children of G., and the plaintiff in the suit, in particular, and that the defendant said, *your children are thieves, and I can prove it*, the *colloquium* conclusively points the words, and designates the plaintiff as one of the children intended. *Gidney v. Blake*, 11 J. R. 54.

44. And a *colloquium* is sufficient to give application to words still more indefinite. *Ibid.*

Pleadings in slander. See PLEADINGS, XVIII.

SLAVES

[Sess. 36. c. 88. 2 N. R. L. 201.]

1. An agreement between A. and B., by which A. put to service to B., in this state, a slave owned by A., and whom he had brought

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into this state, "to continue in such service until the parties, or their executors, should mutually agree to annul the agreement," is a sale within the act of the 22d of February, 1788, prohibiting the sale of imported slaves. *Sable v. Hitchcock*, 2 J. C. 79. S. C. affirmed in error, *id.* 488.

2. But that act does not extend to persons acting in a representative capacity, as executors, &c., and not as owners, or agents for the owner, so as to subject them to the penalty, and render the slave free. *Ibid.*

3. A slave, aged 25 years, ran away from his master, in another state, and came to this state, and his master followed him, and entered into an agreement with a person residing here, to let the slave to him for 20 years, for the consideration of 225 dollars, giving him absolute authority over the slave; this was an importation and sale of the slave, within the act of the 22d of February, 1788. *Fish v. Fisher*, 2 J. C. 89.

4. So, where the services of a slave of 18 years old were sold for 20 years, for a *bona fide* consideration, by an indenture, containing a clause of manumission at the expiration of that time; *held*, that this was an evasion of the act of 1788, and that it was a sale within the statute. *Link v. Beumer*, 3 C. R. 325.

5. A slave imported into this state after June, 1785, and sold after October, 1801, is within the protection of the act of 1788, and entitled to be free, notwithstanding the law of 1788 is repealed by that of April, 1801; (*An act to repeal the acts and parts of acts therein men-*

[*387] *tioned.* *Laws, vol. 1. p. 619. K. and R.) he having acquired, under the statute of 1788, a right not to be sold, which right is preserved to him by the proviso in the repealing act of 1801. *Ibid.*

6. In an action, *qui tam*, on the 6th section of the act concerning slaves, (Sess. 24. c. 188.) *held*, that the exception in the clause was matter of excuse to the defendant, and need not be negated by the plaintiff in his declaration. *Hart v. Cleis*, 8 J. R. 41.

7. That part of the 6th section of the act, which declares that "the slave exported, or attempted to be exported, shall be free," does not operate, unless the master or owner is concerned in the exportation; but in case of a stranger, or third person, acting without the knowledge of the owner of the slave, the only penalty is the forfeiture of 250 dollars. *Ibid.*

8. A certificate of manumission, given to a slave, to take effect on the death of the master, irrevocably, is valid. *In the case of Tom*, 5 J. R. 365.

9. And if the master, for a valuable consideration, during his lifetime, sells and delivers him to a third person, he will, notwithstanding, on the master's death, be entitled to his freedom. *Ibid.*

10. If the owner of a slave give a written promise to manumit him after a certain number of years, on condition of his faithful service during that period, it is a conditional manumission, obligatory on the master, and of which the slave may avail himself, on the performance of the condition. *Kettles v. Fleet* 7 J. R. 324.

11. Parol declarations, made more than twenty years ago, by the owner of a slave, that he purchased her to make her free, and that he meant her to be freed, were *held* to be a manumission of such slave. *Wells v. Lane*, 9 J. R. 144.

12. Whether, since the statute of the 8th of April, 1801, (Sess. 24. c. 188.) a slave can be manumitted without some instrument in writing? *Quære.* *Ibid.* See 14 J. R. 324. *Post*, 30.

13. Where the overseers of the poor of the town of O. gave a certificate in writing, "that the bearer, J., the slave of H., was under the age of fifty years, and of sufficient ability to get his living," at the bottom of which was written, "we do hereby manumit the same," and the whole signed by the overseers, but not by the executors of H., to whom the slave belonged; and the certificate was recorded in the office of the clerk of the town; *held*, that this certificate, registered at the request of H., was conclusive evidence to charge the town with the future maintenance of such slave, as a pauper. *Hopkins v. Fleet*, 9 J. R. 225.

14. Whether the slave was duly manumitted or not, as respected his former owner, was a question between the slave and such former owner, with which the town had no concern; but, it seems, that this was a manumission sufficient to conclude the owner. *Ibid.*

15. A person who has been a slave, but who has obtained his freedom, is competent to prove facts which took place whilst he was a slave. *Gurnie v. Dessies*, 1 J. R. 508.

16. A., the owner of a slave in this state, went into Vermont to reclaim the slave, who had run away, and resided there as a freeman. *A. having taken the [*389] slave, while he was in his possession, B. took out an attachment against the slave, for a debt, on which the slave was arrested by an officer, and forcibly taken out of the possession of his master, and imprisoned: A. brought an action of trespass against B., in this state, for taking away his slave; *held*, that under the law of the United States, A. had a right to reclaim the slave, as a fugitive from service; and that, as the slave was incapable of contracting a debt, the attachment was illegal and void, and no justification to B., who was guilty of a trespass, for which an action would lie here. *Glen v. Hodges*, 9 J. R. 67.

17. A sale under a *feri facias* of a slave brought into this state is valid. *Cesar v. Peabody*, 11 J. R. 68.

18. But if the purchaser sell him again, such sale is contrary to the act, and void. *Ibid.*

19. Where L., who was the owner of a slave, during the revolutionary war, left his family and property in this state, and went into Canada, where he resided until his death, and his son J. took the management of his property, and under an execution against the goods of J., the sheriff sold all the right and title of J. in the slave; *held*, that the property of the slave continued in L., (he having never been attainted,) until his death, and that it then

passed to his executors and administrators, so that J. had no property in him which could be sold under an execution. *Gelston v. Russell and others*, 11 J. R. 415.

20. Where a person by his last will, manumitted his slave named *Maria*, and gave "to *Maria* her daughter *Chloe*, during her natural life;" held, that whether the words "during her natural life," applied to *Maria* or *Chloe*, and whether the children of *Chloe* born during the time that *Maria* was entitled to her services, became free on the death of *M.* or not, they could not be claimed by the representatives of the testator. *Concklin v. Havens*, 12 J. R. 314.

21. If *Maria* had no legal representatives on her decease, the children of *Chloe* became free. *Ibid.*

22. It seems, that the words "during her natural life," are to be referred to the life of *C.* *Ibid.*

23. But if these were referred to *M.*, the children of *C.*, born in the lifetime of *M.*, became her property, on the general principle, that the temporary proprietor of an animal is entitled to its increase. *Ibid.*

24. An action on the case lies for seducing and harboring the slave or servant of the plaintiff, notwithstanding the penalty given by the "act concerning slaves and servants," which is a cumulative remedy. *Scidmore v. Smith*, 13 J. R. 322.

25. Where two or three tenants in common of a slave manumit him, this is sufficient to entitle him to his freedom, especially where the third joint owner has, for a long time, suffered him to act as a freeman, without claiming him as a slave, and thus authorized the inference that he, also, had manumitted the slave. *Outfield v. Waring*, 14 J. R. 188.

26. Where a person brings a suit against another, it seems, that he cannot, afterwards, claim the defendant as his slave. *Ibid.*

27. All presumptions ought to be made in favor of personal liberty. *Ibid.*

*28. Where a slave ran away [*389] from his master, an inhabitant of Connecticut, and came to the city of New-York, where he was found and sold by the master to a person, also an inhabitant of Connecticut, then in New-York, on business; held, that this was not such a sale of a slave brought into the state, as rendered him free under the act, (Sess. 36. c. 88. s. 23.) *Skinner v. Fleet*, 14 J. R. 263.

29. The owner of a slave, by his will, dated the 15th January, 1813, declared as follows: "I manumit and give freedom to my negrowoman *Moll*, and her daughter *Nan*, immediately after my decease." The testator, afterwards, sold *Nan* as a slave to *C.*, and died; held, that the sale of the slave by the testator, was, *pro tanto*, a revocation of his will, and that *N.* was not entitled to her freedom, after his decease. *Matter of Nan Mickel*, 14 J. R. 324.

30. To render a manumission effectual, there must be some certificate or writing to that effect, delivered by the master to the slave, or to some third person, for his benefit, so as to consummate the act of manumission. *Ibid.*

31. The plaintiff, who had married an executrix, who was a legatee of all the property of the testator, and which included slaves brought by him from Virginia, sold a slave belonging to the testator at the time of his death, and took a promissory note for the purchase money, which he applied to the payment of his own debt; held, that the sale was not made by the plaintiff, in his character of executor, but in his own private right, as owner of property acquired by his marriage with a legatee, and was, therefore, contrary to the statute, and void; especially, as the sale was not necessary to pay the debts of the testator, and there was evidence of its being a contrivance to evade the statute; and that no action could be maintained on the note. *Helm v. Miller*, 17 J. R. 296.

32. If the owner of a slave, who executes a deed of manumission, does not deliver it to the slave, or to some person for his benefit, the manumission is not complete, and the slave is not free. *Petry v. Christy*, 19 J. R. 53.

33. Where the owner of a slave promised to manumit the slave, his wife and child, on his procuring good notes for 200 dollars, and giving his own note for 75 dollars; and the slave accordingly procured and gave the notes to *G.*, who approved of them, and executed a deed of manumission, and procured the usual certificate from the overseers of the poor, but refused to deliver the deed, and kept it with the other papers in his hands for more than two years, during which time he detained the man, his wife, and child, as slaves; in an action against *C.*, the maker of one of the notes, which was payable in five months; held, that the freedom of the slaves being the consideration on which the note was given, there was a failure of consideration, and that *G.* was not entitled to recover. *Ibid.*

34. Marriages between parties, where one or both of them are slaves, are legal by the statute, (Sess. 36. c. 88.) and the issue legitimate. And where the wife is a free woman, and the husband a slave, their condition is not changed by the marriage; but the children follow the condition of the mother as to their civil rights, and the mother has the control and custody of them during infancy, as if the father were dead. Overseers of Marbletown v. Overseers of Kingston, 20 J. R. 1. [*390]

[The seventh section of the act, declared all children born of slaves, after the 4th of July, 1799, to be free; but, if male, to continue to serve their masters until the age of 23, and if female, until 25 years of age. By the act of March 31, 1817, (Sess. 40. c. 137.) every child born of a slave, after the passing of that act, is to remain a servant until the age of 21, and no longer; and by the 32d section, every negro, mulatto, or mustee, within this state, born after the 4th July, 1799, is declared to be free after the 4th July, 1827.]

STAMPS.

1. Arbitration bonds and powers of attorney, in suits depending in the Supreme Court, were not within the act of Congress (July 6, 1797),

relative to stamp duties, since repealed. *Davis v. Ostrander*, 1 J. C. 106.

2. But an inventory under the act "for the relief of debtors, with respect to the imprisonment of their persons," was required to be stamped. *Burns v. Baker*, 1 J. C. 134.

3. Bank checks were not required to be stamped. *Conroy v. Warren*, 3 J. C. 259.

4. A note not stamped according to the directions of the act of Congress of the 6th July, 1797, cannot be read in evidence in an action brought since the repeal of that act, unless the holder has complied with the provision of the repealing act of the 6th April, 1802, by paying the duty of 10 dollars. *Edeek v. Ranuer*, 2 J. R. 423.

STATUTES.

- I. Construction of statutes.
- II. Private acts.
- III. Construction of different statutes, local, temporary, or private, and not to be found under any particular title of this Digest.

I. Construction of statutes.

1. A special power granted by statute, affecting the property of individuals, ought to be strictly pursued, and appear to be so on the face of the proceedings. *Gilbert v. Columbia Turnpike Company*, 3 J. C. 107.

2. A penal statute which may be construed as authorizing either a summary remedy, or an action in the ordinary course of proceeding, shall be taken to mean the latter. *Bennett v. Ward*, 3 C. R. 259.

3. A summary conviction is to be strictly construed, and is only to be adopted where the language of the act is positive and unequivocal. *Ibid.*

*4. Where the law, antecedently [*391] to a revision of the statutes, is settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to make a change. Per *Spencer, J. Taylor v. Delancy*, 2 C. C. E. 143. S. P. Per *Kent, Ch. J. Case of J. V. N. Yates*, 4 J. R. 359.

5. An act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right. *Dash v. Van Kleeck*, 7 J. R. 477.

6. It is a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retroactive effect. *Ibid.*

7. The term *ex post facto* law, in the constitution of the *United States*, applies only to criminal cases. *Ibid.*

8. Where a right is granted by statute, and a subsequent statute gives a forfeiture or penalty for the violation of that right, such forfeiture or penalty is cumulative to the remedy provided by the common law in cases of the viola-

tion of a statute right, where the statute itself is silent. *Livingston v. Van Ingen*, 9 J. R. 507.

9. And it seems that the law would be the same, if the penalty were given by a subsequent clause of the same statute. *Ibid.*

10. A penalty cannot be raised by implication, but must be expressly created and imposed. *Jones v. Estis*, 2 J. R. 379.

11. Conveyances by authority of a statute, pass no other or different right than that which the party before possessed. *Jackson, ex dem. Cooper, v. Cary*, 8 J. R. 385.

12. An act extending the bounds of a town over the adjacent navigable waters, does not thereby grant the land covered by the water to the town, but is merely for the purposes of civil and criminal jurisdiction. *Palmer v. Hicks*, 6 J. R. 133.

13. Under a penal statute, only one penalty is recoverable for one offence or entire transaction, and not a separate penalty for each particular act into which the offence may be divisible. *Corporation of New-York v. Ordreman*, 12 J. R. 122.

14. A statute, penal as to some persons, if it is generally beneficial, may be equitably construed. *Sickles v. Sharp*, 13 J. R. 497.

15. A statute, imposing a penalty, implies also a prohibition of the act rendered penal, and such act is, consequently, illegal and void. Per *Thompson, Ch. J. Hallett v. Novion*, 14 J. R. 273—290.

16. The preamble of a statute may be referred to, to explain the enacting part, when it is doubtful, but not to restrain its meaning, when clear and unambiguous. *Jackson, ex dem. Woodruff, v. Gilchrist*, 15 J. R. 89.

17. The word "month," when used in a statute, without any other word to show the intention, is to be understood as a lunar, not a calendar month. *Loring v. Halling*, 15 J. R. 119.

18. Where the words of a statute are obscure or doubtful, the object or intention of the legislature, in passing it, may be resorted to, to explain the meaning. *The People v. The Utica Insurance Company*, 15 J. R. 358.

19. A thing within the intention, is as much within the statute, as *if [*392] it were within its letter; and a thing within the letter only, if contrary to the intention, is not within the statute. *Ibid.*

20. Such a construction ought to be given as will not suffer the statute to be defeated. *Ibid.*

21. A statute, restraining any person from doing certain acts, applies equally to bodies corporate or politic, though not named. *Ibid.*

22. To take private property for public use, without providing a just compensation to the party, is not only unconstitutional, as against the fundamental principle of government, but a violation of natural right and justice. A statute, therefore, which violates this principle, is null and void. *Bradshaw v. Rodgers*, 20 J. R. 103. S. C. in error, *id.* 735.

II. Private acts.

23. If, by a private act, the property of a person is directed to be sold by the surveyor

general, without any warranty, and the money to be paid to certain creditors, it does not take away the rights of third persons, but amounts only to a quit-claim of any right or interest of the state. *Jackson, ex dem. Gratz, v. Catlin*, 2 J. R. 248.

24. A private act binds only the parties to it, and cannot be extended to divest the interest of a stranger. *Catlin v. Jackson, ex dem. Gratz*, in error, 8 J. R. 520.

25. So, where a person purchased land at a sheriff's sale in 1774, and a deed was delivered to a third person, to be delivered to the grantee, on payment of the purchase money, and the purchaser did not pay the money, but was afterwards attainted in 1779; *held*, that a private act, passed on the petition of the judgment creditor, directing the land to be sold, and the money to be paid to the creditor, did not take away the rights or interests of the debtor or his heirs, or affect any person not a party to the act. *Ibid*.

26. The printed statute book is not evidence of a private act. *Duncan v. Dubois*, 3 J. C. 125.

27. But it seems, that the rule does not apply to the case of a private statute given in evidence by the opposite party, against the party for whose benefit the act was passed. *Ibid*.

III. Construction of different statutes, local, temporary, or private, and not to be found under any particular title of this Digest.

28. The act of the 22d of March, 1791, (Sess. 14. c. 42. s. 11.) sometimes called the *Canaan* act, granted the lands only to those who were in possession in their own right, and not occupying in the right of another. *Jackson, ex dem. Bromley, v. Benjamin*, 8 J. R. 101.

29. Where A. bought land in *Canaan* in 1782, and put B. one of his sons, in immediate possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children, his heirs at law, and B. continued in possession of the land [*393] above 27 years, but *without having obtained a deed from his father; *held*, that B. was in possession under his father, and not in his own right, or adversely to his father; and that the act of 1791 confirmed the right to the land in the heirs of A. generally, on whom the law cast the inheritance, and that the rest of the children of A. were entitled to their proportion of the land so occupied by B. *Ibid*.

30. By the "act to vest certain powers in the freeholders and inhabitants of the village of *Poughkeepsie*," passed the 8th of April, 1801, (Sess. 24. c. 182.) the trustees of the village have power to make a by-law to prevent the sale of meat, &c. for the consumption of the inhabitants, within certain prescribed limits, except at the public market place; and an action may be maintained by the trustees, to recover the penalty given for every offence against such by-law. *Bush v. Seabury*, 8 J. R. 413.

31. By an act of the legislature, a grant was made to A., and six others named, and their executors, administrators, and assigns, of the

exclusive right of establishing and running stage-wagons, on the west side of *Hudson* river, from *Albany* to the north line of *New-Jersey*, for the term of 7 years; and if any other person should establish a stage on the same route, during that term, he was made liable to the penalty of 500 dollars. The grantees, by certain resolutions, divided the whole line, and assigned a portion of the route to each grantee, who was to keep and own a stage on that part of the route assigned to him, and receive the profits. B., one of the grantees, with the consent of two other of the grantees, besides running a stage on the part of the route assigned to him, also run a stage on the road which had been assigned to A. In an action brought by A. against B., to recover the penalty given by the act; *held*, that the penalty was given to secure the grantees in the privilege vested in them from the encroachment of strangers, and that the defendant, being one of the grantees, was not liable for the penalty; that the resolutions assigning to each a distinct part of the road was not a division or partition of the franchise or right given by the act. Whether such a privilege or franchise is susceptible of partition, according to the spirit and intention of the act, so as give exclusive and independent rights in distinct parcels of the road, *dubiat*. *Donnelly v. Vandenberg*, 3 J. R. 27.

32. To entitle a party to present cloth, in order to obtain the bounty given by the second section of the act, (Sess. 31. c. 186.) it is not requisite, that it should be filled and dressed in the same county in which it was manufactured, but it is sufficient if it was manufactured in the family of the party within the county. *Briggs v. Tylotson*, 8 J. R. 304.

33. The act, passed the 5th of April, 1810, (Sess. 33. c. 181.) "concerning the *Onondaga* salt springs," required "that all leases of the said lots, and all transfers thereof, should be recorded within 24 hours after the execution thereof, in the town clerk's office, &c., or that, in default, the same should be deemed void." *Held*, that a neglect to have an assignment of a lease recorded, rendered it void only against *bona fide* purchasers. *Jackson, ex dem. Fosdick, v. West*, 10 J. R. 466.

*34. The proviso of the act (Sess. [*394] 28. c. 55. s. 9.) exempting from toll for passing the bridge over the *Schoharie* kill, "all persons drawing firewood for their own family use," extends as well to a person drawing his firewood at one time, with the assistance of his neighbors and others hired for the purpose, as if he himself drew but one load in one day. *Wooster v. Van Vechten*, 10 J. R. 467.

35. According to the true construction of the act, (Sess. 33. c. 144.) authorizing the president, directors and company of the *Bank of Utica*, to establish an office of discount and deposit at *Canandaigua*, in the county of *Ontario*, and requiring all notes issued at such branch at C. to be countersigned by the cashier, and declaring that the same should be considered as payable on demand, at such branch at C., the holder of a *Utica* bank note, so countersigned and issued, cannot maintain an action upon it

against that bank, without having previously demanded payment of it, at the branch at C. A demand of payment at the bank of *Utica* alone, is not sufficient. *Bank of Utica v. Magher*, 18 J. R. 341.

36. A note of the *Utica* bank, on which is written, "countersigned, O. Seymour," is countersigned within the meaning of the act; for it is not necessary that he should add to his name his official character of *cashier* at C. *Ibid.*

37. And this act being to extend the powers of the bank of *Utica*, under its act of incorporation, which was a public act, is also a public act of which every person is bound to take notice. *Ibid.*

38. And the presumption in such case is, that the countersigning is official; and if there be any ambiguity on the face of their note, it may be explained by parol. *Ibid.*

39. The 13th section of the act (Sess. 31. ch. 216.) passed April 11, 1808, which directs that if the council of appointment are satisfied that a commissioner for loaning money has faithfully discharged the duties of his office, they may accept his resignation, and appoint another in his place, is unconstitutional and void. *The People v. Foot*, 19 J. R. 58.

See CHANCERY, LXV.

STATUTES OF THE UNITED STATES.

1. The act of Congress for the relief of insolvent debtors in the district of *Columbia*, (Cong. 7. s. 1. c. 184.) passed March 3, 1803, is a private act, of which the Courts of the several states are not bound to take notice, unless set forth by pleading, or so much of it, at least, as to enable the Court to decide whether the discharge is warranted by the provisions of the act. *Wright v. Paton*, 10 J. R. 300.

2. That act is only a bar to a future remedy against the person; and the creditor may still prosecute his demand to judgment, in order to charge the after-acquired property of the owner. *Ibid.*

3. The law of the *United States*, requiring the register to be inserted *in the bill of sale, on every transfer of a vessel, affects only its character and privileges as an *American* vessel. *Wendover v. Hogeboom*, 7 J. R. 308.

4. Whether a collector might, under the non-intercourse act, have entered and searched a dwelling-house without the warrant of a magistrate? *Quere. Sally v. Smith*, 11 J. R. 500.

5. But he might take goods standing under a horse shed, at a public inn, without a warrant. *Ibid.*

SUPERVISORS OF COUNTIES.

1. A grant to the supervisors, for the use of the inhabitants of a particular town, is void:

for, if the supervisors are a corporation, they have no capacity to take and hold lands as supervisors for the use of the inhabitants of a town, or for any other use or purpose than that of the county which they represent. *Jackson, ex dem. Lynch, v. Hartwell*, 8 J. R. 422.

2. The supervisors are a corporation, with special powers, and for special purposes only; and it is very questionable whether, prior to the act, (Sess. 24. c. 180.) they were competent to take a grant of land. *Ibid.*

3. By the act of the 3d of April, 1807, (Sess. 30. c. 127.) the supervisors of *Cayuga* were directed to raise a certain sum, by tax, for the purpose of building a fire-proof clerk's office, &c.; this act is mandatory, and which they were bound to execute without delay; and any of the supervisors who, at any of their meetings subsequent to the passing of the act, refused to raise money for the purpose, were held liable to the penalty given by the act of the 20th of March, 1807, (Sess. 30. c. 43. 2 N. R. L. 140.) "to compel supervisors to raise such sums of money as they are directed to raise by acts of the legislature." *Caswell v. Allen*, 7 J. R. 63.

4. A., in 1791, granted a lot of land to the people of the county of *Otsego*, on which a court house and gaol were built, in 1792, and used by the county. In 1806, by an act of the legislature, the supervisors were authorized to sell the court house and gaol, with the lot of land on which they stood; and they, accordingly, sold the land to B. In an action of ejectment against B.; held, that the people of the county had no capacity to take by grant, and that the deed was void; that the act, (Sess. 24. c. 180.) enabling supervisors of counties to take conveyances of land, applies only to conveyances made to the supervisors by name; and that the act of the legislature, in 1806, did not authorize the supervisors to sell any thing more than such right or title as they had. *Jackson, ex dem. Cooper, v. Cory*, 8 J. R. 385.

5. Supervisors of counties are not obliged to allow any charge for services relative to a pauper, unless a previous order of a justice has been obtained, or the [*396] services have been rendered by request of the overseers of the poor, and the account presented to them for payment. *Hull v. The Supervisors of Oneida*, 19 J. R. 259.

See MANDAMUS.

TAXES.

1. Taxes mean a contribution in money, not labor or personal service. *Overseers of Amenia v. Overseers of Stanford*, 6 J. C. 92.

2. Taxes are burdens, charges, or impositions, set on persons or property for public uses; but an assessment for a supposed benefit is not a tax or tollage within the exemption, in the act for the assessment and collection of taxes, (Sess. 24. c. 178. s. 24.) of churches or places of public worship from being taxed by

any law of the state. *Matter of the Corporation of New-York, &c.*, 11 J. R. 77.

3. The exemption in the act has reference only to general and public taxes for the benefit of the town, county, or state, at large, and not to assessments of benefits resulting to the property from opening, enlarging or improving the streets in the city of New-York; though churches, being exclusively devoted to religious purposes, the benefits of such improvements must be small to them, in comparison with other property, and they ought not to contribute in like proportion. *Ibid.*

4. Where a lease of a lot in the city of New-York contains a covenant that the lessee shall pay "all taxes, and assessments of every kind soever which should be laid or imposed on the premises during the term;" held, that the lessee is liable for an assessment imposed by the corporation of New-York, for altering a street. *Oswald v. Gilsfert*, 11 J. R. 443. *S. P. Corporation of New-York v. Cashman*, 10 J. R. 96.

5. Under the act for the assessment and collection of taxes, corporations are liable to be taxed or rated as persons or inhabitants, within the meaning of the act. *The Clinton Woollen and Cotton Manufacturing Company v. Morse & Bennet*, cited in *The People v. The Utica Insurance Company*, 15 J. R. 358—362, per Thompson, Ch. J.

6. A sale of land by the comptroller for taxes, is of no validity, if the taxes were, in fact, paid to the collector; and a deed executed by the comptroller to a purchaser, conveys no title. *Jackson, ex dem. Clark, v. Morse*, 18 J. R. 441.

7. The right or authority to sell lands for taxes, under the act, sess. 36. c. 32. (2 N. R. L. 509.) is founded on the non-payment of the tax, and the returns made to the comptroller are not conclusive evidence of that fact; though they may be sufficient to justify him, in the discharge of his duty, as a public officer, in making the sale. *Ibid.*

8. A purchaser of lands, sold at public auction for the non-payment of taxes, acquires only a contingent title, which is
[*397] liable to be *defeated by proof of the fact, that the tax (for which the land was sold) was paid before the sale. *Ibid.*

9. In a suit brought by the collector of taxes, to recover the tax of the defendant, the production of the assessment roll in which the defendant was rated, and the warrant to the plaintiff, as collector, are not sufficient evidence to support the action. *Thompson v. Gardner*, 10 J. R. 404.

10. The plaintiff ought to show, at least, a previous demand of the tax, and default of payment.

11. But whether a collector of taxes can, even after the demand of the tax and a default, bring an action for the tax? *Quære. Ibid.*

See *tit. COLLECTOR OF TAXES. COVENANT, tit.*

TENANT AT WILL.

1. A parol gift of lands creates a tenancy at will. *Jackson, ex dem. Van Allen, v. Rogers*, 1 J. C. 33. *S. C. 2 C. C. E. 314.*

2. A person occupying land, where no terms are prescribed, and without a reservation or payment of rent, is a tenant at will. *Jackson, ex dem. Van Denberg, v. Bradt*, 2 C. R. 169.

3. A tenant at will is not entitled to notice to quit. *Ibid.*

4. Voluntary waste is a determination of the will. *Phillips v. Covert*, 7 J. R. 1.

5. A tenant at will is considered as holding from year to year, only for the purpose of a notice to quit; but he has no right to such notice after he has determined the will, by an act of voluntary waste. *Ibid.*

6. A., by a writing under his hand and seal, gave B. the privilege to occupy certain land, and build thereon; this is a mere license, or personal privilege to occupy, and does not vest such a title in B. as he can convey; and his attempt to convey is a determination of the license. *Jackson, ex dem. Hull, v. Babcock*, 4 J. R. 418.

7. A tenancy at will is determined by the landlord's selling the premises. Per Thompson, Ch. J. *Jackson, ex dem. Phillips, v. Aldrich*, 13 J. R. 106.

8. The possession of a tenant at will, is the possession of the person under whom he claims. *Jackson, ex dem. Young, v. Ellis*, 13 J. R. 118.

9. An agreement to sell land does not impart a license to enter, but, at most, gives an implied permission to occupy as a tenant at will. *Ives v. Ives*, 13 J. R. 235.

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*TENANT AT SUFFERANCE.

1. A tenant for years, holding over at the expiration of his term, becomes a tenant at sufferance. *Wilde v. Cantillon*, 1 J. C. 123.

2. If a person selling lands, agrees to deliver them up to the grantee on a certain day, but continues in possession after that day, he is a tenant at sufferance; and if, while the right of possession continues in him, he permits another to enter, who holds over, he, too becomes a tenant at sufferance. *Hyatt v. Wood*, 4 J. R. 150. *S. P. Wood v. Hyatt, id.* 313.

TENANT IN COMMON.

1. Where several patentees bear, in equal proportions, the expense of obtaining a patent, and, by the recital of deeds among themselves, it appears they intended to purchase in common, they will be taken as tenants in common, and not as joint tenants, though the patent be to them jointly. *Cryler v. Bradt*, 2 C. C. E. 326.

2. If a person raises a crop of corn on the land of another, on an agreement to give the owner a certain number of bushels of corn, by way of rent, it does not make the latter a tenant in common of the crop. *Newcomb et al. v. Ramer*, 2 J. R. 421. note.

3. The widow of the ancestor is not a tenant in common with the heir. *Jackson*, ex dem. *Clark*, v. *O'Donaghy*, 7 J. R. 247.

4. One tenant in common cannot sue his co-tenant, to recover documents relative to their joint estate. *Cloves v. Hawley*, 12 J. R. 484.

5. A. and B. purchased a piece of land and divided it between them, and A. being in the exclusive occupation of his part, sold it to D., but both A. and B. joined in the conveyance; held, that though the deed from A. and B. might be *prima facie* evidence that they were tenants in common of the part conveyed, yet that the occupation of the land by A., and the purchase of him alone by D., were sufficient evidence of A.'s seisin of the whole. *Dolf v. Basset*, 15 J. R. 21.

6. Where real estate is held by partners, for the purpose of the partnership, they do not hold as partners, but as tenants in common; and the rules relative to partnership property do not apply in regard to it; therefore, one partner can only sell his individual interest; and when both join in the sale and conveyance, and one only receives the purchase money, the other may maintain an action against him for his proportion. *Coles v. Coles*, 15 J. R. 159. See *Seldon v. Hickock*, 2 C. R. 166.

7. One tenant in common of a chattel cannot maintain trespass or trover against the other, unless the thing held in [*399] common, be destroyed. **Seldon v. Hickock*, 2 C. R. 166. S. P. *St. John v. Standing*, 2 J. R. 468. *Wilson v. Reed*, 3 J. R. 175. *Mersereau v. Norton*, 15 J. R. 179.

8. But in case of a sale by one, and a receipt of the money, an action for money had and received will lie against him. *Seldon v. Hickock*, 2 C. R. 166.

9. Where there were three joint owners of a cargo of salt, and two of them, with the assent of the other, sold their proportions to the plaintiff, the vendee does not become a tenant in common, with the other, but may maintain trover against him. *Ibid*.

10. Where the undivided interest of one partner in partnership property, is sold under an execution or attachment, the sheriff and the purchaser succeed to the rights of the debtor, and the other partner cannot maintain an action against them for the seizure. *Mersereau v. Norton*, 15 J. R. 179.

11. In an action of trespass brought by tenants in common, in relation to their land, or in an action of debt for rent arising out of the land, or in any other action merely personal, they must all join as plaintiffs, and a release of the action by one of them, is a bar to the others. *Decker v. Livingston*, 15 J. R. 479.

12. *Aliter*, in a distress or avowry, which savor of the realty. *Ibid*.

13. But one tenant in common, before distress and avowry, may receive the whole rent, and discharge the lessee, for the rent is then in the personality. *Ibid*.

And see *TROVER*. ASSUMPSIT, IV.

TENDER

1. Where it is agreed that the defendant should deposit a security with the plaintiff, on the returning of which, the latter was to be entitled to the note of A.; on tendering the deposit, an action may be immediately brought against the defendant, on his agreement, and it will not be defeated by an offer made of the note, after the commencement of the suit. *Ripley v. Wardell*, 1 C. R. 175.

2. A tender, on a bond with a penalty, does not bar the action on such bond. *Manny v. Harris*, 2 J. R. 24.

3. There is a difference, as to tender, between portable and cumbrous articles; with respect to the former, a personal tender is necessary; as to the latter, it will be sufficient if the defendant offer to deliver as the plaintiff shall direct. *Coit v. Houston*, 3 J. C. 243. S. P. *Slingerland v. Morse*, 8 J. R. 474.

4. If no place be appointed for payment or performance, a tender to the person is good; and that too, in cases where a personal tender is not required. *Slingerland v. Morse*, 8 J. R. 474.

5. A waiver of any further tender, by the declaration, or equivalent *act of the creditor, will excuse an actual [*400] offer, even in the case of money. *Ibid*.

6. A. having distrained the goods of B. for rent, C. promised to deliver the goods to A. in six days, or pay 450 dollars; and the goods were left in the possession of C.; A. demanded the goods within the six days, and did not designate any place at which they were to be delivered; and immediately after, and within the six days, A. being, together with C., at the place where the goods were, C. tendered them to A., who said that he was not ready to receive them, but that if C. would carry them to D. he would receive them there; but C. refused to do so; held, that the reply of A. to the offer of C. was a dispensation from any further delivery or tender on the part of C., especially as the articles were bulky and numerous. *Ibid*.

7. And such a tender and refusal are a complete bar to a suit on the contract, and the plaintiff must resort to the person in whose possession the goods are, and who holds them as his bailee, and at his risk. *Ibid*.

8. An offer to deliver, [a cumbrous article, where no objection is made to the time and mode of delivery, but the plaintiff says that he will send and take the article, and at another time says that he is not ready to receive it, and finally, neglects to take it, is equivalent to performance, and is a bar to an action on an agreement for the delivery. *Coit v. Houston*, 3 J. C. 243.

9. In trover, the Court will not order ari-

cles which have been tendered to, and refused by the plaintiff, to be struck out of the declaration; for he may claim damages for the deterioration of them. *Shotwell v. Wendover*, 1 J. R. 65.

10. Machines and instruments of a man's trade, are not allowed to be brought into Court in an action of trover. *Ibid.*

11. If, before the day of payment, the party to whom payment is to be made, agrees to accept bank bills, it is a waiver of a tender in gold and silver, and the bank bills having been tendered, it is competent evidence to support a tender. *Warren v. Mains*, 7 J. R. 476.

12. Where a promissory note was given, payable in produce, to be delivered by a certain day, at the maker's house; in an action on the note, the defendant pleaded payment, and proved that he had hay in his barn, ready to be delivered on the day to the plaintiff, but did not show the quantity or value; held, that there was no proof of a tender or payment. *Newton v. Galbraith*, 5 J. R. 119.

13. The effect of a tender is not to extinguish the right of action, but only to preclude a claim for interest. *Raymond v. Bearnard*, 12 J. R. 274.

And see PAYMENT.

[401] *TENURES.

It is a first principle in the law of tenures, that the State is the original source of title to land; and that the State possesses a sovereign right to grant its lands to whom it pleases, with or without consideration. Per *Platt, J. Jackson*, ex dem. *Houseman*, v. *Hart*, 12 J. R. 77.

See CANADA GRANTS.

TITLE TO PROPERTY.

1. Whatever alteration in form property may have undergone, the original owner may take it, in its new shape, if he can identify the original materials. *Betts v. Lee*, 5 J. R. 348. *S. P. Curtis v. Groat*, 6 J. R. 168. And see *Babcock v. Gill*, 10 J. R. 287.

2. A., the owner of land, brought an action of trespass against B., for entering and cutting down trees, &c. The action was compromised, and B. paid the damages to A., which were equal to the value of the trees which B. had sawed and split into shingles. A., afterwards, took away the shingles, and B. brought an action of trespass against him, for taking and carrying away the shingles. Held, that the compromise of the trespass by B., and paying the damages to A., did not transfer the property in the trees cut down to B.; nor did B., by converting the timber into shingles, change the right of property. *Betts v. Lee*, 5 J. R. 348.

3. Sea-weed, cast on the shore, belongs to the owner of the soil, and not to the first occupant. *Emans v. Turnbull*, 2 J. R. 313.

4. If a trespasser takes a chattel into his own

possession, and the owner sues, and recovers damages for the specific chattel so taken and detained, the recovery and execution will change the property by operation of law, so as to transfer it to the trespasser. *Curtis v. Groat*, 6 J. R. 168.

5. But, in order that the rule may apply, the recovery must have been for that specific chattel: so, where trespass *quare clausum fregit* was brought, for cutting down wood of the plaintiff, which the defendant made into coal on the plaintiff's land, where it remained, and the plaintiff obtained judgment; the defendant is not entitled to the coal, the plaintiff's recovery having been for the trespass, and not for taking the coal, which had always remained in his possession. *Ibid.*

6. The increase of an animal belongs to the person who, by hiring for a time, becomes temporary proprietor of the animal. *Putnam v. Wyley*, 8 J. R. 432.

7. Property in a wild animal is not acquired by the pursuing or hunting it, so that if another person, in the sight of the pursuer, kill *the animal, and appropriate it to his own use, no action will lie. *Pierson v. Post*, 3 C. R. 175.

8. But if the pursuer brings the animal within his own control, at the same time manifesting his intention to appropriate it to his own use, as if he continue the pursuit after having mortally wounded the beast, or encompass it with nets and toils, or otherwise intercept it, so as to deprive it of its natural liberty, and render escape impossible, a property is acquired. *Ibid.*

9. Though property in an animal *feræ naturæ*, may be acquired by occupancy, or by so wounding it as to bring it within the power or control of the pursuer; yet, if after wounding the animal, and continuing the pursuit of it until evening, the hunter abandons the pursuit, though his dogs continue the chase, he acquires no property in the animal. *Buster v. Newkirk*, 20 J. R. 75.

10. Bees are animals *feræ naturæ*; but when hived and reclaimed, a qualified property may be acquired in them. *Gillet v. Mason*, 7 J. R. 16.

11. If a person finds a tree containing a hive of bees, on the land of another, and marks the tree, he does not thereby reclaim the bees, and vest a right of property in himself; and cannot maintain an action for carrying away the bees and honey. *Ibid.*

12. And whether the owner of the soil has not the better right to them? *Quære. Ibid.*

13. Where the materials of A. are united with the materials of B., by the labor of B., who furnishes the principal materials, and those of A. are only accessory, the property of the whole is in B., by right of accession. *Merritt v. Johnson*, 7 J. R. 473.

14. So, if A. contracts with B. to build a vessel, and agrees to furnish the timber requisite to complete the frame, and B. to advance money and furnish the materials for the joiner's work, the vessel, although built on land hired by B. for the purpose, continues the property of A. until completed and delivered to B.; and until then may be seized under an execution against A. *Ibid.*

15. Where a person enters upon land under a void license, and cuts down trees, and converts them into shingles, he is a trespasser, and acquires no property in the timber or shingles. *Chandler v. Edson*, 9 J. R. 362.

16. A. delivered six sheep to B., on an agreement that at the end of the year, B. would deliver to A. an equal number of sheep, of equal value; held, that the property in the sheep was changed; and that B. was bound to deliver six sheep of equal value to A. at the expiration of the year, though some of the sheep received from A. had been taken under an attachment against him. *Wilson v. Finney*, 13 J. R. 358.

17. Where an act of Congress subjects property to forfeiture for the commission of an illegal act, the forfeiture takes place on the commission of the act prohibited, and by the forfeiture, the property is immediately out of the owner, before any actual seizure or suit. *Kennedy v. Strong*, 14 J. R. 128.

And see PRIZE. SALE OF CHATTELS, I.

[*403] *TOWNS.

1. A by-law of a town, declaring that *all hogs should be kept up*, only extends to prevent hogs from going at large on the highway; and it *seems*, that a town has no power to prevent the inhabitants from letting their hogs go at large on their own lands. *Shepherd v. Hees*, 12 J. R. 433.

2. By the "act relative to the duties and privileges of towns," (Sess. 36. ch. 35. s. 5.) the freeholders and inhabitants of the town are authorized to make a second election of town officers, in case those before chosen refuse to serve, die, remove out of the town, or become incapable of serving, within fifteen days next after such refusal, death, removal or incapacity; but, it *seems*, that if there is no election of town officers, at the regular town meeting, they cannot afterwards be chosen; and the vacancy may be supplied by three justices of the county, without waiting the fifteen days, in order to give the town an opportunity of election, as is required in other cases of vacancy specified in the act. *Wildy v. Washburn*, 16 J. R. 49.

3. Where a town meeting proceeds to the election of a town officer, and, on canvassing the votes, they are found to be equally divided, so that there is no choice; it *seems*, that the meeting ought to proceed to a second election, and if they neglect to do so, they lose their rights, and cannot make their election at a subsequent town meeting, though held within fifteen days. *Ibid.*

4. The 12th section of the act, (Sess. 36. ch. 23.) does not authorize a town to impose a penalty on a stranger, or person having no right, for cutting grass on the salt meadows or common lands of the town, contrary to a by-law made by the town meeting, for that purpose; but the town must resort to the common law remedy, to recover damages for the alleged trespass. *Foster v. Rhoads*, 19 J. R. 191.

5. It *seems*, that the salt meadows, &c. in the bay of the town of Jamaica, in Queens county, are part of the common lands belonging to that town, and not the soil or freehold of the freeholders and inhabitants of the town, as tenants in common. *Ibid.*

6. Where a person has been appointed an overseer of the highway under the act, (Sess. 36. c. 35. 2 N. R. L. 125.) and neglects or refuses to serve, whereby he incurs the penalty imposed by the act, (Sess. 36. c. 33. 2 N. R. L. 270.) he cannot be again appointed an overseer, or made liable to a second penalty for the second refusal to act. *Haywood v. Wheeler*, 11 J. R. 432.

See CHANCERY, LXXI.

*TREASON. [*404]

1. The offence of adhering and giving aid and comfort to the public enemies of the United States, is not treason against the people of the state of New-York. *The People v. Lynch and others*, 11 J. R. 549.

2. And an indictment charging the offence to have been committed against the people of the state of New-York, will be quashed. *Ibid.*

3. Treason may be committed against the state, as by opposing the laws, or forcibly attempting to overturn, or usurp the government, &c. *Ibid.*

4. Treason against the United States is not cognizable in the state Courts. *Ibid.*

TRESPASS.

I. When the action must be trespass, and when case.

II. When an action of trespass lies; (a) For injuries to the person; (b) For injuries to personal property; (c) For injuries to real property; (d) For acts committed under color of legal proceedings.

III. Defence and justification.

IV. Trespasser ab initio.

V. Joint trespasser.

I. When the action must be trespass, and when case.

1. Trespass, not case, lies against a sheriff, and those by whose direction he acts, for levying an execution after the return day. *Faul v. Lewis*, 4 J. R. 450.

2. The proper form of action against a person using a private road, by the party at whose instance it was laid out, is trespass on the case, not trespass. *Lambert v. Hoke*, 14 J. R. 363.

3. Where there is an immediate injury attributable to negligence, the party injured has his election to treat the negligence as the cause of action, and declare in case, or to consider

the act itself as the injury, and bring trespass. *Blin v. Campbell*, 14 J. R. 432.

4. Where an act not wilful, but the result of negligence, is the immediate and direct cause of an injury, trespass *vi et armis* will lie. *Perceival v. Hickey*, 18 J. R. 257.

5. Where a belligerent cruiser chases a neutral vessel, supposing her to be an enemy, or for the purpose of search, and in coming up with her, through negligence, runs foul of the neutral vessel, (which had hove to in the night,) and sinks her, an action of trespass lies at *common law, at the suit of the neutral owner, against the commander of the belligerent ship, for the damages sustained, it being considered as a marine tort merely, of which a Court of common law has a concurrent jurisdiction with the instance Court of Admiralty. *Ibid.*

[*405] 6. If an act done cause immediate injury, whether it be intentional or not, trespass lies. *Guille v. Swan*, 19 J. R. 381.

7. As where the defendant G. ascended in a balloon, which descended, a short distance from the place of its ascent, into the plaintiff's garden, and the defendant being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, beat and trod down his vegetables, flowers, &c.; held, that though the ascension, in a balloon was a lawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the plaintiff's garden, either from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable, in an action of trespass, for all the damages done to the plaintiff's garden. *Ibid.*

11. When an action of trespass lies; (a) For injuries to the person; (b) For injuries to personal property; (c) For injuries to real property; (d) For acts committed under color of legal proceedings.

(a) For injuries to the person.

8. A father cannot maintain an action for debauching his daughter, if he has consented to, or connived at, her intercourse with the defendant. *Seagar v. Sligerland*, 2 C. R. 219.

9. Though the master of a vessel may inflict moderate correction on his seamen, for sufficient cause; yet if he exceeds the bounds of moderation, and is guilty of unnecessary severity, he will be liable for a trespass. *Brown v. Howard*, 14 J. R. 119.

(b) For injuries to personal property.

10. To support trespass *de bonis asportatis*, the plaintiff must have the actual or constructive possession at the time. *Putnam v. Wyley*, 8 J. R. 432.

11. He must have such a right, as to be entitled to reduce the goods to actual possession whenever he pleases. *Ibid.*

12. If the plaintiff has let the chattels for a

determinate period, he can only maintain trespass. *Ibid.*

13. Bare possession of a chattel is sufficient to maintain trespass against a wrong-doer. *Hoyt v. Gelston*, 13 J. R. 141. S. C. in error, 13 J. R. 561.

14. Where a person, having a general property in goods, delivers them to his agent to keep for him, and the goods are taken out of the possession of the agent by third persons, the person having the general property, which draws after it the possession, may maintain trespass or trover for the goods against such person. *Thorp v. Burling*, 11 J. R. 285.

*15. Where the plaintiff distressed upon his tenant for rent, [*406] and took a horse which the tenant claimed as his own, but of which he was, in fact, only a bailee; and it was agreed between the tenant and the plaintiff, that the latter, instead of impounding the horse, might use him until the day of sale, and the defendant, who was the true owner of the horse, took him out of the plaintiff's possession; held, that if the tenant had no authority to make the agreement, yet, the using the horse was a mere irregularity after a regular distress; and as by the provisions of the act (Sess. 36. c. 63.) the plaintiff was protected from being deemed a trespasser *ab initio*, the defendant could not treat the distress as a nullity, and was, therefore, a trespasser in taking the horse. *Holt v. Johnson*, 14 J. R. 425.

16. Where the vessel of A. has been seized by an officer of the customs under the revenue laws of the United States, and is afterwards acquitted in the District Court, A. cannot maintain an action of trespass for an act committed between the seizure and the condemnation, as he had neither the possession nor the right to reduce it to possession. *Van Brunt v. Schenck*, 11 J. R. 377.

17. An officer who has seized goods under an execution, may bring trespass against a stranger for taking them away. *Barker v. Miller*, 6 J. R. 195.

18. And proof of the seizure under the execution is sufficient, without producing the judgment. *Ibid.* *S. P. Blackley v. Shelton*, 7 J. R. 32.

19. In an action of trespass by the purchaser of a chattel under an execution, for the destruction of such chattel by the defendant, the chattel never having been in the possession of the plaintiff, he is bound to prove his property, not only by showing a purchase by himself, but also an authority in the officer to sell. *Carter v. Simpson*, 7 J. R. 535.

(c) For injuries to real property.

20. A party must have actual and lawful possession of real property, to enable him to maintain trespass. *Stuyvesant v. Tompkins*, 9 J. R. 61.

21. Or he must be entitled to the remainder or reversion; or, in case the premises are vacant, have the legal title which draws to it the possession. *Hickham v. Freeman*, 12 J. R. 183.

22. Where the plaintiff had let the *locus in quo* to A. for one year, and A. entered and held over the year, and then quitted the possession, and the plaintiff afterwards re-entered, he cannot maintain trespass against B., for any trespass committed by him during the time A. held over, or between the time of A.'s quitting the possession and of the plaintiff's re-entry. *Ibid.*

23. So, where A. and B. are the owners of contiguous lots, the boundary between which has been acquiesced in for more than 25 years, a parol admission by A., that the boundary was incorrect, in consequence of which B. runs a new line, and erects a fence upon it, by which he includes in his own lot part of the land that belonged to A., is not sufficient to change the possession; and if

[*407] A. avail himself *of the *locus penitentie*, by forbidding the erection of the fence, trespass is not maintainable against him for causing it, when erected, to be thrown down. *Stuyvesant v. Tompkins*, 9 J. R. 61. S. C. in error, 11 J. R. 569.

24. A tenant at sufferance cannot maintain trespass against his landlord, although violently turned out of possession. *Wilde v. Cantillon*, 1 J. C. 123. *Hyatt v. Wood*, 4 J. R. 150.

25. A lessor cannot maintain trespass against a stranger while there is a tenant in possession. *Campbell v. Arnold*, 1 J. R. 511.

26. Trespass can be maintained only by the person who has the possession in fact of the land. *Ibid.*

27. A person who enters upon land without any claim or color of right or title, and keeps possession is a trespasser. *Jackson*, ex dem. *Murray, v. Hazen*, 2 J. R. 22.

28. Trespass lies against a person who has been put in possession of land by a writ of restitution, under a conviction for a forcible entry and detainer, and afterwards turned out, on the proceedings being quashed, and re-restitution awarded. *Case v. De Goes*, 3 C. R. 261.

29. But not against a stranger who has acted under license from the person in possession, for a stranger cannot be made a trespasser by relation. *Ibid.*

30. It lies by the owner of the fee of a highway for an exclusive appropriation of the soil. *Cortelyou v. Van Brundt*, 2 J. R. 357.

31. Where the owner of land agrees with another that he may sow the land on shares, they may maintain a joint action of trespass against a third person who cuts and carries away the crop. *Foot v. Colvin*, 3 J. R. 216.

32. A lessor cannot maintain trespass against a sub-tenant of his lessee, for a trespass committed during the term. *Tobey v. Webster*, 3 J. R. 468.

33. If a person having a possessory title to land, enters by force, and turns out a person who has a naked possession only, the latter cannot maintain trespass against the person so entering, under color of title. *Hyatt v. Wood*, 4 J. R. 150.

34. If a person, having a legal title to enter on land, enters by force, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass for damages,

at the suit of the person who has no right, and is turned out of possession. *Ibid.*

35. Where a tenant holds over his term, and the landlord enters by force, and turns him out, the tenant cannot maintain trespass against the landlord. *Ibid.*

36. And by the entry of the landlord, an end is put to the tenancy, so that he may maintain trespass against the defendant, or one claiming to hold under him. *Wood v. Hyatt*, 4 J. R. 313.

37. A guardian in socage may bring trespass in his own name. *Byrne v. Van Hoesen*, 5 J. R. 66.

38. Where a person who had, himself and his ancestors, been in possession of land, died, leaving a widow and infant children, and the widow entered on the land, her possession is sufficient to support trespass; besides, it is to be presumed that she entered as guardian in socage. *Ibid.*

*39. If A. enters on the land of [*408] B. without his permission, to take a chattel belonging to A., it is a trespass. *Heermance v. Vernoy*, 6 J. R. 5.

40. Trespass lies against a tenant at will for a voluntary waste, as in cutting timber; for the injury amounts to a determination of the tenancy. *Phillips v. Covert*, 7 J. R. 1. S. P. *Suffern v. Townsend*, 9 J. R. 35.

41. So, where a person who has entered under a parol agreement for the purchase of land, cuts timber, and afterwards rescinds the agreement, he is a trespasser. *Suffern v. Townsend*, 9 J. R. 35.

42. A tenant entitled to emblements after he has quitted the premises, may maintain trespass. *Stewart v. Doughty*, 9 J. R. 108.

43. So, the grantee, *vestitura terre*, or *hereditas terre*, though he has not the soil. Per *Kent*, Ch. J. *Ibid.*

44. If a person assign all his interest in a crop growing on the land of C., trespass must be brought by the assignee in his own name; if in the name of the assignor, it is bad. *Cato v. Jarvis*, 9 J. R. 143.

45. A person entering under a void license, is a trespasser. *Chandler v. Edson*, 9 J. R. 32.

46. Where a right or interest in part of the premises is reserved out of a lease, the part so reserved becomes a distinct and separate close, for a breach of which the person having the right may maintain trespass. *Van Rensselaer v. Van Rensselaer*, 9 J. R. 377.

47. So, where A., by a permanent lease, conveyed a farm to B., reserving all the mill seats, with the privileges thereof. C. purchased the farm of B., and D., while in possession of the farm, under C., entered into an agreement with A., by which A. agreed to permit D. to erect a dam and mill, &c. on a creek within the bounds of the farm so conveyed to B.; C. afterwards sold the farm, as described in the lease, to E., and D. having quitted the possession, E. pulled down the mills erected by D., who, thereupon, brought trespass *quare clausum fregit*, against E. Held, that the entry of D. under the agreement with A., and the erection of the mill, &c. was so far a severance of the freehold, and the mill thenceforth became a distinct and independent close, and did not pass to E. by the

conveyance of the farm, under the lease; and that D. having the right, the mill, though no longer in his actual possession, remained his close, for the breach of which he might maintain trespass against E. *Ibid.*

48. Where an entry is followed by an ouster, the party can recover damages only for the mere trespass or entry; but if he makes a re-entry, and lays his action with a *continuando*, he may then recover damages for the mesne profits, or subsequent acts, as well as for the trespass. *Case v. Shepherd*, 2 J. C. 27.

49. Entering a dwelling-house of another, without a license, is a trespass. *Adams v. Freeman*, 12 J. R. 408.

50. Familiar intimacy may be evidence of a general license. *Ibid.* And keeping an inn or tavern amounts to a general license. *Ibid.*

51. If a person enters a dwelling-house by permission, and continues *there, after he has been requested to leave it, he becomes a trespasser *ab initio*. *Ibid.*

52. If the defendant's hogs break into the adjoining land of the plaintiff, by reason of the partition fence, which the plaintiff was bound to keep in repair, being insufficient, the plaintiff cannot maintain trespass. *Shepherd v. Hees*, 12 J. R. 433.

53. A person going, or sending a servant, upon the land of another, and taking away his own property, is a trespasser. *Blake v. Jerome*, 14 J. R. 406.

54. Every unwarrantable entry in the land of another, whether it be *enclosed* or not, is a trespass. *Wells v. Howell*, 19 J. R. 385.

55. As, where the defendant's cattle entered the unenclosed field of the plaintiff, and destroyed the grass; it not appearing that there was any regulation of the town, as to fences, or as to cattle running at large; *held*, that the defendant was liable for the damages in an action of trespass. *Ibid.*

56. In trespass, under the statute, (Sess. 36. ch. 56, s. 29,) for cutting down timber, the plaintiff is entitled to treble damages and costs. *Morris v. Brush*, 14 J. R. 328.

(d) *For acts committed under color of legal proceedings.*

57. A party who extends the power of a Court of special jurisdiction to a case to which it cannot lawfully be extended, is a trespasser. *Curry v. Pringle*, 11 J. R. 444.

58. Where the subject matter of a suit is not within the jurisdiction of a Court, all the proceedings are absolutely void, and the officer, as well as the party, is a trespasser. *Smith v. Shaw*, 12 J. R. 257.

59. But if the subject matter is within the jurisdiction of the Court, and the want of jurisdiction is as to the person or place, the officer is excused, unless the want of jurisdiction appears on the face of the process. *Ibid.*

60. Trespass does not lie against a collector for entering and levying a distress or a tax on premises liable to be assessed, but which have been assessed erroneously. *Henderson v. Brown*, 1 C. R. 92.

61. It lies against a justice of the peace who

issues a writ of restitution on an indictment for a forcible entry and detainer, after a *certiorari* has been delivered to him. *Case v. Shepherd*, 2 J. C. 27.

62. If a sheriff levy an execution after the return day, by the direction of the plaintiff and his attorney, they are all trespassers. *Vail v. Lewis*, 4 J. R. 450.

63. No action will lie against the plaintiff, or his attorney, for not countermanding an execution after the return day. *Ibid.*

64. A person lets a house, excepting an inner room, which he reserves for himself, and occupies separately; and the outer door being open, an officer enters, and breaks open the door of the inner room, and arrests him on civil process: he cannot maintain trespass against the officer. *Williams v. Spencer*, 5 J. R. 352.

65. Persons not inhabitants of a town, are not liable to be taxed for the support of the common schools in that town, under the act, (1 N. *R. L. 261.) and if a tax be levied and assessed upon the property of such non-resident, not only the trustees who issue the warrant, but also the collector who executes it, are trespassers. *Snydam v. Keys*, 13 J. R. 444.

66. The trustees, in such case, having only a special and limited authority, the officer is bound to see that he acts within the scope of their legal powers. *Ibid.*

67. Where an attachment is issued under the 23d section of the act for the recovery of debts to the value of 25 dollars, on the oath of a party to the attachment, by which the constable is directed to attach the goods and chattels of the defendant named therein, (his arms and accoutrements excepted,) in an action of trespass against the justice for issuing the attachment, brought by such defendant, he cannot recover damages because the constable took and detained his arms and accoutrements. *Collins v. Ferris*, 14 J. R. 246.

68. Whether a justice issuing an attachment on the oath of the plaintiff therein, is a trespasser? *Quære. Ibid.*

69. Every tribunal proceeding under special and limited powers, descends at its peril; and hence it is, that process issuing from a Court not having jurisdiction, is no protection to the Court, to the attorney, or to the party, nor even to a ministerial officer who innocently executes it. Per *Van Ness, J. Cable v. Cooper*, 15 J. R. 152.

70. Where beasts *damage feasant* have been distrained, or even impounded, the distrainer may relinquish the proceedings before satisfaction for the damage sustained, and bring an action of trespass. *Colden v. Eldred*, 15 J. R. 220.

Trespass on the land of Indians. See INDIANS.

III. Defence and justification.

71. If several defendants join in pleading the general issue, they render themselves equally trespassers, and cannot avail themselves of separate defences. *Schermerhorn v. Tripp*, 2 C. R. 108.

72. In an action for seducing a daughter, it is no defence that the daughter is unchaste, unless it be shown that the father connived at her criminal intercourse. *Akerley v. Haines*, 2 C. R. 292.

73. Instructions from the secretary of the navy, to take and send in certain neutral vessels, under suspicious circumstances, will justify a commander of an armed ship in detaining a vessel, and taking her out of her course, in order to examine her papers, provided he acted with good faith. *Ruan v. Perry*, 3 C. R. 120.

74. In trespass, for killing the plaintiff's dog, it is a justification that he was chasing and killing the defendant's sheep, or other reclaimed and useful animals. *Leonard v. Wilkins*, 9 J. R. 233.

75. So, that he was on the land of the defendant, in the act of destroying a fowl, without showing property in the fowl. *Ibid.*

76. It is for the jury to decide, whether the killing was justified by the necessity of the case. *Ibid.*

77. In trespass, for killing the plaintiff's dog, the defendant's confession, "that [*411] he killed the dog, which assaulted him in the highway, must be taken together, and amounts to a justification. *Credit v. Brown*, 10 J. R. 365.

78. Any person is justified in killing a ferocious and dangerous dog, permitted to run at large by its owner, or escaping through negligent keeping; the owner having notice of its vicious disposition. *Putnam v. Payne*, 13 J. R. 312.

79. Any person is justified in killing a dog which has been bitten by a mad animal. *Ibid.*

80. Whether that would be a justification for killing more useful and less dangerous animals? *Quere. Ibid.*

81. A mere possessory title is sufficient to support a plea of *liberum tenementum*, in an action by a person holding without color of claim of title. *Hyatt v. Wood*, 4 J. R. 150. *Wood v. Hyatt*, *id.* 313.

82. If a defendant, in trespass *quare clausum fregit*, before a justice, plead a plea of title, (Sess. 24. c. 165. s. 10. Sess. 31. c. 204. s. 7.) it is an admission of the trespass, and, on the removal of the cause, he cannot plead the general issue. *Strong v. Smith*, 2 C. R. 28.

83. The defendant, in such case, may support his plea by showing a title in a stranger. *Ibid.*

84. So that there are three grounds on which he may entitle himself to a verdict, viz. title in himself, title in a third person, or possession out of the plaintiff. *Douglas v. Valentine*, 7 J. R. 273.

85. So, where the defendant proved that he was in possession of the premises, and had been so, for upwards of six years, and that the plaintiff never had any possession, except that a tenant of the defendant delivered him a key of the house; *held*, that this was sufficient to entitle him to a verdict; for the act of his tenant could not prejudice his possession. *Ibid.*

86. Trespass for cutting timber; defendant gave in evidence the following letter to him

from the plaintiff: "I will consent to your taking my timber upon the terms proposed in your letter, but restricting you to that which has been injured by fire, in the first place, and preferring that you should begin between B's lot and the creek," &c.; *held*, that this was merely a license, which was revocable, and not an agreement; that after it had been revoked, and notice thereof to the defendant, it did not furnish a justification as to timber subsequently cut; and that, if the letter was founded on any propositions of the defendant, so as to make a contract, it was incumbent on the defendant to show such propositions. *Tillotson v. Preston*, 7 J. R. 285.

87. An agreement for the purchase of land is not, of itself, a license to enter. *Suffern v. Townsend*, 9 J. R. 35.

88. And a license to enter does not imply a permission to cut and consume the timber. *Ibid.*

89. So, a contract to sell and convey lands, upon the performance of certain acts, to be performed by the purchaser at a future period, does not, of itself, contain a license to enter; much less a license to enter and commit waste, by destroying the timber. *Cooper v. Slower*, 9 J. R. 331.

*90. Nor does an agreement, [*412] made with one of several purchasers, that until all of them had executed the contract of purchase, and a certain bond for the performance of its covenants, "no timber should be cut on the lot," imply a license to the purchasers, after the contract and bond are executed, to commit waste, by cutting and carrying away the timber: the most that can be implied by such a contract and agreement, is a permission to the purchasers to enter, in the mean time, as tenants at will, and occupy the land in a reasonable manner, as tenants at will might lawfully do. *Ibid.*

91. A probable cause of seizure will not justify a custom-house officer for taking goods, where he is not protected by the act under which the seizure is made. *Amley v. Sands*, 1 C. R. 566.

92. An officer of the custom seizing goods as forfeited, and causing them to be libelled and tried in an action of trespass by the owner against him, can only plead a condemnation, or an acquittal with a certificate of probable cause. *Gelston v. Hoyt*, in error, 13 J. R. 561.

93. In an action against the trustees or officers created by the act relative to common schools, they are not entitled to give evidence of a justification, under the general issue. *Drake v. Barrymore*, 14 J. R. 166.

94. In trespass *de bonis asportatis* against a collector of the customs, it is a good justification, that the goods were imported contrary to the non-intercourse act, whereby they became forfeited to the United States. *Sailly v. Smith*, 11 J. R. 500.

95. Or, that the defendant, suspecting them to have been imported contrary to that act, seized them, and that they were condemned in the District Court. *Ibid.*

96. In trespass *de bonis asportatis*, the defendant cannot show property in a stranger

aliter in trover. *Cook v. Howard*, 13 J. R. 276.

97. In trespass against a justice for issuing an attachment against the goods of the plaintiff as an absent or absconding debtor, without legal proof of the fact of concealment, the restoration of the property attached to the plaintiff, before suit, cannot be pleaded, but it may be admitted as evidence in mitigation of damages. *Vosburgh v. Welch*, 11 J. R. 175.

98. Where a sheriff is sued by a stranger, for taking his goods in execution, the former must give in evidence both the record of the judgment and the *feri facias*. *Hugh v. Wilson*, 2 J. R. 43.

99. But if the Court are satisfied that there was fraud, and that the plaintiff is not entitled to recover, they will not award a new trial, where there has been a verdict for the defendant, though the record of the judgment was not produced at the trial. *Ibid.*

100. Where a sheriff justifies under a *fi. fa.*, it is not necessary that he show that it is returned, nor will the want of an endorsement on the execution, of the time it was received by the sheriff, render it inadmissible in evidence; for the statute is merely directory to the sheriff on this point, and the time of receiving it may be shown by parol proof, or otherwise. *Bealls v. Guernsey*, 8 J. R. 52.

101. If an officer justifies under an appointment, by magistrates *having authority to make the appointment, its validity cannot be questioned in a collateral action. *Wood v. Peake*, 8 J. R. 69.

102. An officer may justify under erroneous proceedings, where there is no defect of jurisdiction. *Snydam v. Keys*, 13 J. R. 444.

103. Where a Court has jurisdiction of the subject matter, it is sufficient to justify the officer executing its process; for the officer is not bound to examine into the validity of its proceedings, or the regularity of its process. *Warner v. Shed*, 10 J. R. 138.

104. The command of a superior to do an act which amounts to trespass, or other unlawful act, is no justification to his inferior. *Brown v. Howard*, 14 J. R. 119.

105. An inquisition on a claim of property to goods taken in execution, is not a justification to the officer, but goes only in mitigation of damages. *Townsend v. Phillips*, 10 J. R. 98.

106. An admission of the counsel of the plaintiff, on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages; and, therefore, the evidence on the part of the defendant, in nature of a justification of the act, is inadmissible by way of mitigation of damages. *Hoyt v. Gelston*, 13 J. R. 141.

S. C. in error, 13 J. R. 561.

107. Where an award settles the boundary of land, it is a justification in an action of trespass brought against the party to whom the land is awarded, by the other party. *Sellick v. Addams*, 15 J. R. 197.

108. In an action for a trespass by cattle, it is a matter of defence, and to be shown by

the defendant, that the fence, which the plaintiff was bound to keep in repair, was defective. *Colden v. Eldred*, 15 J. R. 220.

109. In trespass against several defendants, who jointly plead *not guilty*, one of them, against whom there is no evidence, may be acquitted, and a verdict taken against the others. *Drake v. Barrymore*, 14 J. R. 166.

110. *Aliter*, as to a joint plea of justification, under which, if it is not supported as to all the defendants, none of them can be protected. *Ibid.*

Justification that the *locus in quo* was a public highway. See HIGHWAY.

IV. Trespasser *ab initio*.

111. If a person enters the dwelling-house of another by permission, and continues there after he has been requested to leave it, he becomes a trespasser *ab initio*. *Adams v. Freeman*, 12 J. R. 408.

112. Where the vessel of A. was seized by B., an officer of the customs, under the revenue laws of the *United States*, and, was directed by the collector to be detained, and, during the detention, S., another officer of the customs, and who was interested in the seizure, and consensual of the facts, used the vessel, with the consent of B., for his private purposes, and afterwards restored her to B., and the vessel *was finally acquitted in [*414] the District Court; in an action of trespass by A. against S., held, that S., not being implicated in the first taking, either as an actor, or standing in such relation to B. as would make him a party in the act of seizure, could not be made a trespasser *ab initio*. *Van Brunt v. Schenck*, 11 J. R. 377.

113. It seems, that the leave given to S. by B., to take the vessel and use her, would not make B. a trespasser *ab initio*, so as thereby to re-invest A. with his right of property, or right to reduce the vessel into his possession. *Ibid.*

114. Where a vessel has been seized by an officer of the customs, who, after the seizure, commits an abuse of the authority vested in him, and the vessel is then acquitted in the District Court, but a certificate of probable cause of seizure given, the officer, though liable for the particular act of abuse, is protected by the certificate from being made a trespasser *ab initio*. *Van Brunt v. Schenck*, 13 J. R. 414.

115. It seems, that an action on the case would be the proper remedy. *Ibid.*

116. As to the effect of the plaintiff having taken out of the District Court, the money for which the vessel was sold, under an order entered by consent? *Quere. Ibid.*

117. The abuse of an authority given by law, makes the party a trespasser *ab initio*; but not where there is an abuse of an authority in fact. *Ibid.*

118. A person taking the goods of another under lawful authority, does not become a trespasser *ab initio* by refusing to restore them, after his authority to detain the goods is determined. *Gardner v. Campbell*, 15 J. R. 401.

119. A mere non-feasance will not make a person a trespasser *ab initio*. *Ibid*.

120. Where an act is lawfully done, it cannot be unlawful *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act. The mere intention of doing a subsequent illegal act, is not sufficient to render the first act unlawful. *Gates v. Lounsbury*, 20 J. R. 427.

121. The approbation by a superior, of a trespass committed by his inferior officer, renders the superior a trespasser. *Van Brunt v. Schenck*, 13 J. R. 414.

122. Whether an assent, afterwards, to a trespass, will make the party assenting, a trespasser *ab initio*, in cases of mere personal tort, *dubitatur*. *Adams v. Freeman*, 9 J. R. 117.

123. But if so, such assent must be clear and explicit, and founded on full knowledge of the trespass. *Ibid*.

124. A person impounding cattle, taken damage feasant, before the damages have been ascertained by two fence viewers, is a trespasser *ab initio*. *Sackrider v. McDonald*, 10 J. R. 253. *S. P. Pratt v. Petrie*, 2 J. R. 191. *S. P. Hopkins v. Hopkins*, 10 J. R. 369.

[*415] *V. Joint trespassers.

125. Where an act causing immediate injury for which trespass lies, is done by the co-operation of several persons, all are trespassers, and all may be sued, or one is liable for the injury done by all; but it must appear that they acted in concert, or that the act of the one sued, naturally and ordinarily produced the acts of the others. *Guille v. Swan*, 19 J. R. 381.

126. If separate suits be brought against several joint trespassers, the plaintiff may recover separately against each, but he can have but one satisfaction, and he may elect *de melioribus damnis*, and issue his execution therefor against one of them; and the other defendants will be obliged to pay the costs of the suits against them respectively. *Livingston v. Bishop*, 1 J. R. 290.

127. But a recovery against one joint trespasser is not alone a bar to a suit against another; there must, at least, have been an execution thereon. *Ibid*.

128. After verdict for the plaintiff, it cannot be objected in arrest of judgment, that from the plaintiff's declaration it appears that there were other persons jointly concerned with the defendant in the trespass, who were not brought into Court. *Rose v. Oliver*, 2 J. R. 365.

129. In actions for torts, the defendants may plead separately or jointly, and the jury may find some guilty and the others not. *Lansing v. Montgomery*, 2 J. R. 382.

130. In trespass against several defendants, who jointly plead not guilty, a joint trespass is proved; *held*, that the plaintiff cannot give in evidence, in aggravation of damages, the distinct and unconnected acts of some of the defendants. *Higby v. Williams*, 16 J. R. 215.

131. A. lent his wagon to B. and C., who put their own horses to it; and A., at the invitation of B. and C., rode with them in the

wagon; B. drove the wagon, and run with so much violence against the horse of D., who was before on the road, and had turned out, that the horse was wounded by the tongue of the wagon of A., and soon after died. In an action of trespass brought by D. against A. B., and C.; *held*, that A. was not a mere passenger, but equally liable with B. and C. for a joint trespass. *Bishop v. Ely*, 9 J. R. 294.

See ante, I.

Pleadings in trespass. *See* PLEADING, XIX.
Costs in trespass. *See* COSTS, III.

*TRIAL.

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I. In civil cases.

II. In criminal cases.

I. In civil cases.

1. All questions compounded of law and fact must be submitted to a jury, unless there be a demurrer to the evidence. *Lytle v. Lee*, 5 J. R. 112. *Foot v. Winwall*, 14 J. R. 304.

2. Negligence is a mixed question of law and fact; but where the facts have been ascertained by a jury, whether they warrant the charge of negligence or not, is a matter of law. *Foot v. Winwall*, 14 J. R. 304.

3. The plaintiff, in averring performance of the condition of a recognizance taken before a justice of the peace, on a plea of title, averred that he did commence an action of trespass in the next Court of Common Pleas, *prout patet per recordum*; *held*, that notwithstanding the *prout patet*, &c., the issuing of the writ in trespass was a fact triable by the jury, and not by the record. *Brown v. Van Deusen*, 10 J. R. 51.

4. If on the trial of a cause the facts of the case are indisputable, and the judge has doubts as to the law, he may advise the jury to find a verdict subject to the opinion of the Court, on a case; but if either party refuses to consent to that course it seems most proper for the judge to decide the point of law, giving the party against whom he decides, leave to make a case. If the facts are disputable, and there is any thing within the province of the jury to consider, and either party objects to a verdict being taken subject to the opinion of the Court on a case, the proper course seems to be, for the judge to submit the cause to the jury, with such remarks on the law and the facts as the circumstances of the case may require. *Ely v. Adams*, 19 J. R. 313.

5. It seems, that where counsel object to the evidence, or to the opinion of the judge at the trial, he ought to state the ground of his objection, so as to draw the attention of the judge to the point of exception; and to afford the opposite party an opportunity of obviating it, by additional proofs. *Jackson, ex dem. Parker, v. Hobby*, 20 J. R. 357.

6. If the evidence offered by the plaintiff does not support his action, and there is no question of fact for the jury to decide, the plaintiff may be compelled to be nonsuited. *Pratt v. Hull*, 13 J. R. 334.

See PRACTICE, XXVII. XXVIII. XXIX. JURY.

[*417] *II. In criminal cases.

7. A peremptory challenge made by the prisoner to the *polls*, is not a waiver of his right to object to the want of a *venire*, as that is not a ground of challenge to the array. *The People v. McKay*, 18 J. R. 212.

8. A paper purporting to be a *venire*, but without a seal of the Court, is a nullity. *Ibid.*

See INDICTMENT. NEW TRIAL. JURY.

TROVER.

I. *By and against whom, and in respect of what property or possession, an action of trover will lie.*

II. *Conversion.*

III. *Defence.*

I. *By and against whom, and in respect of what property or possession, an action of trover will lie.*

1. To maintain trover, the plaintiff must have a property general or special. *Hotchkiss v. McVickar*, 12 J. R. 403. *S. P. Sheldon v. Soper*, 14 J. R. 352. *Heyl v. Burling*, 1 C. R. 14.

2. A special property can only arise from possession. *Ibid.*

3. One tenant in common cannot maintain trover against his co-tenant; unless the thing holden in common be destroyed. *St. John v. Standing*, 2 J. R. 468. Or the co-tenant has sold it. *Wilson v. Reed*, 3 J. R. 175. That is, if the sale be such as to destroy the tenancy in common. See *Mersereau v. Norton*, 15 J. R. 179. And see TENANT IN COMMON.

4. If one joint owner of a cargo sell part of it with the advice and consent of the other joint owners, and on their engagement to deliver the quantity purchased, it is a severance of the tenancy, and the vendee may bring trover against the other joint owners. *Seldon v. Hickock*, 2 C. R. 166.

5. Where two persons are possessed of a chattel, indivisible in its nature, and one of them sells his share, it is not a severance of the tenancy, and if the other tenant take and convert the whole chattel to his own use, the vendee cannot maintain trover. *St. John v. Standing*, 2 J. R. 468.

6. A mate of a vessel having a right to a certain quantity out of a cargo, by way of privilege, cannot, after a sale of the whole cargo by the consignee, pick out any specific parts and sell them; and his right of privilege does not give such an interest as

[*418] will enable the purchaser of it to maintain trover, if the consignee has not assented to the selection of those parts which are taken in satisfaction; for in trover, property and possession must be shown. *Heyl v. Burling*, 1 C. R. 14.

7. In case of capture, if the assured abandons

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and receives the amount of the loss, and, after condemnation, the property is purchased by him, or his agent, the purchase will enure to the benefit of the insurer, if such be his election; and if the property thus purchased is invested in other articles by the agent, and transmitted by him to his principal, who sells them, trover lies by the insurer; for, by his affirmation of the acts of the agent, he obtains an absolute property in the goods, and the subsequent sale by the insured amounts to a conversion. *United Insurance Company v. Robinson*, 2 C. R. 280. *S. C.* in error, 1 J. R. 592.

8. If property attached, and in the possession of an officer, under the process of attachment, is lost or destroyed, without the neglect of the officer, trover will not lie against the person at whose suit the attachment was issued. *Jenner v. Joliffe*, 6 J. R. 9.

9. An officer, who has seized goods under an execution, may bring trover against a third person for taking them away. *Barker v. Miller*, 6 J. R. 195.

10. And proof of the seizure under the execution, is sufficient, without producing the judgment. *Ibid.* *S. P. Blackley v. Sheldon*, 7 J. R. 32.

11. Trover lies for wild animals, which have been tamed, and strayed away, but without regaining their natural liberty. *Amory v. Flynn*, 10 J. R. 102.

12. Trover will lie for a note in the hands of a third person. *Todd v. Crookshanks*, 3 J. R. 432.

13. A note was given to B. and C., two executors; the maker paid it to B., and took his receipt for it, but the note remained in the possession of C.; the maker cannot bring trover against C. for the note; for, after it was paid and discharged, it became of no value, and did not belong to the plaintiff; and it might be useful to C., the other payee and co-executor, to show that he had not received the money. *Ibid.*

14. Trover lies for the injury suffered, although the owner has repossessed himself of the property. *Murray v. Burling*, 10 J. R. 172.

15. As where A., having money to pay on account of B., at a certain day, on the suggestion of C., in order to raise the money for that purpose, made a note, payable to B., and delivered it to him, and B. gave it to C., who promised to obtain the money on the note, from one D., and pay it immediately to B., to be paid over to A.; but C., on receiving the note, immediately passed it away on his own account, for a valuable consideration, to an endorsee, without notice, and A., when the note became due, took it up; held, that A., notwithstanding his having possession of the note, might maintain trover against C., to recover the money he had paid to take up the note. *Ibid.*

16. Trover will not lie for goods seized by virtue of legal process, and in the custody of the law. *Jenner v. Joliffe*, 9 J. R. 381.

*17. A mere naked bailee of goods, is not liable to an action of [*419] trover for them, at the suit of the bailor, until after a demand and refusal of them. *Brown v. Cook*, 9 J. R. 361.

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18. Trover will not lie for a note payable to the plaintiff, which has been delivered to A. to collect, and to apply the amount received thereon to the payment of a note held against the plaintiff. *Canfield v. Monger*, 12 J. R. 347.

19. It seems, that where an agent is authorized to deliver goods to a third person, on receiving sufficient security for the amount, and the agent delivers the goods, but does not take sufficient security, *trover* will not lie against the agent, but the proper remedy is an action on the case. *Cairnes v. Bleeker*, 12 J. R. 300.

20. V. and D. agreed to exchange horses, and after they had been mutually delivered, V., being dissatisfied with the bargain, immediately took back his horse, and D. likewise took back his, and sued V. before a justice, and recovered 10 dollars; V. afterwards brought an action of *trover* against D. for the horse so exchanged by him; and on the trial, it appeared that the horse which V. had offered to exchange with D. belonged to C., who had intrusted him to V. to sell; *held*, that admitting there was a valid exchange of horses in this case, which was very questionable, yet V. had not property sufficient to maintain the action; for the property in the horse of D., if it passed by the exchange, vested in C., and not in V., his agent. *Dyer v. Vandenberg*, 11 J. R. 149.

21. Where a person, having a general property in goods, delivers them to his agent to keep for him, and the goods are taken out of the possession of the agent by third persons, the person having the general property, which draws after it the possession, may maintain trespass or *trover* for the goods against such person. *Thorp v. Burling*, 11 J. R. 285.

22. Where A., a cartman, at the request of B., takes goods and carries them away on his cart, under circumstances sufficient to put him on his guard, as to the legality of the taking, he is equally liable with B. to an action of *trover* for the goods at the suit of the owner. *Ibid*.

23. Where A., having an execution against B., levies on his goods, and becomes himself the purchaser at the sale, though it may be questionable whether he could himself become a purchaser, yet he has, by virtue of the levy and possession, such a special property in the goods, that he may maintain *trover* for them. *Schermerhorn v. Van Volkenburgh*, 11 J. R. 529.

24. A sheriff, after the teste of a *fi. fa.*, but before an actual levy, has not such a property in the goods of the defendant in the execution, as will enable him to maintain *trover* against a person who tortiously takes them away and converts them to his own use. *Hotchkiss v. M'Vicar*, 12 J. R. 403.

25. When goods are sold under an execution, without any particular designation, at the time of sale, the purchaser acquires no property, and cannot, therefore, maintain *trover* for the goods. *Sheldon v. Soper*, 14 J. R. 352.

26. The assignee of a bond may maintain *trover* for it, in his own name, against the obligor, who has got it into his possession, and converted it. *Clowes v. Hawley*, 12 J. R. 484.

27. And such bond being conditioned for the conveyance of a lot of land by the obligor to

the obligee and his assigns, if it appears that the obligee or the plaintiff has done every thing on his part to entitle him to a conveyance, the value of the land to be conveyed will be the measure of damages which he is entitled to recover. *Ibid*.

28. One of two joint lessors cannot maintain *trover* against the other for the lease. *Ibid*.

29. One tenant in common cannot maintain an action against the other, to recover the possession of documents relative to their joint estate. *Ibid*.

30. *Trover*, or an action at common law, will not lie for property captured illegally on the high seas, as prize; and no irregularity, or misconduct of the captor, in the subsequent disposition of the prize, can confer jurisdiction, or be, in itself, the ground of an action at common law. *Novion v. Hallett*, in error, 16 J. R. 327. *Contra*, S. C. 14 J. R. 273.

31. *Trover* lies against a common carrier, who puts goods on a wharf, for such part of them as are lost, or not actually delivered to the consignor. *Ostrander v. Brown*, 15 J. R. 33.

32. Where a creditor, by fraud or deception, obtains the goods of his debtor, the property is not changed, and the debtor may maintain *trover* for it. *Woodworth v. Kissam*, 15 J. R. 186. And what circumstances are sufficient to make out the fact of fraud or deception, is a question for the jury. *Ibid*.

33. A mortgagee cannot maintain *trover* for trees cut down by a mortgagor in possession. *Peterson v. Clark*, 15 J. R. 205.

34. The plaintiff and A. entered into an agreement, which stated that the plaintiff had bought of A. a certain quantity of timber, which the plaintiff was to pay, at the measurement of it, in the city of New-York, when it was delivered and inspected; and also, to pay the fair market price in New-York, when it was delivered: the plaintiff also agreed, that the amount should be endorsed on notes which he held against A., and if it exceeded the amount of the notes, he would pay the balance to A.; *held*, that this agreement, being executory, did not vest the property in the timber in the plaintiff, so that he could maintain *trover* for it against a third person. *M'Donald v. Hewett*, 15 J. R. 349.

35. Where goods are deposited with a person to be sold at no less than a certain fixed price, and the depository sells the goods at a less price, the owner cannot maintain *trover* against him; but the proper remedy is an action on the case. *Sarjeant v. Blunt*, 16 J. R. 74.

36. If a lessor, having no reversionary interest in the premises, underlets, and distrains on his tenant, and sells the goods, the purchaser at such sale acquires no property in them, and the tenant may maintain *trover* against him. *Prescott v. De Forest*, 16 J. R. 159.

37. In an action of *trover* for a promissory note, it is not necessary to give notice to the defendant to produce the note alleged to be converted. If the note is shown to be in the possession of the defendant, or under his control, the action is notice. *Bissel v. Drake*, 19 J. R. 66.

*38. Where the note was describ- [*421]

ed in the declaration, as being for 180 dollars, and the note proved to be in the possession of the defendant was for 300 dollars, the variance was held to be fatal. *Ibid.*

39. Though the declaration alleged, that the note in question was to pay to the plaintiff or his order, a certain sum of money, to wit, the sum of 180 dollars, the *videlicet* does not dispense with proof of the particular sum alleged. *Ibid.*

40. If the plaintiff cannot state the precise amount of the note of which he is dispossessed, he may state it to be of great value, to wit, of a certain sum. *Ibid.*

41. The measure of damages to be recovered in trover, is the value of the goods at the time of the conversion. *Kennedy v. Strong*, 14 J. R. 128.

II. Conversion.

42. There must be a conversion proved before the commencement of the action. *Storm v. Livingston*, 6 J. R. 44.

43. Demand, after suit brought, is not sufficient. *Ibid.*

44. Nor will a sale by the defendant, after suit brought, avail as evidence of a conversion. *Ibid.*

45. A demand of payment, or satisfaction for the goods, generally, is a sufficient demand. *La Place v. Aupoix*, 1 J. C. 406.

46. An admission, by the defendant, that he had the goods of the plaintiff, and that they were lost, is sufficient evidence of a conversion, without showing a demand and refusal. *Ibid.*

47. Where the consignee of goods demanded them of the master of the vessel, and, at the same time, tendered him the freight, to which he made no objection, but refused to deliver them, on the ground that his owners had ordered him not to deliver the goods; his refusal was considered evidence of a conversion. *Judah v. Kemp*, 2 J. C. 411.

48. To constitute a conversion, it is not necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use; but the assuming a right to dispose of it, or exercising a dominion over it, to the exclusion, or in defiance of the plaintiff's right, is a conversion. *Bristol v. Burt*, 7 J. R. 254. *S. P. Murray v. Burling*, 10 J. R. 172.

49. It will be considered as the act of the person by whose authority the goods of the plaintiff are detained; as where the agent of the state prison refused, by the direction and command of one of the inspectors, to deliver the goods of the plaintiff, trover lies against the inspector. *Shotwell v. Few*, 7 J. R. 302.

50. Proof that the defendant promised to return the goods to the plaintiff, and that he had not returned them, is sufficient evidence of a conversion, without showing a demand and refusal. *Durell v. Mosher*, 8 J. R. 445.

51. An abuse of a possession, originally lawful, or a breach of the trust under which the property was placed in the defendant's hands, is a conversion: it is not necessary, to support trover, that the defendant's possession should, at first, have been illegal. *Murray v. Burling*, 10 J. R. 172.

*52. And the principle is the same in the case of a chose in action as of a chattel. *Ibid.*

53. A. received a quantity of black salts from the plaintiff, to manufacture into pearl ashes, and when manufactured, to be re-delivered to the plaintiff: after having been manufactured, they were delivered to the plaintiff, by putting them into the highway, so as to be at his disposal; A. then sold them to the defendant, who had notice of the plaintiff's claim; this was held to be a conversion. *Babcock v. Gill*, 10 J. R. 287.

54. If a factor pledges the goods of his principal for his own debt, it is a conversion. *Kennedy v. Strong*, 14 J. R. 128.

55. A tortious taking is, of itself, a conversion, and a subsequent demand and refusal is not necessary, in order to maintain this action. *Farrington v. Payne*, 15 J. R. 431.

56. In trover for a promissory note, where the defendant had left the note with an attorney, a demand of the defendant of an order on the attorney for the note, and the refusal of the defendant to give such order, contrary to his duty, is sufficient evidence of a conversion. *Bissel v. Drake*, 19 J. R. 66. See *ante*, l. 36.

III. Defence.

57. Under the general issue, the defendant may show, in justification, a right of entry for rent-arrear, under which he entered, distrained, and sold. *Kline v. Husted*, 3 C. R. 275.

58. The defendant may show a paramount title in a stranger. *Schermerhorn v. Van Volkenburgh*, 11 J. R. 529.

59. In trover for goods which the defendant had received as the factor of the plaintiff, the defendant is precluded, by his admission of property in the plaintiff made subsequent to the conversion, from showing that the property had been deusted previously to his receiving the goods. *Kennedy v. Strong*, 14 J. R. 128.

60. But if there had been no such admission, the defendant might have set up property in a third person. *Ibid.* *S. P. Rolan v. Fletcher*, 15 J. R. 207.

61. So the defendant may show that the sale under which the plaintiff claims was made without authority of the vendor, or that it was made in fraud of the creditors of the vendor. *Rolan v. Fletcher*, 15 J. R. 207.

62. In trover by an officer who had levied under an execution, against parties who were engaged in a second levy on the goods, they may show fraud to defeat the action, equally as if the suit had been brought by the creditor himself. *Farrington v. Sinclair*, 15 J. R. 428.

63. And to establish the fraud, in such case, evidence is admissible that the plaintiff permitted other property of the debtor, levied upon at the same time with that which was the subject of the action, to continue in his possession. *Ibid.*

See ACTION ON THE CASE. COMMON CARRIERS. TENANTS IN COMMON. TENDER. TREASURES.

[*423] *TRUST.

- I. Nature of a trust, how created and assignment of a trust.
- II. Resulting trust.
- III. Trustee.

I. Nature of a trust, how created, and assignment of a trust.

1. A trust created for the benefit of a third person, though without his knowledge, may be affirmed by him, and its execution enforced. *Neilson v. Blight*, 1 J. C. 205.

2. B. conveyed land to K., the infant daughter of A., and the consideration was expressed in the deed to have been received from A., but the deed was not actually delivered to K., but remained in the possession of A. until it was surreptitiously taken by K., on which B. executed another deed to A. A. took possession under the first deed, and continued in possession until his death, in 1802, for about thirty-eight years; and in 1786, during the continuance of his possession, C., for a valuable consideration, executed a quit-claim deed of the same premises to B. Held, that the deed to K. was not an advancement for her, but a trust for A., such expressly appearing to have been his intention, and the deed never having been delivered to K., the legal estate never vested in her, and the title of A. had consequently become complete by length of possession; but admitting that the legal estate vested in K., the deed from K. to B. was fraudulent, since B. must have purchased with full notice of the trust; and if the deed from K. were not absolutely void, yet B. will be considered as trustee for A., and the lapse of time is sufficient to warrant a presumption of a release to the *cestui que trust*. *Jackson, ex dem. Benson, v. Malsdorf*, 11 J. R. 91.

3. Courts of law will protect the rights of a *cestui que trust*, against any person having notice of the trust; and actual notice of the trust need not be shown, but it is enough, if the party acts with a knowledge of such facts and circumstances as ought to put him on inquiry. *Anderson v. Van Alen*, 12 J. R. 343.

4. Trust estates pass under the general words of a will of the trustee, relating to the realty. *Jackson, ex dem. Livingston, v. Delancy*, in error, 13 J. R. 537.

5. A. confesses a judgment to B., who covenants to sell the property of A. under the judgment, and apply the proceeds to the payment of A.'s debts, and account with him for any surplus there may be; held, that B. may himself become a purchaser, at a sale under the execution issued on such judgment; for as the legal and equitable title in the property remains in A. until such sale, B. is not a trustee as to that property, nor is he accountable to A. beyond the sum for which he purchased the property at such sale. *Sheldon v. Sheldon*, 13 J. R. 220.

6. A. by his deed, dated January, 1799, conveyed a lot of land to *B. (reciting [*424] a contract of purchase between

A. and M., dated August 23d, 1797, by which M. covenanted to pay one fourth of the purchase money on the 23d August, 1799, &c., and agreed that if he failed in performance, A. was to be discharged from making a conveyance) in trust, to convey the premises to M. or his appointee, when he should have made the payments and performed the covenants stipulated in the contract. A., by B. his attorney, covenanted, the 23d September, 1799, to convey part of the lot to S., who paid part of the purchase money to B., and the residue to A., who conveyed the premises to S. by deed, dated November 14, 1801.—M. having failed to perform his contract, B., by a deed (dated 29th September, 1813, executed by virtue of a power from A., dated the 16th December, 1799, reciting that A. had assigned M.'s contract to C. in trust for the executors of G.,) conveyed the premises in question to C.; held, that S. had a good title under his deed, notwithstanding the previous contract with M. and the deed of trust to B., as M. having failed to perform his contract, the trust in B. was at an end, and resulted to A., and B. had no authority to execute a conveyance, afterwards, without a new power from A.; that A. and B. having, subsequently to the deed of trust, made the agreement with S., which had been carried into effect, it was a revocation of the trust, as far as concerned S., and that the subsequent deed to C. was inoperative, on the ground of the adverse possession of S. *Short v. Wilson*, 13 J. R. 33.

See CHANCERY, LXXII. (A)

II. Resulting trust.

7. If a person purchase land with the money of another, and take a deed for it in his own name, there is a resulting trust in favor of the person to whom the consideration money belonged. *Jackson, ex dem. Kane, v. Sternbergh*, 1 J. C. 153. S. C. 1 J. R. 45. note. S. P. *Foot v. Colvin*, 3 J. R. 216. *Jackson, ex dem. Benson, v. Malsdorf*, 11 J. R. 91. *Jackson, ex dem. Whitlocke, v. Mills*, 13 J. R. 463. *Jackson, ex dem. Seelye, v. Morse*, 16 J. R. 197.

8. It is essential to a resulting trust, that it should arise from some deed or conveyance. *Ibid.*

9. Such a trust is not within the statute of frauds, and may be proved by parol. *Ibid.* S. P. *Jackson, ex dem. Benson, v. Malsdorf*, 11 J. R. 91. S. P. 13 J. R. 463. S. P. 16 J. R. 197.

10. And the land may be sold on an execution under a judgment against the *cestui que trust*. *Foot v. Colvin*, 3 J. R. 216.

11. Where a person purchases and pays for land, but does not take a deed, the purchaser does not become seised, but only acquires an equitable interest, which is to be enforced in equity, and not at law; and if the vendor, afterwards, by direction of the purchaser, conveys the land to a person to whom the purchaser was indebted, no trust results upon the conveyance to the original purchaser. *Jackson, ex dem. Seelye, v. Morse*, 16 J. R. 197.

See CHANCERY, LXXII. (B)

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*III. Trustee.

12. Trustees are only liable to a purchaser for their own acts, and where they warrant the title. *Murray v. Trustees of the Ringwood Company*, 2 J. C. 278.

13. If two trustees for the sale of an estate join in the conveyance, and that conveyance includes a receipt for the consideration money, one trustee is not answerable for the money which goes into the hands of the other, and is by him misapplied. *Kip's Administrators v. Deniston*, 4 J. R. 23.

14. Where two guardians of an infant's estate are appointed by the Court of Chancery, and one of them dies, the trust survives to the other. *The People v. Byron*, 3 J. C. 53.

15. Whether the rule prohibiting trustees from becoming purchasers of the trust estate, extends to public sales under an execution? *Quære. Sheldon v. Sheldon*, 13 J. R. 220.

16. It seems, that a guardian *ad litem* in partition, may be a purchaser at a sale made by commissioners pursuant to an order of the Court. *Jackson, ex dem. Gillespy, v. Woolsey*, 11 J. R. 446.

17. It is not a matter of course for equity to interfere and set aside a purchase by a trustee of the trust estate; but the purchase will stand, if the *cetui que trust* agrees to the sale. *Jackson, ex dem. McCarty, v. Van Dalfsen*, 5 J. R. 43.

18. A Court of law will not permit strangers to raise the objection, or invalidate the sale, if the *cetui que trust* acquiesces in it. *Ibid.*

19. Where a trustee becomes the purchaser of the trust estate, either himself, or through the intervention of a third person, the conveyance, in such case, is not void at law, and the legal estate passes by it; and although it is a rule in equity, that a trustee shall not purchase, yet such a sale is not, *ipso jure*, void in a Court of equity, but will only be set aside, on the application of the *cetui que trust*, made within a reasonable time. *Jackson, ex dem. Colden, v. Walsh*, 14 J. R. 407.

See further CHANCERY, LXXII—D. E. ASSIGNMENT.

TURNPIKES AND TURNPIKE COMPANIES.

1. Where an inquisition, taken under the second section of the act amending the act to establish the *Columbia Turnpike Company*, passed March 28th, 1800, (Sess. 23.) omitted to state a disagreement between the owner of the lands mentioned, and the company, and that the judge, who appointed the commissioners, was not interested, &c.; it *was held defective, and quashed. *Gilbert v. Columbia Turnpike Company*, 3 J. C. 107.

2. If an act gives a turnpike company power to erect a toll-gate near a particular spot, they may place it on the very intersecting point of an old road, provided only that the gate be near the place designated; for near is not to be con-

strued nearest. *The People v. Denlow*, 1 C. R. 177.

3. Under the 11th section of the act incorporating the first company of the *Great Western Turnpike*, 15th March, 1799, full toll is payable at each of the 10 mile gates, although the person has travelled the road less than 10 miles; and where the gates are placed at a greater distance apart, the toll is assessed ratably, according to the distance from one gate to the other. *Stuart v. Rich*, 1 C. R. 182.

4. Under the 9th section of the act incorporating the *Columbia Turnpike Company*, passed 1st April, 1799, (Sess. 22. c. 73.) a person is not liable to the penalty for simply riding through a gate, without paying toll, without any force or violence. *Columbia Turnpike Company v. Woodworth*, 2 C. R. 97.

5. The act for establishing a turnpike road from *Cherry Valley* to the *Chenango River*, gives no penalty against the toll-gatherer, for taking toll from persons exempted by the act from the payment of toll. *Jones v. Estis*, 2 J. R. 379.

6. No action lies against a toll-gatherer, for the penalty under the 13th section of the act, (Sess. 25. c. 98.) "to establish a turnpike corporation for improving and making a road from *Salisbury*, in the state of *Connecticut*, to the *Susquehannah River*, at or near *Jericho*," for detaining and exacting toll from a person who is exempted, by the 10th section of the same act, from the payment of toll. The section of the act, creating the penalty, relates only to the offence of unreasonably hindering or detaining travellers, or passengers who are obliged to pay toll, or for taking more toll from them than is established by the act. It does not apply to persons who have a right to pass toll free. *Conklin v. Elling*, 2 J. R. 410.

7. In an action against a turnpike company for the value of a horse, killed by the fall of a bridge on the road; held, that the defendants were bound to bestow ordinary care and diligence in the construction of their bridges; but are not responsible for accidents which do not arise from their neglect, or want of such ordinary care and skill. *Townsend v. President, &c. of the Susquehannah Turnpike Company*, 6 J. R. 90.

8. Under the act, (Sess. 22. c. 30. s. 11.) and the act, (Sess. 31. c. 213.) a person is exempted from paying toll, on the first *Great Western Turnpike*, when going to mill in a town different from that in which he resides, if it appears that he usually went to such mill when there was no grinding in his own town, and that he went for no other purpose than to have his corn ground. *Chestney v. Coon*, 8 J. R. 150.

9. According to the true construction of the second section of the act, passed the 29th March, 1800, relative to the *Mohawk Turnpike and Bridge Company*, (Sess. 32. c. 189.) the corporation cannot *legally exact more than half toll, or 6 1-4 cents, for crossing the bridge at *Schenectady*, with a wagon and two horses, &c., from the inhabitants of the city of *Schenectady*, or from persons going to or from mills, &c. &c. The discretion given to the corporation to mitigate

the rate of tolls, in such cases, is to be exercised only in reducing them below one half. *Hearsey v. Pruyn*, 7 J. R. 179.

10. The words in the act, *going to and from mills*, comprehend saw mills as well as grist mills. *Ibid.*

11. And the privilege granted by the act to the inhabitants of *Schenectady*, going to market with the produce of their farms, and returning from market, and paying only half toll, is personal, and is waived, if the person carries, or brings back from the place of market, the goods of others; and though he carries the produce of his farm to market, yet if, on his return, his wagon is loaded in part with his own goods, and in part with the goods of others, he must pay full toll for the return load. *Hearsey v. Boyd*, 7 J. R. 183.

12. Where a turnpike act exempted persons going to and from a blacksmith's shop from the payment of toll; *held*, that to be entitled to this exemption, the person must go to the blacksmith's shop, for the express purpose of having work done in the shop; going there with articles to pay for work, done at a former time by the blacksmith, does not entitle to the exemption. *Stratton v. Herrick*, 9 J. R. 356.

13. Where a turnpike act exempted persons going to their usual blacksmith's shop from the payment of toll; *held*, that a person who had carried a load of goods to market, and, on his return, stopped at his blacksmith's to get work done, was not entitled to pass toll free, on his return home; the going to the blacksmith's must be the principal, not the incidental business, to bring it within the exception. *Stratton v. Hubbel*, 9 J. R. 357.

14. *Assumpsit* lies against a stockholder of a turnpike company, at the suit of the company, on his promise, in writing, to pay for the shares for which he has subscribed, in instalments, notwithstanding the remedy given in the act, to exact, in case of non-payment, a forfeiture of the shares, and all previous payments. *Goshen Turnpike Company v. Hurtin*, 9 J. R. 217. *Union Turnpike Company v. Jenkins*, 1 C. R. 381. S. C. 1 C. C. E. 86.

15. Where a turnpike company, by an act of the legislature, were empowered to make a road from *Troy* to the city of *Hudson*; *held*, that the words were to have a reasonable construction in reference to the subject, and the public object of the grant, which was to open a good road to the compact part of the city of *Hudson*; and that such road did not terminate on arriving at the north bounds, or charter limits of the city of *Hudson*, several miles from the compact parts of the city. *Farmers' Turnpike Company v. Coventry*, 10 J. R. 389.

16. Toll-gates on a turnpike road, authorized by the act of incorporation, may be erected so as to intersect and stop an old highway, provided they are in the places designated by the act, which is to be considered as so far controlling the use of the old road. *Ibid.*

*17. Where a turnpike company [*428] pledged their income, and tolls of the road, to a person, to reimburse money advanced by him; *held*, that the pos-

session of the gates, &c. was still, in judgment of law, in the company, who might maintain trespass for pulling down the gates. *Ibid.*

18. Though a penalty is given by a turnpike act for injuring or destroying toll-gates, yet the company may bring an action of trespass at common law, for such injury to their property. *Ibid.*

19. According to the true construction of the 10th section of the act incorporating the *Newburgh and Cochection Turnpike Company*, (Sess. 24. c. 36.) a person who owns a farm on the west side of the toll-gate, and another farm on the east side of the gate, within a mile thereof, is exempted from toll, in passing through the gate from one farm to the other, with materials for buildings and improvements, it being, according to the *proviso* in the act, the common business of his farm. *Newburgh and Cochection Turnpike Company v. Belknap*, 17 J. R. 33.

20. Where a turnpike act exempts from the payment of toll persons going to or returning from mill, with grain or flour for their family use, the exemption does not apply to a wagon going through the gate loaded with other articles and some grain or flour. *Bates v. Suderland*, 15 J. R. 510.

21. According to the true construction of the act to amend the act incorporating the *Neversink Company*, and for altering its name and style, (Sess. 40. c. 134.) parties interested are entitled to six weeks' notice, in addition to the four weeks, during which the assessment rolls are to remain for inspection. *Matter of Bradhurst v. The President & Directors of the first Great Southwestern Turnpike Company*, 16 J. R. 8.

22. Proceedings under this act may be brought before the Court on *certiorari*. *Ibid.*

23. The Court, on motion for that purpose, will order a *certificate*, in the nature of an *execution*, which had been delivered to the sheriff for the sale of lands assessed under the act, to be superseded, on the ground of irregularity, for want of the notice required to be given to the parties interested. *Ibid.*

24. Under the ninth section of the act relative to turnpikes, (Sess. 30. c. 38.) a toll-gatherer is not liable to the penalty of five dollars, for demanding toll of a person exempted from payment of it; but only when he hinders or delays passengers bound to pay toll, or takes more toll than the law allows. *Norval v. Cornell*, 16 J. R. 73.

25. A turnpike act (Sess. 25. c. 113.) provided, that if any person, with his team, cattle, &c., turn off, in order to pass the toll-gate, on ground adjoining thereto, and again enter on the road with intention to defraud the company, by avoiding the payment of toll, he should forfeit the sum of five dollars, &c.; the fact that the person, after turning off, travelled on an old public highway, makes no difference; for the only question is, whether he turned off the road *bona fide*, or with a view to avoid payment of the toll. *Carrier v. Schoharie Turnpike Company*, 18 J. R. 56.

26. If a person turns off the turnpike road at

[*429] a place little more *than half a mile from the toll-gate, it is a turning off on ground adjacent to the gate, within the meaning of the act. *Ibid.*

27. A light *one horse wagon*, with a frame box, swelled sides, painted in imitation of panel work, a crooked bolster, a chair seat, with wooden springs, in which were two passengers, a trunk, a box, a bag of oats, and a bottle, is not "a pleasure carriage with one horse," within the meaning of the act, sess. 23. c. 78. passed April 1, 1800, to establish a turnpike road company, for improving the state road from the house of J. H., in the village of *Ulica*, to the village of *Cayuga*, &c., and of the acts passed in addition thereto and in amendment thereof; and, therefore, is not subject to a higher toll than six cents, or the toll for a "*one horse cart*," in passing through the toll-gate, on the north branch of the *Seneca* turnpike road in the town of *Manlius*. *Pardee v. Blanchard*, in error, 19 J. R. 442. *Contra*, it seems, to *Moss v. Moore*, decided by the Supreme Court; where it was held, that a one horse wagon with a spring seat and panelled sides, used only for the carriage of persons, was a "pleasure carriage," within the meaning of the 11th section of the *Seneca* turnpike company act, (Sess. 23. c. 78.) 18 J. R. 129.

28. The act incorporating the *Columbia* turnpike company, for improving the road from *Hudson* to the *Massachusetts* line, a distance of about twenty miles, authorizes the company to erect the most easterly turnpike gate on the road, "at a place near the *Massachusetts* line, as the president and directors should direct;" held, that a toll-gate erected at a place *two miles and three quarters* from the *Massachusetts* line, was not placed *near* that line, within the meaning of the act. *Griffen v. House*, 18 J. R. 397.

29. Therefore, an action lies against a toll-gatherer, at the suit of a person of whom he demanded and received toll at such gate, to recover back the money so unlawfully received. *Ibid.*

30. It seems, that if a power given to a turnpike company, to erect toll-gates, within certain limits, at their discretion, has once been exercised, it is at an end; and the company cannot, without some strong and manifest necessity, change the local situations of the gates once erected, merely to suit their own convenience. *Ibid.*

31. Though a turnpike company have a lawful right to repair their road, so as to prevent the effect of rains or freshets, yet in the exercise of that right, they must take care not to injure the owners of the adjoining land. *Boughton v. Carter*, 18 J. R. 405.

32. They have no right to turn water which washes the road upon the land of a private person, and if a damage arise to the owner of the land, from their negligence, or want of care, in this respect, he may maintain an action on the case against them for the damages he has sustained. *Ibid.*

See CHANCERY, LXXIII.

*VIEW.

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The affidavit, on moving for a view, must state that boundaries are in question. *Wickham v. Waters*, C. C. 49.

See ACTIONS (REAL.) 12, 13, 14.

UNITED STATES.

1. The individual states having submitted their interfering territorial claims to the judiciary of the *United States*, are, in respect to those rights, to be deemed to have ceded their sovereignty to the *United States*, and to be so far considered as corporations. Their right to grant lands must be judged of by the same rules of common law as the rights of other persons, natural or politic; and, before they can convey land held adversely, they must reduce their right to possession by suit. *Woodworth v. Janes*, in error, 2 J. C. 417. *Whitaker v. Cone*, id. 58. *Belding v. Pitkin*, 2 C. R. 147.

2. The article of the constitution of the *United States*, prohibiting states to pass laws impairing the obligation of contracts, does not apply to municipal regulations, rendering more easy, or less inconvenient, the process and proceedings for the recovery of debts; therefore, the act establishing gaol liberties does not come within that prohibition. *Holmes v. Lansing*, 3 J. C. 73.

3. Citizens of the same state entering into contracts, are to be understood as making them in reference to the existing laws of the state, and as tacitly consenting that the contract shall be governed or modified by such laws; therefore, if at the time of entering into a contract, there is a law of the state which declares, that if an insolvent debtor, on petition of two thirds of his creditors, shall assign to them all his property, he shall be discharged from his debts, it is not a law impairing the obligation of contracts, within the meaning of the constitution of the *United States*. *Mather v. Bush*, 16 J. R. 233. And see *Hicks v. Hotchkiss*, 7 J. C. R. 297. Per *Kent*, Ch. *Ibid.* [See *Sturges v. Crowningshield*, 4 Wheat. Rep. 122. *M'Millan v. M'Neil*, 4 Wheat. Rep. 209.]

4. But if such an insolvent act is passed after the contract has been made, it is so far unconstitutional and void, as impairing the obligation of such contract. *Roosevelt v. Cibra*, 17 J. R. 108.

5. To entitle the *United States* to a preference over other creditors, it must be shown that the debtor was insolvent, and had voluntarily assigned all his property for the benefit of his creditors; or that an attachment had been taken out against his property, as an absconding and absent debtor, and prosecuted to effect. *M'Lean v. Rankin*, 3 J. R. 369.

*6. If an attachment is taken out, and afterwards withdrawn, by [*431] consent of creditors, without any

proceedings under it, it is inoperative, and gives no right of preference to the *United States*. *Ibid*.

7. A consignment of goods by a debtor abroad, though insolvent, with directions to have them sold, and the proceeds paid to his creditors in *New-York*, is not such an assignment of his property as will entitle the *United States* to a preference. *Ibid*.

8. The several acts of the legislature of this state, granting to certain persons the exclusive right of navigating boats by steam in the waters of this state, are constitutional; not contravening the power of Congress either to regulate commerce among the several states, or to secure to authors and inventors the exclusive right to their writings and inventions. *Livingston v. Van Ingen*, 9 J. R. 507.

9. Wherever the constitution has granted any power to Congress without a negation express, or arising from necessary implication, of the exercise of that power by the respective states, they have a concurrent jurisdiction over the subject matter, and may legislate thereon without restraint, except that whenever any of their regulations should come in collision with those established by Congress, the former must yield. *Ibid*.

10. *It seems*, that the different states may, under those restrictions, grant patent or copyrights to inventors and authors. *Ibid*.

11. The provision in the constitution authorizing Congress to secure to inventors exclusive privileges, does not authorize them to grant such privileges to the possessors of useful inventions, or to such persons as have introduced them into the country. *Ibid*. [*But see Gibbons v. Ogden*, 9 Wheat. Rep. 1.]

See ALIEN. BANKRUPT. CHANCERY, XXIII. XVII. (D.) XXVII. LXVI. CIRCUIT COURT OF THE UNITED STATES. COURTS MARTIAL OF THE UNITED STATES. DOMICIL. DUTIES. FUGITIVE FROM JUSTICE. INDEPENDENT STATES. INDIANS. INSOLVENT DEBTOR. JURISDICTION. MARTIAL LAW. MILITIA. NON-INTERCOURSE LAWS. PRIVILEGE. PRIZE. SLAVES. STATUTES OF THE UNITED STATES. TITLE TO PROPERTY, 17. TREASON. WAR.

USAGE OF TRADE.

1. A commercial usage will be considered as established, when it has existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it. *Smith v. Wright*, 1 C. R. 43.

2. Usage of trade is, in general, inadmissible, to show that a transaction was not usurious. *Dunham v. Dey*, 13 J. R. 40.

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*USE.

1. In a covenant to stand seised, appearing on the face of it to be from father to son, the

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consideration of blood is raised by implication. *Jackson, ex dem. Trowbridge, v. Dunsbach*, 1 J. C. 91.

2. A pecuniary consideration will raise a use, by way of covenant to stand seised. *Ibid*.

3. A use in *esse* cannot be destroyed by the alienation of the person having the seisin of the land. *Ibid*.

4. If a valuable consideration be proved, it is sufficient, though no consideration is expressed in the deed. *Jackson, ex dem. Salisbury, v. Fish*, 10 J. R. 456.

5. Whenever the use limited by a deed expires, or cannot vest, it reverts to him who raised it. *Jackson, ex dem. Ludlow, v. Myers*, 3 J. R. 388.

6. A deed from A. to B., *habendum* to A. for life, and after his death to B., his heirs or assigns, forever, is a valid conveyance under the statute of uses, as a covenant by the grantor to stand seised to his own use during life, and after his death to the use of the grantee or his heirs. *Jackson, ex dem. Staats, v. Staats*, 11 J. R. 337.

See COVENANT TO STAND SEISED TO USES. BARGAIN AND SALE. DEED, II. TRUST, I. II.

USE AND OCCUPATION.

1. The statute giving an action for use and occupation seems to apply only to the case of a demise, and where there exists the relation of landlord and tenant, founded on some agreement creating that relation. *Smith v. Stewart*, 6 J. R. 46.

2. And if a person enters on land, under a contract for a deed, that relation does not exist; and on his refusing to perform the contract, he becomes a trespasser, and an action for the *meane profits* is the proper remedy. *Ibid*.

3. An action for the use and occupation lies, where the holding is upon an implied, as well as an express permission of the landlord. *Osgood v. Dewy*, 13 J. R. 240.

4. After the expiration of a parol demise, and payment of rent under it, the tenant continuing in possession, without any new agreement, cannot, in an action against him, for the use and occupation of the premises subsequent to the expiration of the former demise, dispute the title of the landlord; and his subsequent holding will be deemed to have been with the implied permission of the original lessor. *Ibid*.

5. Assumpsit for the use and occupation of land lies against a *lessee by deed, who holds over after the expiration [*433] of the term. *Abel v. Radcliff*, 13 J. R. 297.

6. Such an action lies against a tenant holding under a covenant for a renewal in a lease which has expired. *Ibid*.

7. An action for use and occupation can only be maintained, where the relation of landlord and tenant exists between the parties. *Bancroft v. Wardwell*, 13 J. R. 489.

8. It will not lie against a third person, who has come in under the purchaser from him. *Ibid.*

See LANDLORD AND TENANT. RENT.

WAGER.

1. An action on a wager is maintainable at common law, although the parties may have no other interest in the subject matter of the wager than what is created by the wager itself. *Bunn v. Riker*, 4 J. R. 426.

2. But a wager contrary to the principles of sound policy is void, equally as if it contravened a positive law. *Ibid.* *S. P. Mount v. Waite*, 7 J. R. 434.

3. A. lays a wager with B. (before the closing of the poll) on the event of an election for governor of the state; A. and B. are both voters, one of whom had already voted at the election: the parties respectively deposited a sum of money in the hands of C., as stakeholder; the winning party cannot bring an action against C. for the whole sum deposited, the wager being contrary to the principles of sound policy, inasmuch as it may involve an inquiry into the validity of the election, and its tendency is to corrupt, being a bias on the mind of an elector. *Bunn v. Riker*, 4 J. R. 426.

4. But whether an action lies against the stakeholder to recover back the party's own deposit? *Quare. Ibid.*

5. Where money is deposited with a stakeholder on an illegal wager, (as a wager on the event of an election,) no action lies, after the event has happened, and the bet has been lost and won, by the loser against the stakeholder to recover back his deposit, which still remains in the hands of the stakeholder, and which he has had notice not to pay over to the winner. *Yates v. Foot*, in error, 12 J. R. 1. Contra, *Vischer v. Yates*, 11 J. R. 23.

6. A. and B., being qualified electors for governor, a few days before the polls were opened, laid a bet on the event of the election, and deposited their respective checks on the bank for the amount, payable on the 1st of June, with a stakeholder. When the result of the election was generally known, but before the canvass of the votes was declared, B., supposing the wager to be lost, withdrew all his money from the bank, and his check, which had been delivered over by the stakeholder, after the official canvass, to A., on presentment, was refused payment. In an action by A. against B., to recover the [*434] amount of the check; held, that the wager being illegal, no action would lie on the check given for the wager, nor for money had and received to the use of the plaintiff. *Denniston v. Cook*, 12 J. R. 376.

7. So, if the bet were made after the closing of the poll, it will be void. *Lansing v. Lansing*, 8 J. R. 454.

8. Where a wager is lost, and the money or property has been fairly paid or delivered, the Court will not help the plaintiff. *M'Cullum v. Gourlay*, 8 J. R. 147.

9. If the plaintiff delivers property to the defendant, on an agreement that if P. is elected governor, the defendant should pay a certain price for the property, otherwise he was to pay nothing, and P. is not elected, no action lies to recover back the property delivered. *Ibid.*

10. A. set up a mark to shoot at, and it was agreed between him and B., that B. should pay A. 25 cents for every shot fired; but if B. hit the mark, then A. should pay him 25 dollars. This is a legal wager, and B., having hit the mark, may bring an action for the 25 dollars. *Campbell v. Richardson*, 10 J. R. 406.

11. An action to recover back the amount of a wager laid on the event of a horse race, is to be brought in the form prescribed by the act to prevent excessive and deceitful gaming; and if the plaintiff, in his declaration, state, that the action accrued to him "according to the form and as is prescribed by the second and third sections of the act to prevent excessive and deceitful gaming," &c., he will, nevertheless, be permitted to show a cause of action arising under the act to prevent horse-racing. *Haywood v. Sheldon*, 13 J. R. 88.

12. The action in such case, is properly brought by the person who made the bet, although he acted as agent or a depository for other persons. *Ibid.*

13. In such an action, the plaintiff is entitled to recover no more money, than the defendant has actually gained by the event of the race, though the contract was made between the plaintiff and defendant for the whole sum bet, being a much larger sum on each side, and which was won nominally by the defendant, with whom other persons were concerned, and contributed to make up the sum bet in his name, and had received their proportions of the money won. *Zielly v. Warren*, 17 J. R. 192.

See GAMING.

WAR.

1. Trading with an enemy's country is unlawful; but a citizen or subject of one belligerent may withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of war, and does not himself go to the enemy's country for that purpose. *Amory v. McGregor*, 15 J. R. 24.

*2. As soon as war is commenced [*435] ed, all trading, negotiation, communication or intercourse, between the citizens of this country and its enemy, without the direction or permission of the government, is unlawful. *Grinsold v. Waddington*, in error, 16 J. R. 438. *S. P. Seaman v. Waddington*, 16 J. R. 510.

3. Therefore, no valid contract can exist, 553

nor any promise arise, by implication of law, from any transaction with an enemy. *Ibid.*

4. And if, after the termination of the war, an action is brought against a citizen here, upon any contract arising out of such illicit intercourse, the defendant may set up the illegality of the transaction as a defence. *Ibid.*

5. The only exception to this general rule of law, if it can be considered as an exception, is the case of ransom bills, which are acts of necessity, arising out of the laws of war. Per Chancellor Kent. S. C. 16 J. R. 451—456.

See INSURANCE. PARTNERSHIP.

WASTE.

1. If the lessee, or his assigns, cut down wood, in such a manner as to injure the inheritance, it is waste, and the lessee is liable to an action for a breach of the covenant against waste. *Jackson, ex dem. Church, v. Brownson, 7 J. R. 227.*

2. And if the lease contain a clause of re-entry, for a breach of the covenants and conditions in the lease, the lessor may maintain ejectment. *Ibid.*

3. Where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste; but he cannot cut down all the wood and timber, so as permanently to injure the inheritance. *Ibid.*

4. And to what extent the wood and timber on such land may be cut down, without waste, is a question of fact for the jury. *Ibid.*

5. Where a testator, by his will, appoints a trustee of all his estate, during the infancy of the heir, he is neither a guardian, liable for waste at common law, nor a tenant for life, or for years, or other terms, so as to be liable for waste under the statute. *Kincaid v. Scott, 12 J. R. 368.*

6. An action of waste does not lie by the heir against the assignee of the tenant of the courtesy, but only against the tenant himself. *Bates v. Schroeder, 13 J. R. 260.*

See *tit. CHANCERY, XXXIII.* See also, ACTION ON THE CASE, 45, 46, 47.

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*WAY.

1. Where a right of way is granted, without any designation of the place in the deed, it becomes located by usage for a length of time. *Wyntoop v. Burger, 12 J. R. 222.*

2. And being so located, it cannot afterwards be changed by the grantor. *Ibid.*

3. But if changed, and the grantee has, for a length of time, used the new way, his acquiescence in the alteration will be presumed. *Ibid.*

4. The grantee of a right of way, must keep the road in repair. *Ibid.*

Public ways. See HIGHWAY.

WILL.

- I. *What will invalidate a will.*
- II. *Witnesses to a will.*
- III. *Revocation of a will.*
- IV. *Republication of a will.*
- V. *Construction of a will.*
- VI. *Proof of a will.*
- VII. *Munucipative will.*

I. *What will invalidate a will.*

1. The sanity of a testator is presumed until the contrary appears; and the *onus probandi*, as to his mental incapacity, lies on the party who alleges his insanity. *Jackson, ex dem. Van Dusen, v. Van Dusen, 5 J. R. 144.*

2. But if a mental derangement has been proved, it is then incumbent on the devisee to show a lucid interval, or the sanity of the testator at the time of executing the will. *Ibid.*

3. Parol evidence, to show that the testator executed a will under duress, may be received; but not of the declarations of the testator himself as to that point. *Jackson, ex dem. Coe, v. Kniffen, 2 J. R. 31.*

4. An alteration made in a will, whether material or immaterial, by a person claiming under it, renders it void. *Jackson, ex dem. Malin, v. Malin, 15 J. R. 293.*

5. But whether a material alteration by a stranger, without the privity of the party claiming under it, has the same effect? *Quære. Ibid.*

6. A testatrix devised as follows: "I give, &c. to my daughter E. R., all my property in W., in the state of Connecticut, all the land deeded to me by B., excepting 1000 acres of land I deeded to R. M., &c." It was alleged that the word *also* had been erased between the words "Connecticut" and "all," after the execution of the will, so as to give R. M. not only the 1000 acres, [*437] but the land out of which it was excepted; held, that the alteration, if any, was immaterial, and did not vitiate the will, for whether the word *also* was inserted or not, the legal construction and effect of the will was the same, the land deeded to the testatrix by B. excepting the 1000 acres she had deeded to R. M., was devised to R. M. *Ibid.*

II. *Witnesses to a will.*

7. A devise or legacy to a witness is absolutely void; so that a conveyance by the devisee to a third person is inoperative. *Jackson, ex dem. Denniston, v. Denniston, 4 J. R. 311.*

8. If either husband or wife be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void, and the party is a competent witness to the will. *Jack*

son, ex dem. *Cooder, v. Woods*, 1 J. C. 163.
Jackson, ex dem. Beach, v. Durland, 2 J. C. 314.

III. Revocation of a will.

9. The mere act of cancelling a will is nothing, unless it be done *animo revocandi*. *Jackson, ex dem. Howard, v. Holloway*, 7 J. R. 394.

10. So, if the testator, without a republication of his will, makes alterations and corrections in it, with the intent not to destroy, but to enlarge and extend a devise already made, it is not a revocation of the devise. *Ibid*.

11. Parol evidence of the revocation of a will, is inadmissible. *Jackson, ex dem. Coe, v. Kniffen*, 2 J. R. 31.

12. A testator may revoke a will in whole, or in part, at any time before his death. The owner of a slave, by his will, declared as follows: "I manumit and give freedom to my negro woman *Mott*, and her daughter *Nan*, immediately after my decease." The testator, afterwards, sold *Nan*, as a slave, to C., and died: *held*, that the sale of N., by the testator, was, *pro tanto*, a revocation of the will, so that she was not entitled to her freedom after his decease. *Matter of Nan Mickel*, 14 J. R. 324.

IV. Republication of a will.

13. A devise of lands will not pass lands acquired subsequently to the execution and publication of the will, without a republication. *Jackson, ex dem. Howard, v. Holloway*, 7 J. R. 394. *S. P. Jackson, ex dem. Rogers, v. Potter*, 9 J. R. 312.

14. Where the testator altered his will, by erasures and interlineations, so as to make the devise extend to all lands of which he should die seised; and endorsed a memorandum to that effect on the will, stating the alterations which he had made, but the memorandum was attested by two witnesses only; *held*, that the alteration was inoperative, and that lands acquired subsequently to the date of the devise, descended to the heirs at law. *Jackson, ex dem. Howard, v. Holloway*, 7 J. R. 394.

*15. A republication so as to [*438] affect after-acquired lands, must be made with the same solemnities as the execution of the original will. *Jackson, ex dem. Rogers, v. Potter*, 9 J. R. 312.

16. Where a person made a will in 1805, devising all his estate, and, afterwards, became seised of other lands, and in his last sickness, in 1810, declared that he had made a disposition of all his estate, by a will which he had deposited with S., and that he did not wish to alter it, except to add another executor; this was held not to amount to a republication of the will, so as to pass the after-acquired lands. *Ibid*.

V. Construction of a will.

17. Where any part of a will is ambiguous, the whole will is to be considered, for the purpose of ascertaining the intention of the testator in that particular part; but where the intention is clear and certain, and no repugnancy ap-

pears between the different parts of the will, no such aid is necessary or proper. *Jackson, ex dem. Van Vechten, v. Still*, 11 J. R. 201.

18. A devise of the testator's estate, generally, passes both real and personal estate, and may include a debt and mortgage. *Jackson, ex dem. Livingston, v. De Lancey*, 11 J. R. 365.

19. No technical words are necessary to devise a fee, and the intention of the testator, to be collected from the whole will, is to govern. *Jackson, ex dem. Herrick v. Babcock*, 12 J. R. 389.

20. Since the statute of wills, as well as before, a will may be construed in connection with another instrument in writing to which it refers. *Ibid*.

21. The testator devised as follows: "I give to my wife, after payment of debts, &c., all my estate, real and personal, that I may be in possession of at my decease, to be at her absolute disposal, according to an agreement made and entered into with her on the 27th October, 1802, and previous to our marriage; it being my intention, if my said wife should die before me, that my real and personal estate shall be divided among my said children, their heirs and assigns." *Held*, that the wife took an estate in fee, not by implication, but by force of the words "all my estate to be at her absolute disposal;" that as, by reference to the agreement in writing mentioned in the will, it appeared that it was intended, that after the death of one, the other should have the full benefit of survivorship in the joint estate created by that agreement, it showed the intention of the testator to dispose of the fee; and the use of the word *heirs* in the devise to the children did not show an intention in the testator to limit the preceding devise to his wife, to her life only. *Ibid*.

22. A will has no effect or operation, until the death of the testator, who, in the mean time, may revoke it in whole or in part. *Matter of Nan Mickel*, 14 J. R. 324.

23. The words of a will were, "my property, after my debts are paid, I leave to my beloved wife, A., and wish her to educate my two daughters, J. and G., with care, and to treat them with kindness and affection," without any personal bequest, except a ring to a third *person, or [*439] other words to explain or control them; *held*, that the real and personal estate of the testator passed to the wife in fee. *Jackson, ex dem. Pearson, v. Housel*, 17 J. R. 281.

VI. Proof of a will.

24. A probate of a will, proved before the surrogate of the city and county of *New-York*, in the year 1779, after the adoption of the constitution of the state, but while the city of *New-York* was in the possession of the enemy, and which probate was granted by the deputy of the British governor, according to the practice of the colonial government, is valid, being confirmed by the act of the 10th May, 1784, (1 Gr. ed. Laws. 121.) provided the same be recorded in the office of the judge of probates; and, by an act of the 30th March, 1799, the judge of

probates being required to deliver to the surrogate of the city of *New-York*, all papers, records, &c. appertaining to the Court of Probates, on the 1st of *May*, 1787, except in particular cases; and as the custody of the will in question belonged to the surrogate of the city of *N. Y.* by the last mentioned act, an exemplification of the record of such will, given by the surrogate of *N. Y.*, accompanied with his certificate, that the original could not be found in his office, is sufficient evidence of such will in an action of ejectment, under the act concerning wills, (Sess. 36. c. 23. s. 21.) by which the exemplification of a will recorded in the office of the judge of probates, before the 1st *January*, 1785, the original of which cannot be found in his office, is allowed to be read in evidence, in real or mixed actions. *Jackson*, ex dem. *Colden*, v. *Walsh*, 14 J. R. 407.

25. One of the subscribing witnesses to a will, if he can prove all the solemnities required by the statute, is sufficient for the plaintiff; but if the witness called can only prove his own signature, other witnesses, if living, must be produced, or, if they are dead, their hand writing and that of the testator must be proved; and it is then a question of fact, whether, under all the circumstances, all the requisites of the statute have been complied with. *Jackson*, ex dem. *Le Grange*, v. *Le Grange*, 19 J. R. 386.

26. Where one of the witnesses to a will was called, and proved his own signature, and that of another subscribing witness, who was dead; but the witness had lost all recollection of the facts and circumstances of the execution of the will, and had no knowledge of the testator; held, that this was not sufficient proof of the execution of the will; but that the third subscribing witness, who was living, within the jurisdiction of the Court, ought to be produced. *Ibid.*

VII. Nuncupative will.

27. A nuncupative will is not good, unless it be made when the testator is in extremis, or overtaken by sudden and violent sickness, and has not time to make a will. *Prince v. Hazleton*, in error, 20 J. R. 502.

28. By the words "last sickness," within the purview of the statute, (Sess. 36. c. 31. s. 14.) is to be understood last extremity. *Ibid.*

See CHANCERY, XX. LXXV. DEVISE. LEGACY.

WRIT.

1. Where an *alias* writ is issued in the first instance, the clause constituting it an *alias* may be rejected as surplusage. *Jackson*, ex dem. *Kane*, v. *Sternbergh*, 1 J. C. 153.

2. After a lapse of 5 years, the Court would not order a former sheriff to amend the return to a writ, by stating the commitment of the defendant, who had broken out of prison with many others. *Potter v. Briggs*, 1 C. R. 57.

3. A writ tested out of term, is void. *Simonds v. Catlin*, 2 C. R. 61.

4. A writ tested the 12th *May*, and made returnable on the 17th *May* next, is a nullity, and cannot be amended. *Bunn v. Thomas*, 2 J. R. 190.

5. Where a term, or more, intervenes between the teste and return of a writ, it is a nullity. *Bunn v. Thomas*, 2 J. R. 190. *S. P.* *Burk v. Barnard*, 4 J. R. 309.

6. An inaccuracy in stating the return of a writ does not make it void; but voidable only. *Williams v. Rogers*, 5 J. R. 163.

7. A writ made returnable, before us, &c., is voidable only, and may be amended. *Morrell v. Waggoner*, 5 J. R. 233. *Contra*, *Drake v. Miller*, C. C. 85.

8. A sheriff, or deputy sheriff, may serve a writ in a cause in which he is plaintiff. *Band v. Fuller*, 4 J. R. 486.

9. The thirty-first article of the constitution of the state, which ordains "that all writs and proceedings shall run in the name of the people of the state," &c., applies only to the Court of Chancery and Courts of record having common law jurisdiction. *Dickenson v. Rogers*, 19 J. R. 279.

10. A warrant, therefore, issued by a justice of the peace, or other magistrate acting as a conservator of the peace, may be either in the name of the people, or in the name of the magistrate; and it most usually is in the name of the latter. *Ibid.*

11. All original writs, by the act, passed February 17, 1815, are directed to be issued out of the Courts in which they are returnable, instead of applying to the Court of Chancery, as heretofore. (Sess. 38. ch. 38.)

See PRACTICE, I.
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